IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FALEN GHEREBI, *et al.*,	)	
Petitioners,	)	
v.	)	Civil Action No. 04-CV-1164 (RBW)
GEORGE WALKER BUSH,	)	
et al.,	)	
Respondents.	)	

RESPONDENTS' MOTION TO DISMISS OR FOR JUDGMENT AS A MATTER OF LAW AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

INTRODUCTION

This case challenges the exercise of the Executive's core war powers at a time when the United States is engaged in armed conflict abroad and seeking to defend the homeland from additional attack by a resourceful and unconventional enemy. The petition is brought on behalf of an alien who is presently being detained by the United States military in Guantanamo Bay, Cuba, outside the sovereign territory of the Untied States. The petition in this case seeks a writ of habeas corpus, challenging the lawfulness of the detention based upon an alleged violation of rights under only two sources of law: the Constitution and the Third Geneva Convention. As explained below, petitioner-detainee's claims fail as a matter of law under controlling Supreme Court and D.C. Circuit precedent. First, petitioner-detainee cannot state any claims for relief under the Constitution because, as an alien outside the sovereign territory of the United States, he lacks any cognizable constitutional rights. Furthermore, petitioner-detainee cannot base any

claims for relief upon the Third Geneva Convention because it gives rise to no privately enforceable rights. Accordingly, as elaborated below, the petition should be rejected as a matter of law, because there is no set of facts upon which any relief could be granted.

BACKGROUND

On September 11, 2001, the al Qaeda terrorist network launched a vicious, coordinated attack on the United States, killing approximately 3,000 persons. In response, the President, as Commander-in-Chief and with Congressional authorization for the use of force, took steps to protect the Nation and prevent additional threats. See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). Among these steps, the President dispatched the armed forces of the United States to Afghanistan to seek out and subdue the al Qaeda terrorist network and the Taliban regime and others that had supported and protected that network. In the course of that campaign—which remains ongoing—the United States and its allies have captured or taken control of a large number of individuals, many of whom are foreign nationals.

Pending before the Judges of this Court are approximately 13 cases brought on behalf of approximately 60 aliens who are held at the United States Naval Base at Guantanamo Bay, Cuba. The cases commonly challenge the legality and conditions of the detention of the aliens on whose behalf the cases are brought. On June 28, 2004, the Supreme Court issued a decision in three of the cases originally consolidated and then dismissed by Judge Kollar-Kotelly of this Court. See Rasul v. Bush, 524 U.S. ___, 124 S. Ct. 2686 (2004). The Supreme Court held for the first time that federal district courts have jurisdiction to consider a petition for a writ of habeas corpus under the habeas statute, 28 U.S.C. § 2241, brought by aliens apprehended abroad and held at Guantanamo Bay, even though Guantanamo Bay is within the sovereignty of Cuba,

not the United States. See id. at 2693-98. The Court expressly declined to address "whether and what further proceedings" would be appropriate after remand of the cases to the district court. See id. at 2699.

The petition in this case—like the other Guantanamo detainee petitions—raises important issues concerning the extraterritorial application of the Constitution to aliens detained abroad and whether United States treaties form a substantive basis for private causes of action. Because these threshold legal issues are common to all of the Guantanamo Bay habeas petitions pending before the Judges of this Court, respondents recently filed a Motion for Joint Case Management Conference, requesting that the Court develop and enter a coordination order to allow for the orderly and efficient resolution of the many common questions of law presented by these petitions, including the issues of law raised in the present motion. See Respondents' Motion for Joint Case Management Conference, Entry of Coordination Order, and Request for Expedition (Doc. #10). In light of concerns regarding judicial economy and the avoidance of piecemeal litigation, coordinated consideration of these legal issues with any challenges to the factual basis for petitioner-detainee's designation as an unlawful enemy combatant may be appropriate following the development of a more detailed factual record. Nonetheless, respondents are entitled to judgment as a matter of law in this case.

In this case, a petition is brought on behalf of Salim Gherebi[1] for writ of habeas corpus pursuant to 28 U.S.C. § 2241,[2] asserting claims under the Due Process Clause of the Fifth and

[1] Gherebi's correct first name has been represented to be "Salim." The court records thus far all refer to him as "Falen."

[2] Section 2241(a) provides:

Fourteenth Amendments, the Sixth Amendment, the Cruel and Unusual Punishment Clause of the Eighth Amendment, and the Third Geneva Convention.[3] See Amended Verified Petition for Writ of Habeas Corpus and Memorandum of Law (hereinafter "Petition"). Petitioner-detainee asserts these claims against respondents George W. Bush, Donald H. Rumsfeld and "1,000 unknown named United States Military Personnel and Government Officers and/or Officials." See Petition. The petition seeks, inter alia, an acknowledgment that petitioner-detainee is detained by respondents, a statement of the reasons for his detention, an appearance "before the court for a determination of his conditions of detention, confinement, and status," access to legal counsel, and release from detention.[4] See id. at pp. 3-4.

> Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

[3] This action is asserted on Gherebi's behalf by and through his brother, Belaid Gherebi, a resident of the State of California, as next friend. See Petition ¶ 1.

[4] Petitioner-detainee originally filed the petition in the United States Court of Appeals for the Ninth Circuit on January 1, 2003. The Ninth Circuit transferred the case to the United States District Court for the Central District of California. The district court subsequently dismissed the petition for lack of jurisdiction. On appeal, the Ninth Circuit reversed, holding that habeas jurisdiction exists in the U.S. district courts for claims filed by detainees held at Guantanamo Bay. See Gherebi v. Bush, 352 F.3d 1278 (9th Cir. 2003). Respondents then filed a petition for writ of certiorari to the Supreme Court. Following the Rasul decision, the Court granted the petition for writ of certiorari, but vacated the Ninth Circuit's judgment and remanded the case to Ninth Circuit for further consideration in light of Rumsfeld v. Padilla, 542 U.S. ___, 124 S. Ct. 2711 (2004). See Bush v. Gherebi, 124 S. Ct. 2932 (2004). On July 8, 2004, the Ninth Circuit issued an amended opinion in which it concluded that "[i]t appears to us that the proper venue for this proceeding is in the District of Columbia." Gherebi v. Bush, No. 03-55785, 2004 WL 1534166, at *9 (9th Cir. July 8, 2004). In accordance with this decision, the Ninth Circuit transferred the case to this Court. Id. Petitioner-detainee's Bivens suit—a matter separate and distinct from the habeas petition—was also recently transferred to this Court by the U.S. District Court for the Central District of California.

As a factual basis for his claims, petitioner-detainee, a Libyan, is alleged to have been captured by respondents in the nation of Afghanistan during ongoing military operations on or about January 11, 2002. See Petition ¶ 2.[5] It is further alleged that respondents designated petitioner-detainee an "unlawful enemy combatant," and have held him at the United States Navel Base at Guantanamo Bay, Cuba, "under the exclusive and complete jurisdiction of respondents in the nation of Cuba." See id. ¶¶ 2, 4.

ARGUMENT

I. THIS COURT MAY LACK JURISDICTION OVER THE ONLY PROPER RESPONDENT NAMED IN THE PETITION

As a threshold matter, there is a substantial question as to whether this Court has habeas jurisdiction over Secretary Rumsfeld, the only proper respondent named in the petition. The only respondents actually identified by name in the petition are President Bush and Secretary of Defense Rumsfeld. The President is plainly not a proper respondent and should be dismissed from this habeas action. It is long settled that a court of the United States "'has 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, 802-803 (1992) (plurality opinion) (quoting Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 501 (1866)); 505 U.S. at 825 (Scalia, J., concurring in part and concurring in the judgment); al-Marri v. Rumsfeld, 360 F.3d 707, 708 (7th Cir. 2004). In the unique context of a military detainee held outside the sovereign territory of the United States, the Secretary of Defense, rather than the

[5] Although the petition merely states that petitioner-detainee is "a citizen of a foreign state who is domiciled therein," see Petition, p. 5, counsel for petitioner-detainee has admitted in Court that petitioner-detainee is Libyan.

detainee's immediate custodian, may serve as a proper habeas respondent. Controlling D.C. Circuit case law, however, appears to indicate that for habeas purposes, Secretary Rumsfeld "resides" at his office in the Pentagon, which is in the Eastern District of Virginia, not in this District.

As the Supreme Court recently indicated in Rumsfeld v. Padilla, 542 U.S. ___, 124 S. Ct. 2711 (2004), where the habeas petitioner is "detained outside the territorial jurisdiction of any district court," he must "name as respondent a supervisory official and file the petition in the district where the respondent resides." Id. at 2718 n.9, 2725 n.16 (emphasis added). In Monk v. Secretary of the Navy, 793 F.2d 364, 369 n.1 (D.C. Cir. 1986), a case that involved, among other things, a habeas petition that named the Secretary of the Navy as one of the respondents, the D.C. Circuit made clear that, for habeas purposes, "[o]f course, the Secretary of the Navy is located at the Pentagon, which is in Virginia, not the District of Columbia." Cf. Donnell v. National Guard Bureau, 568 F. Supp. 93, 94-95 (D.D.C. 1983) (ordering transfer of Title VII suit against Pentagon officials to the Eastern District of Virginia); Townsend v. Carmel, 494 F. Supp. 30, 32 (D.D.C. 1979) (Pentagon located in Arlington, Virginia and so Virginia state law applies under 18 U.S.C. § 13). In a recent decision, moreover, the D.C. Circuit has held that dicta in one of its prior decisions characterizing limitations on the district court's territorial jurisdiction over a habeas respondent as a waivable issue "have been overtaken by" the Supreme Court's decision in Padilla and are no longer good law. Stokes v. Parole Comm'n, __ F.3d __, 2004 WL 1585843, at *2-4 (D.C. Cir. July 14, 2004) (citing Chatman-Bey v. Thornburgh, 864 F.2d 804, 813 (D.C. Cir. 1988) (en banc)).

On the other hand, as the Supreme Court itself noted in Padilla, 124 S. Ct. at 1275 n.16,

the Supreme Court and this Court have exercised habeas jurisdiction over the petitions of citizens held abroad in cases filed against Pentagon officials in the District Court for the District of Columbia. Id. (citing Burns v. Wilson, 346 U.S. 137 (1953) (Secretary of Defense), and United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955) (Secretary of Air Force)). The Ninth Circuit relied on this aspect of the Padilla opinion in transferring this very case to this Court. Gherebi v. Bush, No. 03-55785, 2004 WL 1534166, at *9 (9th Cir. July 8, 2004). Those cases suggest that in the unusual case of citizens held outside any judicial district, petitions may be filed against Pentagon officials in the seat of government. Nonetheless, the logic of the Padilla opinion does point to the Eastern District of Virginia as the proper forum for this action, and both examples cited in Padilla predate the D.C. Circuit's conclusion in Monk that Pentagon officials are located in the Eastern District of Virginia for habeas purposes. Respondents have no interest in delaying these proceedings and are fully prepared to litigate in this Court, but respondents also want to avoid the delay inherent in litigating these issues in the wrong forum and so raise this possible jurisdictional defect for the Court's consideration.[6]

II. BECAUSE PETITIONER-DETAINEE IS AN ALIEN HELD OUTSIDE THE SOVEREIGN TERRITORY OF THE UNITED STATES, THE CONSTITUTION DOES NOT PROVIDE A BASIS TO CHALLENGE THE LEGALITY OF THE DETENTION.

Petitioner-detainee's constitutional claims–under the Fifth, Sixth, Eighth, and Fourteenth Amendments, see Petition p. 3–fail as a matter of law. As an alien detained by the military

[6] Questions as to the proper respondent to a habeas action brought on behalf of a Guantanamo detainee, and the proper forum court to entertain a habeas action against that respondent are common to all of the Guantanamo habeas actions before the Judges of this Court. As explained in respondent's Motion for Joint Case Management Conference, these issues may be more appropriately resolved through coordinated consideration by the entire Court.

outside the sovereign territory of the United States and lacking a sufficient connection to this country, petitioner-detainee has no cognizable constitutional rights.

The Supreme Court has consistently recognized that the writ of habeas corpus serves "as a means of reviewing the legality of Executive detention." INS v. St. Cyr, 533 U.S. 289, 301 (2001); see Preiser v. Rodriguez, 411 U.S. 475, 484 (1973) (stating that "the essence of habeas corpus is an attack by a person in custody upon the legality of that custody"). In this case, it is alleged that petitioner-detainee's detention at Guantanamo Bay is unlawful because it violates petitioner-detainee's rights under the United States Constitution and the Third Geneva Convention. These claims must be evaluated in the unique context of this case. Petitioner-detainee is neither a United States citizen, nor is he confined within an area of United States sovereignty. Moreover, this case does not involve a criminal detention.[7] To the contrary, the petition admits that petitioner-detainee is an alien who was captured in an active foreign combat zone and who is presently held at Guantanamo Bay, Cuba.[8] Accordingly, even accepting as true all the factual allegations contained in the petition, no appeal can be made under the only two sources of law involved in the petition—the Constitution and the Third Geneva Convention—for challenging the detention. Both the Supreme Court and the D.C. Circuit have held–in cases unaffected by the Supreme Court's recent decision in Rasul–that the constitutional rights claimed

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[7] In Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2640 (2004), the Court explained that captivity in war is not punishment, but protective custody, the purpose of which is "to prevent captured individuals from returning to the field of battle and taking up arms once again."

[8] Indeed, even assuming the truth of the petition's allegation that Guantanamo Bay is "under the exclusive and complete jurisdiction of respondents," see Petition ¶ 2, the petition does not, and cannot, dispute that Guantanamo Bay is outside the sovereign territory of the United States. See Rasul, 124 S. Ct. at 2691-93.

by petitioner-detainee do not extend to aliens held outside the sovereign territory of the United States, and that the Third Geneva Convention is enforceable only by the exercise of executive authority, and not by private actions in the courts. Thus, regardless of the underlying facts of the petitioner-detainee's capture and detention, the petition should be rejected as a matter of law.

"It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside our geographic borders." Zadvydas v. Davis, 533 U.S. 678, 693 (2001). In particular, the Supreme Court has concluded that neither the Fourth nor Fifth Amendments obtain with respect to aliens outside the United States territory. See United States v. Verdugo-Urquidez, 494 U.S. 259, 266 (1990) (rejecting proposition that the Fourth Amendment "was intended to restrain the actions of the Federal Government against aliens outside of the United States territory"); Johnson v. Eisentrager, 339 U.S. 763, 783-85 (1950) (rejecting claim that aliens outside the territory of the United States are entitled to Fifth Amendment rights). The D.C. Circuit, for its part, has repeatedly noted that a "'foreign entity without property or presence in this country has *no constitutional rights*, under the due process clause or otherwise.'" 32 County Sovereignty Comm. v. Dep't of State, 292 F.3d 797, 799 (D.C. Cir. 2002) (quoting People's Mojahedin Org. of Iran v. Dep't of State, 182 F.3d 17, 22 (D.C. Cir. 1999)) (emphasis added); see also 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."); Harbury v. Deutch, 1999 WL 33456919, *6-7 (D.D.C. 1999), rev'd in part on other grounds, 233 F.3d 596, 603 (D.C. Cir. 2000), rev'd in part on other grounds sub nom., Christopher v. Harbury, 536 U.S. 403 (2002) (rejecting extraterritorial application of Fifth Amendment); Pauling v. McElroy, 278 F.2d 252,

254 n.3 (D.C. Cir. 1960) ("The non-resident aliens here plainly cannot appeal to the protection of the Constitution or laws of the United States.").

The bar on extraterritorial assertion of constitutional rights by aliens undoubtedly applies here. As the Supreme Court's decision in Eisentrager makes clear, in a holding unaffected by the Supreme Court's subsequent decision in Rasul, the determination whether an alien is present in the United States for purposes of evaluating the availability of constitutional protection, turns not on whether the alien is located within territory over which the United States exercises control, but on whether the alien is within territory over which the United States exercises *sovereignty*. In Eisentrager, the Supreme Court denied a petition for a writ of habeas corpus brought by a group of German civilians who had been captured in China by United States forces during World War II, convicted by a military commission of violating the laws of war and imprisoned in Germany under the control of the United States Army. The Court rejected the petitioners' attempt to invoke a "constitutional right" to bring a habeas petition, reasoning that the "prisoners at no relevant time were within any territory over which the United States is *sovereign*, and the scenes of their offense, their capture, their trial, and their punishment were all beyond the territorial jurisdiction of any court of the United States." 339 U.S. at 778 (emphasis added). The Court went on to overturn the determination by the Court of Appeals that the prisoners possessed Fifth Amendment liberty interests, highlighting concerns about "extraterritorial application of organic law." Id. at 781-785. Thus, while the petitioners in Eisentrager were imprisoned under the control of the United States government, the absence of United States sovereignty precluded the attachment of constitutional rights. As the Supreme Court later explained, the Court in Eisentrager "rejected the claim that aliens are entitled to Fifth Amendment rights outside the

sovereign territory of the United States."[9] Verdugo-Urquidez, 494 U.S. at 269 (emphasis added).

The distinction for constitutional purposes between "territorial jurisdictional" and

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[9] In the Supreme Court's recent Rasul decision, the Court noted that certain aspects of Eistentrager had been overruled by Braden v. 30th Jud. Conf. of Ky., 410 U.S. 484 (1973). But the Rasul Court made clear that Braden's impact on Eisentrager was limited to the statutory question of the availability of habeas review. It held that "Braden overruled the statutory predicate to Eisentrager's holding," and thus that "Eisentrager plainly does not preclude the exercise of § 2241 jurisdiction over petitioner's claims." 124 S. Ct. at 2695. Because the narrow question of the statutory availability of habeas review was the only one before the Court in Rasul, id. at 2693 (noting that the "question" before the Court was "whether the habeas statute confers a right to judicial review" under the circumstances), nothing in Rasul can conceivably be read to affect Eisentrager's core constitutional holding.

Indeed, the Rasul Court's analysis of the impact of subsequent authority on Eisentrager was narrowly limited to the "statutory predicate"of that decision. That predicate was that a statutory prerequisite to habeas jurisdiction was the "presence" of the habeas petitioner within the "jurisdiction" of the habeas court. Rasul, 124 S. Ct. at 2694. Because this predicate had been established in the Court's decision in Ahrens v. Clark, 335 U.S. 188, 192 (1943) (reading the phrase "within their respective jurisdiction" as used in the habeas statute, 28 U.S.C. § 2241(a), to require a petitioner's actual presence within the district court's territorial jurisdiction), and since the petitioners in Eisentrager were not within the presence of the habeas court's jurisdiction, the Eisentrager Court had 'proceeded from the premise that 'nothing in our statutes' conferred federal-court jurisdiction.'" Rasul, 124 S. Ct. at 2694 (quoting Eisentrager, 339 U.S. at 768). But the Rasul Court held that this predicate had been overruled by the Court's subsequent decision in Braden, which "held, contrary to Ahrens, that the prisoner's presence within the territorial jurisdiction [of the district court in which the habeas petition is filed] is not 'an invariable prerequisite' to the exercise of district court jurisdiction under the federal habeas statute." Rasul, 124 S. Ct. at 2695. Based on the Braden decision, Rasul explained that "Braden overruled the statutory predicate to Eistertrager's holding," that is, Braden overruled the requirement that a petitioner must be within the territorial jurisdiction of the district court to file a statutory habeas petition. Braden, however, did not undermine Eisentrager's *constitutional holding* that aliens outside the sovereign territory of the United States are not afforded the protections of constitutional rights. Indeed, Braden did not even mention Eisentrager and it is unreasonable to conclude that the Court dramatically changed existing jurisprudence regarding the extraterritorial application of the Constitution in a case that dealt with little more than an Alabama's prisoner's ability to seek statutory habeas relief in Kentucky.

"sovereignty" is not meaningless semantics. In rejecting extraterritorial constitutional rights for aliens, Eisentrager is consistent with a long line of prior cases refusing to extend full constitutional rights to aliens abroad, and recognizing that even fundamental rights apply not in all territories controlled or under the jurisdiction of the United States, but only in those over which "the United States has sovereign power." Verdugo-Urquidez, 494 U.S. at 268 (citing Insular Cases). To adopt a rule that territorial jurisdiction is the determining factor for purposes of constitutional application would "endorse the view every constitutional provision applies wherever the United States Government exercises power." Id. The Supreme Court expressly rejected this construction in Verdugo-Urquidez. Id. at 268-69.

Here, it is clear that the Guantanamo Bay Naval Base is outside the sovereign territory of the United States. As the Supreme Court observed in Rasul, under the 1903 Lease Agreement executed between the United States and Cuba, "'the United States recognizes the continuance of the *ultimate sovereignty of the Republic of Cuba* over the [leased areas],' while 'the Republic of Cuba consents that . . . the United States shall exercise complete jurisdiction and control over and within said areas.'" Rasul, 124 S. Ct. at 2690-91 (emphasis added). Indeed, the Supreme Court posited a distinction between "plenary and exclusive jurisdiction" and "'ultimate sovereignty" at Guantanamo Bay even as it framed the specific question for its review. Id. at 2693; cf. United States v. Spelar, 338 U.S. 217, 221-22 (1949) (lease between for military air base in Newfoundland "effected no transfer of sovereignty with respect to the military bases concerned"); Vermilya-Brown Co. v. Connell, 335 U.S. 377, 380-81 (1948) (U.S. naval base in Bermuda, controlled by United States under lease with Great Britain, was outside United States

sovereignty).[10]

Given the absence of U.S. sovereignty over Guantanamo Bay and petitioner-detainee's status as an alien, it is plain that petitioner-detainee lacks cognizable constitutional rights with respect to his detention. Indeed, in a similar case, the Eleventh Circuit concluded that alien migrants located at the Guantanamo Bay Naval Base have "no First Amendment or Fifth Amendment rights which they can assert." See Cuban American Bar Ass'n, Inc. v. Christopher, 43 F.3d 1412, 1428-29 (11th Cir. 1995). As a predicate to its decision, the court specifically rejected the contention that "'control and jurisdiction' is equivalent to sovereignty" for the purpose of assessing the applicability of constitutional provisions to aliens. Id. at 1424-25. Like the court in Cuban American Bar Ass'n, this Court should dismiss any contention that the Constitution provides actionable rights to aliens located at a U.S. military facility within the sovereign territory of another nation.[11] See also Haitian Refugee Center, Inc. v. Baker, 953 F.2d

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[10] In its Memorandum Opinion dismissing the petition in the Rasul case, Judge Kollar-Kotelly concluded that the military base at Guantanamo Bay is outside the sovereign territory of the United States. See Rasul v. Bush, 215 F. Supp. 2d 55, 72 (D.D.C. 2002). This conclusion was not disputed by the D.C. Circuit or the Supreme Court.

[11] In its amended opinion transferring this case to this Court, a divided panel of the Ninth Circuit held that "by virtue of the United States' exercise of territorial jurisdiction over Guantanamo, *habeas jurisdiction* lies in the present case." Gherebi v. Bush, 374 F.3d 727, 736 (9th Cir. 2004) (emphasis added). The Ninth Circuit expressly stated, and, indeed, "reiterate[d]," that it was not considering whether "any particular constitutional issues" may be raised by petitioners. Id. at 737; see also id. at 730 ("[W]e underscore that the issue before us is not whether Gherebi's detention will withstand constitutional inquiry."). Thus, there is no "law of the case" with respect to whether petitioners here are entitled to constitutional rights. See LaShawn A. v. Barry, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (en banc) (law-of-the-case doctrine is that "the *same* issue presented a second time in the *same* case in the *same* court should lead to the *same* result." (emphases in original)); see also id. at 1394 ("The law-of-the-case doctrine, the Supreme Court said, turns 'on whether a court previously decide[d] upon a rule of law . . . not whether, or how well, it explained the decision.'" (citing Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 817 (1988)) (alterations in Barry)); Barry, 87 F.3d at 1394 ("[L]aw-of-the-

1498, 1513 (11th Cir. 1992) (Haitians interdicted by U.S. Coast Guard on the high seas "have no recognized substantive rights under the laws or Constitution of the United States.").

Even if this Court were to disagree with the Eleventh Circuit and conclude that Guantanamo Bay were the equivalent of U.S. sovereign territory for purposes of assessing the applicability of constitutional provisions, the Supreme Court's decision in United States v. Verdugo-Urquidez would still bar the assertion of constitutional rights by petitioner-detainee in this case. In Verdugo-Urquidez, the Court considered whether the Fourth Amendment applied to the search and seizure by United States agents of property in Mexico owned by a non-resident alien who had been arrested and transported to the United States prior to the search. The Court noted that certain previous cases "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*." Verdugo-Urquidez, 494 U.S. at 271 (1990) (emphasis added); see also Jifry, 370 F.3d at 1182; People's Mojahedin Org., 182 F.3d at 22. The Court reasoned that presence in the United States that is "lawful but involuntary [] is not the sort to indicate any substantial connection with our country." 494 U.S. at 271. Respondent, "an alien who ha[d] had no previous significant voluntary connection with the United States" and was being held in the

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case doctrine applies to questions decided 'explicitly or by necessary implication.'" (citation omitted)). In any event, this Court would not be bound by any discussion in Gherebi pertaining to the import of Guantanamo Bay's legal status under Eisentrager, given that, for the reasons stated above, the Ninth Circuit's reasoning (which emphasizes territorial jurisdiction rather than sovereignty, see 374 F.3d at 734) is plainly flawed. See Christianson, 486 U.S. at 817 ("A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'" (citation omitted)); Murphy v. FDIC, 208 F.3d 959, 965 (11th Cir. 2000) (declining to apply prior ruling by transferor court).

United States against his will, was not entitled to the protection of the Fourth Amendment. Id. Even more clearly here, petitioner-detainee–who does not allege to have any "significant voluntary connection with the United States" and whose detention in Guantanamo Bay by the military is instead "involuntary"–does not have a sufficient connection with the United States to give rise to constitutional protection.[12]

It bears noting that nothing in the Supreme Court's opinion in Rasul undermines the foregoing analysis or the conclusion that invariably flows from Eisentrager and its progeny– that aliens, such as petitioner-detainee, who are outside the sovereign territory of the United States and lack a sufficient connection to the United States may not assert rights under the Constitution. To begin with, the Court in Rasul repeatedly emphasized that its decision that petitioners have a right to seek a writ of habeas corpus was based on an interpretation of the habeas statute, 28 U.S.C. § 2241, not on a reading of the Constitution. The question framed by the Court in Rasul was "whether the habeas *statute* confers a right to judicial review" for aliens detained in Guantanamo Bay. 124 S. Ct. at 2693 (emphasis added). The Court, in turn, "h[e]ld that § 2241 confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges to the

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[12] In People's Mojahedin Organization, the D.C. Circuit stated, "'[A]liens receive constitutional protections [only] when they have come within the territory of the United States and developed substantial connections with this country.'" 182 F.3d at 22 (quoting Verdugo-Urquidez, 494 U.S. at 271 (alterations in People's Mojahedin Organization); see also Jifry, 370 F.3d at 1182 (aliens may be accorded some constitutional protections where they "have come within the territory of the United States and established 'substantial connections' with this country . . . ."). However, in National Council of Resistance of Iran v. Dep't of State, 251 F.3d 192, 201-02 (D.C. Cir. 2001), a separate panel of the D.C. Circuit queried, but did not decide, whether a "substantial" connection to the United States is necessary. Even that court, however, appeared to assume that some connection was required. See id. at 202. Regardless, petitioners' lack of *any* "voluntary connection with the United States" makes constitutional protection unavailable. See Verdugo-Urquidez, 494 U.S. at 271.

legality of their detention at the Guantanamo Bay Naval Base." Id. at 2698. The Court repeatedly distinguished the decision in Eisentrager, emphasizing that the Court in Eisentrager was concerned with the "question of the prisoners' *constitutional* entitlement to habeas corpus" and "had far less to say on the question of petitioners' *statutory* entitlement to habeas review." Id. at 2693-94 (emphases in original); see also id. at 2694 (Eisentrager opinion "devoted . . . little attention to question[s] of statutory jurisdiction"); id. at 2694 n.8 (the Court in Eisentrager "clearly understood the Court of Appeals' decision to rest on constitutional and not statutory grounds"). Rasul thus left intact Eisentrager's constitutional holding that non-resident aliens in U.S. custody overseas do not have a constitutional right to the writ of habeas corpus. See Eisentrager, 339 U.S. at 778.[13]

More importantly, the Court in Rasul made no attempt—and had no occasion—to revisit Eisentrager's specific rejection of an extraterritorial application of the Fifth Amendment in that case. See id. at 785. Indeed, nothing in Rasul detracts from Eisentrager's powerful admonition against extension of the Amendments in the Bill of Rights to aliens detained by the military outside the United States:

> Such a construction would mean that during military occupation irreconcilable enemy elements, guerrilla fighters, and 'were-wolves' could require the American Judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, right to bear arms as in the Second, security against 'unreasonable' searches and seizures as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments.

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[13] The Court's conclusion that Eisentrager does not "*categorically exclude*[] aliens detained in military custody outside the United States from the 'privilege of litigation' in U.S. Courts," see Rasul, 124 S. Ct. at 2698 (emphasis added), of course, only means that Congress may provide jurisdiction for these persons by statute, not that they have a constitutional entitlement to bring suit in the absence of congressional action.

> 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.

339 U.S. at 784-785 (internal citation omitted).[14]

This Court should heed the Supreme Court's warning, follow clear and still binding circuit precedent, and resist any assertion that constitutional rights may be raised by non-resident aliens detained by the military outside the sovereign United States. The claims in the petition under the Constitution, including the Due Process Clause of the Fifth and Fourteenth Amendments, the Sixth Amendment, and the Cruel and Unusual Punishment Clause of the Eighth Amendment, should be rejected.

III. EVEN ASSUMING THAT PETITIONER-DETAINEE IS ENTITLED TO CONSTITUTIONAL PROTECTION, HIS CLAIMS FAIL AS A MATTER OF LAW.

Even assuming that the Constitution applies to petitioner-detainee, which it does not, the

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[14] The cryptic dicta in a footnote in Rasul that the petitioners have alleged that they are in "'custody in violation of the Constitution or laws or treaties of the United States,' 28 U.S.C. § 2241(c)(3)," 124 S. Ct. at 2698 n.15, cannot reasonably be read to overrule the Supreme Court's repeated holdings that aliens outside sovereign United States territory and with insufficient connection to the United States lack constitutional rights. E.g., Verdugo-Urquidez, 494 U.S. at 266; Zadvydas, 533 U.S. at 693. The Court's holding is clear that it decides only the statutory jurisdiction of a court to hear petitioners' claim. Indeed, the narrowness of the specific issue before the Court in Rasul was expressly recognized at oral argument, in questions distinguishing between the merits of the petitioners' claims–which were not before the Court–and the jurisdiction of the Court to consider them. See Rasul v. Bush Oral, Argument Transcript, 2004 WL 943637, at 12-13. The mere notation in a footnote that petitioners' allegations describe "custody in violation of the Constitution or laws and treaties of the United States" does not resolve the fundamental antecedent question of whether petitioners are entitled to the protection of these laws. At most, the footnote indicates only that the claims asserted by petitioners in that case were the proper subject for a statutory habeas action.

constitutional claims asserted in the petition would not provide a basis for relief. The Sixth Amendment does not provide petitioner-detainee with a right to counsel in the context of this case. The plain text of the Sixth Amendment provides that the "accused" in a "criminal proceeding" shall "have the assistance of counsel for his defense." U.S. Const. amend VI. Therefore, the Sixth Amendment is not triggered until the government commences a criminal proceeding against the accused. See Texas v. Cobb, 532 U.S. 162, 167-68 (2001) (stating that the Sixth Amendment "does not attach until a prosecution is commenced, that is, at or after the initiation of adversary judicial criminal proceedings–whether by way of formal charge, preliminary hearing, indictment, information, or arraignment") (quoting McNeil v. Wisconsin, 501 U.S. 171, 175 (1991)) (internal quotations and citations omitted). Here, the Sixth Amendment does not apply to petitioner-detainee because the government has not instituted criminal proceedings against him. Petitioner-detainee is detained solely because of his status as enemy combatant, not for any other criminal or punitive purpose. See Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2640 (2004) (explaining that captivity in war is not criminal punishment). Because the right to counsel embodied by the Sixth Amendment does not apply in the absence of criminal proceedings, the petition fails to state a Sixth Amendment claim.[15]

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[15] Petitioner-detainee also lacks a right to counsel under the Self-Incrimination Clause of the Fifth Amendment. In Miranda v. Arizona, 384 U.S. 436 (1966), the Supreme Court recognized that, in order to protect a suspect's Fifth Amendment right not to incriminate himself, a suspect must be warned prior to custodial interrogation that he has the right to remain silent and the right to have an attorney present. The Court has since explained, however, that the Fifth Amendment's Self-Incrimination Clause is "a fundamental trial right of criminal defendants." Verdugo-Urquidez, 494 U.S. at 264. Accordingly, "a constitutional violation occurs only at trial." Id.; see Chavez v. Martinez, 538 U.S. 760, 767 (2003) ("Statements compelled by police interrogations of course may not be used against a defendant at trial, but it is not until their use in a criminal case that a violation of the Self-Incrimination Clause occurs.") (internal citation omitted). Because petitioner-detainee is not being subjected to a criminal trial, the right to

The petition also fails to state a claim under the Cruel and Unusual Punishment Clause of the Eighth Amendment Claim. This provision only applies in criminal actions following conviction. See, e.g., City of Revere v. Massachusetts General Hosp., 463 U.S. 239, 244 (1983); Ingraham v. Wright, 430 U.S. 651, 667-671 (1977). In fact, the government "does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt" in a criminal prosecution. City of Revere, 463 U.S. at 244. Here, petitioner-detainee has not been charged with or convicted of a criminal offense, thus he has failed to state an Eighth Amendment violation.

Finally, the petition's Fourteenth Amendment argument fails as a matter of law. The Due Process Clause of the Fourteenth Amendment applies only to the States, not the federal government. See U.S. Const. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property without due process of law"). (Furthermore, any Fifth Amendment due process claim must ultimately fail, too, as a matter of law in light of the process afforded to petitioner-detainee under the Combat-Status Review Tribunal (CSRT) procedures recently implemented by the military. See Combat Status Review Tribunal Order Issued, available at www.defenselink.mil/releases/2004/nr20040707-0992.html. The CSRT procedures are "at least equal to" the military tribunal procedures endorsed in Hamdi as constitutionally sufficient even for United States citizen detainees. See El-Banna, et al. v. Bush, et. al., Civil Action No. 04-1144 (RWR), Transcript of Temporary Restraining Order Proceedings, p. 47 (Aug. 3, 2004). If such procedures satisfy due process for citizen-detainees, then a fortiori, they are constitutional

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counsel associated with the Fifth Amendment's Self-Incrimination Clause does not apply to this case.

for non-citizen detainees like petitioner-detainee. Cf. Verdugo-Urquidez, 494 U.S. at 275-78 (Kennedy, J., concurring) (explaining that the constitutional standards that normally apply to United States citizens do not necessarily with the same force to "noncitizens who are beyond our territory").)

Accordingly, even assuming the Constitution applies, petitioner-detainee's constitutional claims fail.

IV. PETITIONER CANNOT STATE A CLAIM UNDER THE THIRD GENEVA CONVENTION.

The petition likewise fails to state a claim under the Third Geneva Convention. Petitioner-detainee is being held under the law of war, and there is an entire body of international law that applies during armed conflict to regulate interactions between governments and members of enemy forces. That body of law includes treaties such as the Geneva Conventions, which were developed with the exigencies of warfare in mind and address specifically and in detail a nation-state's obligations with respect to detainees seized in combat. See, e.g., Geneva Convention Relative to the Treatment of Prisoners of War of Aug. 12, 1949, 6 U.S.T. 3316 (hereinafter "Third Geneva Convention").

Even assuming that petitioner-detainee is protected by this specialized law of war, including the Third Geneva Convention, the Supreme Court has held "responsibility for observance and enforcement" of any such law "is upon political and military authorities," not United States courts. Eisentrager, 339 U.S. at 789 n.14 (holding that although "prisoners claim to be and are entitled to the" protections of the Geneva Convention, these claims are not cognizable in federal court because the rights of aliens "are vindicated under [the Geneva

Convention] only through the protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention"). Although the Supreme Court in Eisentrager addressed the 1929 Geneva Convention, not the current convention, its analysis is fully applicable here.

This fundamental principle of international law has been distilled to a general rule that international treaties do not create rights that are privately enforceable in federal courts; instead, enforcement is reserved to the executive authority of the governments who are parties to the treaties.[16] See, e.g., Committee of United States Citizens Living in Nicaragua v. Regan, 859 F.2d 929, 937-38 (D.C. Cir. 1988); United States v. Emuegbunam, 268 F.3d 377, 389-90 (6th Cir. 2001); Matta-Ballesteros v. Henman, 896 F.2d 255, 259 (7th Cir.1990). Accordingly, international treaties do not provide private litigants with enforceable rights unless their terms are implemented by appropriate legislation or intended to be self-executing. See Whitney v. Robinson, 124 U.S. 190, 194 (1888) ("When the stipulations [of a treaty] are not self-executing, they can only be enforced pursuant to legislation to carry them into effect."); see also Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (Marshall, C.J.), overruled on other grounds, United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833) (holding that a non-self-executing treaty "addresses itself

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[16] As explained by the Supreme Court:

> A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamation, so far as the injured parties choose to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress.

Head Money Cases, 112 U.S. 580, 598 (1884).

to the political, not the judicial department; and the legislature must execute the [treaty] before it can become a rule for the Court").[17]

The Third Geneva Convention does not create privately enforceable rights, and Congress has never sought to create such rights through implementing legislation. Instead, as the Court recognized in Eisentrager with respect to the 1929 Geneva Convention—the predecessor treaty to the Third Geneva Convention—the "obvious scheme" of the Third Geneva Convention is that the "responsibility for observance and enforcement" of its provisions is "upon political and military authorities," not the courts. 339 U.S. at 789 n.14. Indeed, "[c]ourts have unanimously held that neither the Hague nor Geneva Conventions are self-executing." Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 434, 439 n.16 (D.N.J. 1999); see Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808-09 (D.C. Cir. 1984) (Bork, J., concurring), cert. denied, 470 U.S. 1003 (1985) (concluding that the Third Geneva Convention is not self-executing); Huynh Thi Anh v. Levi, 586 F.2d 625, 629 (6th Cir. 1978) (concluding that there is "no evidence" that the Fourth Geneva Convention was "intended to be self-executing or to create private rights of action in the domestic courts of the signatory countries"); Handel v. Artukovic, 601 F. Supp. 1421, 1424-25 (C.D. Cal. 1985) (concluding that the Third Geneva Convention is not self-executing); see also

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[17] There is a strong presumption that international treaties do not create privately enforceable rights. See Goldstar (Panama) S.A. v. United States, 967 F.2d 965, 968 (4th Cir. 1992) (en banc) ("International treaties are not presumed to create rights that are privately enforceable."); see also United States v. Li, 206 F.3d 56, 67 (1st Cir. 2001) (en banc) (Selya, J., concurring) ("It is surpassingly difficult to accept the idea that, in most instances, either the Executive Branch or the ratifying Senate imagined that it was empowering federal courts to involve themselves in enforcement on behalf of private parties who might be advantaged or disadvantaged by particular readings of particular treaty provisions.").

Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 442 & n.10 (1989) (holding that the Geneva Convention on the High Seas, which provides that an illegally boarded merchant ship "shall be compensated for any loss or damage that may have been sustained" does "not create private rights of action" enforceable in United States courts); Federal Trade Comm'n v. A.P.W. Paper Co., 328 U.S. 193, 203 (1946) (holding that with respect to the Geneva Convention of 1929, the "undertaking 'to prevent the use by private persons' of the words or symbol [of the Red Cross] is a matter for the executive and legislative departments"). This conclusion is supported by the text of the treaty, which contains no explicit provision for enforcement by any form of private petition. Furthermore, the terms of the treaty relating to enforcement focus solely on vindication by the various diplomatic means available to sovereign nations. See, e.g., Third Geneva Convention, art. 11 (stating that "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"). Put simply, "the corrective machinery specified in the treaty itself is nonjudicial." Holmes v. Laird, 459 F.2d 1211, 1222 (D.C. Cir. 1972).

In sum, the Third Geneva Convention is not self-executing and enforcement of its terms is limited to the executive branch of government rather than the courts. Consequently, the petition fails to state a claim for relief under this provision.[18]

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[18] Without identifying any specific provisions of law, the petition states in conclusory fashion, that the detention at issue in this case is "in violation of international laws and treaties to which the United States of America is a signatory." See Petition p. 6. To the extent that argument was meant to invoke the International Covenant on Civil and Political Rights (ICCPR), Art. 14, 999 U.N.T.S. 171, 6 I.L.M. 368 (1992), this claim cannot succeed. Congress ratified the ICCPR with numerous reservations and with the express declaration that the ICCPR is not self-executing. See International Covenant on Civil and Political Rights, 102d Cong., 138 Cong.

CONCLUSION

For the foregoing reasons, respondent is entitled to dismissal of the petition or to judgment as a matter of law. The petition should be dismissed.

Dated: August 6, 2004

Respectfully submitted,

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Rec. S4781, S4784 (April 2, 1992). Accordingly, the ICCPR does not create privately enforceable rights in United States courts. See Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2767 (2004) ("Congress ratified the [ICCPR] on the express understanding that it was not self-executing and so did not create obligations enforceable in the federal courts").

A claim also does not exist under American Convention on Human Rights (ACHR), 1144 U.N.T.S. 123, 9 I.L.M. 673 (1969), or the American Declaration on the Rights and Duties of Man (ADRDM), O.A.S. Off. Rec. OEA/Ser. LV/I.4 Rev. (1965). These provisions are simply multinational resolutions that have not been ratified by Congress; thus, they do not have the force or effect of law. See Flores v. Southern Peru Copper Corp., 343 F.3d 140, 162-64 (2d Cir. 2003) (stating that "the United States has declined to ratify the American Convention [on Human Rights] for more than three decades"); Garza v. Lappin, 253 F.3d 918, 925 (7th Cir. 2001) (stating that the American Declaration on the Rights and Duties of Man "is an aspirational document" that "did not create any enforceable obligations on the part of any" member nations).

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CERTIFICATE OF SERVICE

Pursuant to the Court's Scheduling Order, I hereby certify that on August 6, 2004, a copy of this electronically filed document was sent by electronic facsimile to:

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