

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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DAVID M. HICKS,

Petitioner,

v.

GEORGE W. BUSH,

President of the United States,  
*et al.*,

Respondents.

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Civil Action No. 02-CV-0299 (CKK)

FAWZI KHALID ABDULLAH FAHAD  
AL ODAH, *et al.*

Plaintiffs,

v.

UNITED STATES OF AMERICA,  
*et al.*,

Defendants.

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Civil Action No. 02-CV-0828 (CKK)

MAMDOUH HABIB, *et al.*

Petitioners,

v.

GEORGE WALKER BUSH,  
President of the United States,  
*et al.*,

Respondents.

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Civil Action No. 02-CV-1130 (CKK)

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MURAT KURNAZ, *et al.*  
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v.  
GEORGE W. BUSH,  
President of the United States,  
*et al.*,  
Respondents.

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Civil Action No. 04-CV-1135 (ESH)

O.K., *et al.*  
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GEORGE W. BUSH,  
President of the United States,  
*et al.*,  
Respondents.

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*et al.*,  
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RIDOUANE KHALID, *et al.*  
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President of the United States,  
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Pursuant to the Court's September 20, 2004 Coordination Order Setting Filing Schedule and Directing the Filing of Correspondence Previously Submitted to the Court, respondents hereby respond to the above-captioned petitions for writs of habeas corpus and move to dismiss or for judgment as a matter of law.

## **INTRODUCTION**

In Rasul v. Bush, 124 S. Ct. 2686 (2004), the Supreme Court held for the first time that aliens apprehended abroad and detained at Guantanamo Bay, Cuba, as enemy combatants, "no less than citizens," can invoke the habeas jurisdiction of a district court under 28 U.S.C. § 2241. 124 S. Ct. at 2696. But the Court did nothing more. It did not overturn settled precedent that our Constitution affords no rights to aliens held abroad, or that the treaty and convention provisions relied upon by petitioners are somehow actionable in court; indeed, 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 (emphasis added). These questions remain for this Court in the first instance, and they have clear answers. The petitions must be rejected.

Petitioners demand an unprecedented judicial intervention into the conduct of war operations, based on the extraordinary, and unfounded, proposition that aliens captured outside this country's borders and detained outside the territorial sovereignty of the United States can claim rights under the U.S. Constitution. Petitioners proceed as if the actions of the Military in zones of active hostilities, and in preventing aliens from returning to the battle with the means and intent to bring fresh harm to United States and coalition forces, are no less amenable to searching review by the courts than routine actions of administrative agencies. Undaunted by the sheer absence of any historical precedent for the proceeding they want to stage, petitioners contend that the Supreme Court's recent decision sustaining the federal courts' statutory habeas jurisdiction over the detainees

at Guantanamo Bay allows them, and this Court, to dispense altogether with 200-plus years of history, and, without limitation, to revise the judgments of the President and his military commanders in prosecuting a war that Congress has specifically authorized.

Petitioners could not be more wrong. On a fundamental level, petitioners' objection to the Executive's power to capture and detain alien enemy combatants in foreign territory during ongoing hostilities is flatly inconsistent with the historical understanding of the President's role as Commander in Chief of the Armed Forces, and runs counter to Congress's specific authorization to the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons[.]" Authorization for Use of Military Force, Pub. L. 107-40, §2(a), 115 Stat. 224 (2001). While petitioners ask the Court to delineate the outer bounds of the President's authority to defend the country – for instance, to decide whether the President's power to detain extends to supporting personnel captured away from the front lines in Afghanistan – any such undertaking, on the terms petitioners suggest, would improperly embroil the Court in second-guessing decisions on sensitive issues that the Constitution entrusts to the Executive Branch.

The specific constitutional and other objections raised by petitioners are meritless in any event. The notion that the U.S. Constitution affords due process and other rights to enemy aliens captured abroad and confined outside the sovereign territory of the United States is contrary to law and history. Even if that threshold issue could be resolved favorably to petitioners, their due process objections would properly be dispensed with on the grounds that the enemy combatant status proceedings that the Department of Defense ("DoD") is completing provide all the process that

petitioners are due (and then some) in these circumstances. Similarly, petitioners' other claims – whether under the Constitution, international treaties and conventions that are not self-executing, statutory provisions, or military regulations – have no merit.<sup>1</sup> The petitions must be dismissed.

## **BACKGROUND**

On September 11, 2001, the al Qaeda terrorist network launched a coordinated attack on the United States, killing approximately 3,000 persons. Congress responded by passing a resolution authorizing the President:

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

Authorization for Use of Military Force, Pub. L. 107-40, §§ 1-2, 115 Stat. 224 (2001) ("AUMF"). Congress emphasized that the forces responsible for the September 11th attacks "continue to pose an unusual and extraordinary threat to the national security," and that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." Id.

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<sup>1</sup> Because these constitutional, statutory, regulatory, and international law claims are each common to a significant number of the petitions, in the interest of simplifying these proceedings and providing the Court with a full appreciation of the legal principles applicable to all the issues raised pertaining to the legality of enemy combatant detention, respondents have consolidated their responses to the claims in this unified response and motion to dismiss or for judgment as a matter of law. And to assist the Court in identifying specific issues common among the cases, as well as issues that might be unique to some cases, included as an Appendix hereto is a chart identifying claims raised in each case and noting where those claims are addressed in this response or otherwise. Claims related to military commission proceedings for the trial of war crimes raised in the Hicks and in Hamdan v. Rumsfeld, No. 04-CV-1519(JR), are being addressed through separate, agreed-upon briefing ordered by the Court. In addition, a unified motion to dismiss respondents sued in their personal capacities is being filed separately in the eleven cases to which it applies.

Pursuant to this authorization and his authority under the Constitution, the President, as Commander in Chief, dispatched United States armed forces to seek out and subdue the al Qaeda terrorist network and the Taliban regime and others that had supported it. In the course of that campaign – which remains ongoing – the United States and its allies have captured thousands of individuals overseas, many of whom are foreign nationals. The Military has determined that many of those individuals should be detained during the conflict as enemy combatants. Approximately 550 of the foreign nationals designated for detention as enemy combatants are being held by DoD at the United States Naval Base at Guantanamo Bay, Cuba. The petitioners<sup>2</sup> in the above-captioned cases are among those being so detained.

The Guantanamo Bay detentions have been the subject of extensive diplomatic discussions between the Executive Branch and officials of the foreign governments of detainees' home countries. Some detainees have been released from Guantanamo to foreign governments. Others have been determined eligible for prosecution by a military commission for violations of the laws of war.

Currently, each petitioner's status as an enemy combatant is undergoing review by military tribunals, known as Combatant Status Review Tribunals ("CSRTs"), convened for that purpose. During the CSRT proceedings, the detainees are provided with notice of the factual basis for their classification as enemy combatants, they are allowed to present evidence on their own behalf, and the tribunal members then make an independent determination as to whether the detainees should continue to be designated as enemy combatants. Those who are not so designated have been and will be released. See infra § II.B.1.

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<sup>2</sup> The word "petitioners" is used in this sentence, and elsewhere in this brief to the extent the context requires, to mean the petitioners who are individuals detained by DoD at Guantanamo (as opposed to their "next friends" who are also petitioners in most of these cases).

The present response and motion concerns thirteen habeas petitions<sup>3</sup> brought by more than sixty aliens who were captured overseas in connection with the ongoing war against al Qaeda and its supporters and were transferred to Guantanamo Bay. In these cases, petitioners commonly raise claims under the Constitution and under federal and international law. Specifically, they allege violations of the United States Constitution, and also assert claims under the Administrative Procedure Act, 5 U.S.C. §§ 701-706; the Alien Tort Statute, 28 U.S.C. § 1350; and Army Regulation 190-8. Finally, with respect to international law, petitioners contend that respondents have violated, inter alia, the International Covenant on Civil and Political Rights and the American Declaration on the Rights and Duties of Man, as well as the Geneva Conventions.

For the reasons explained below, all of petitioners' claims should be rejected.<sup>4</sup>

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<sup>3</sup> Citations to "Petitions" in this brief are to the most recently amended petition/complaint filed in a particular case.

<sup>4</sup> It should be noted that, in asserting their claims, petitioners name a number of respondents. Secretary Rumsfeld, however, is the only proper respondent. See Rumsfeld v. Padilla, 124 S. Ct. 2711, 2718 n.9 (2004); Sept. 29, 2004 Mem. Op. and Order in Gherebi v. Bush, No. 04-CV-1164, at 7-8. There exists a jurisdictional issue as to whether Secretary Rumsfeld can be sued in this District, as opposed to the Eastern District of Virginia; respondents recognize, however, that the Court previously resolved this issue in Gherebi. Id. In any event, the respondents other than Secretary Rumsfeld should be dismissed. Indeed, the President is plainly not a proper respondent. 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, 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) ("Naming the President as a respondent [to a habeas petition brought by an alien detainee] was not only unavailing but also improper" because "[s]uits contesting actions of the executive branch should be brought against the President's subordinates"), pet. for cert. filed, 72 U.S.L.W. 3659 (Apr. 9, 2004).

National Treasury Employees Union v. Nixon, 492 F.2d 587 (D.C. Cir. 1974), if it even remains good law, is not to the contrary. NTEU involved an action for a writ of mandamus against the President where the statutory scheme at issue required the President – and only the President –

(continued...)

## ARGUMENT

### I. THE PRESIDENT'S POWER TO DETAIN ENEMY COMBATANTS DURING TIMES OF ARMED CONFLICT IS CONSTITUTIONALLY WELL-ESTABLISHED, INDEPENDENTLY SUPPORTED BY CONGRESSIONAL AUTHORIZATION, AND SUBJECT TO EXTRAORDINARY DEFERENCE

A common thread running through the petitions at issue in this litigation is that petitioners allege that they have been erroneously detained at Guantanamo Bay – that, for example, they supposedly never bore arms against U.S. and coalition forces or provided protection for or otherwise collaborated with al Qaeda leaders. Perhaps petitioners mean, implicitly, to acknowledge what should almost go without saying: that the President's power to wage war includes the power to detain those determined to be enemy combatants. If so, the concession is wise, for the Executive Branch's detention power in such circumstances could not be more clear. The Executive Branch may detain individuals whom it has determined are enemy combatants. That power exists as a matter of the President's inherent authority under Article II of the Constitution. And it is particularly free from doubt where, as here, Congress has authorized the use of "all necessary and appropriate force," including the detention of enemy combatants,<sup>5</sup> through the Authorization for the Use of Military

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<sup>4</sup>(...continued)

to take nondiscretionary ministerial action by a specified date. The present case is distinguishable in several respects. First, the executive action at issue here is not subject to a writ of mandamus because it involves discretionary action taken by the President pursuant to his authority under Article II and the AUMF. Second, the President is not an indispensable party to the petitions because the cases may proceed against Secretary Rumsfeld. Compare id. at 615 ("Thus, no federal official other than the President can be properly named as defendant herein in the place of the President. . . . [T]he sole defendant they can appropriately name in asserting their claims is the President of the United States."). In any event, the D.C. Circuit has questioned the continuing validity of NTEU in light of Franklin. See Swan v. Clinton, 100 F.3d 973, 978-79 (D.C. Cir. 1996) ("It is not entirely clear, of course, whether, and to what extent, [NTEU] remain[s] good law after Franklin.").

<sup>5</sup> See Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2639 (2004) (plurality opinion). In Hamdi, the (continued...)

Force. See AUMF § 2(a).<sup>6</sup>

What is equally clear, also, is that any role that the courts have in reviewing the substantive bases for the Commander in Chief's exercise of this authority to determine the combatant status of detainees is extremely circumscribed. Indeed, such deference by the Judiciary to military determinations during wartime is a hallmark of the separation of powers principle. It is grounded upon the fact that, as explained below, the Constitution squarely entrusts the President with Commander in Chief authority and the grave responsibility to ensure national security. And the need for such deference is heightened by mutually reinforcing prudential factors explained infra at § II.B.2, namely, the dangers posed by judicial intervention into and second-guessing of determinations necessary in the conduct of war, and the limited institutional capacity of the courts to evaluate such determinations. In fact, some of the substantive issues raised by the petitions in these cases – for example, whether enemy aliens taken into custody outside Afghanistan, or first

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<sup>5</sup>(...continued)

Plurality "d[id] not reach the question whether Article II provides such authority [to detain enemy combatants]," because it found that "Congress has in fact authorized Hamdi's detention, through the AUMF." Id. Of course, this approach is in keeping with the Court's policy of not "entertain[ing] constitutional questions in advance of the strictest necessity," Parker v. Los Angeles County, 338 U.S. 327, 333 (1949), and cannot reasonably be read to signal disagreement or doubt concerning the President's authority under Article II. Both matters are addressed herein to provide a full and complete exposition of the basis for Executive action in these circumstances.

<sup>6</sup> Many of the petitions discuss extensively an Order of the President dated November 13, 2001, as though the detentions at issue in these cases were pursuant to that Order. See Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001). However, with respect to most of the petitioners herein, the November 13, 2001 Order is a red herring because it applies only to a subset of detainees whom the President has determined are "individual[s] subject to this order." Id. § 2(a). The detention of the vast majority of the petitioners herein, who have not been so designated, is not pursuant to the November 13, 2001 Order, but, as explained infra, pursuant to the President's general authority as Commander in Chief, the congressional Authorization for Use of Military Force, and the international law of war.

captured by coalition forces and delivered into U.S. custody, may be detained as enemy combatants – even rise to the level of quintessential political questions, the answers to which must be supplied in this context exclusively by the Executive Branch.<sup>7</sup> The courts' role in resolving claims such as those presented in these petitions, in all events, must be extraordinarily deferential, and with respect to certain issues presented, would be proscribed altogether.

**A. Detention of Enemy Combatants Is an Integral and Inexorable Part of the Commander in Chief's Power to Defend the Nation and Vanquish the Enemy**

The Constitution specifically vests the political branches and, in particular, the Commander in Chief, with the power necessary to "provide for the common defense," U.S. Const. preamble, including the authority to vanquish the enemy and repel foreign attack in time of war. See Ex parte Quirin, 317 U.S. 1, 26 (1942) (listing the enumerated war powers). Specifically, Article II, § 2, cl. 1 of the Constitution states that "[t]he President shall be Commander in Chief of the Army and Navy of the United States." As the Supreme Court stressed in Johnson v. Eisentrager, 339 U.S. 763 (1950), it is "of course" the case that the textual "grant of war power includes all that is necessary and proper for carrying [it] into execution." Id. at 788. And, "[f]rom the very beginning of its history [the] Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as enemy individuals." Quirin, 317 U.S. at 27-28.

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<sup>7</sup> See Baker v. Carr, 369 U.S. 186, 217 (1962) (controversy is nonjusticiable political question where there is textually demonstrable commitment to coordinate political branch; lack of judicially discoverable and manageable standards; impossibility of deciding case without making a political policy determination; impossibility of undertaking independent resolution without expressing lack of respect due coordinate branches of government; unusual need for unquestioning adherence to a political decision already made; potentiality of embarrassment from multiple pronouncements by various departments on a question).



"The war power of the national government 'is the power to wage war successfully.'" Lichter v. United States, 334 U.S. 742, 767 n.9 (1948) (quoting Hughes, War Powers Under the Constitution, 42 A.B.A. Rep. 232, 238). Thus, the President has the authority to "employ [U.S. forces] in the manner he may deem most effectual to harass and conquer and subdue the enemy." Fleming v. Page, 50 U.S. (9 How.) 603, 615 (1850); see also Quirin, 317 U.S. at 28 ("An important incident to the conduct of war is the adoption of measures by the military command . . . to repel and defeat the enemy . . ."). This power "is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict." In re Yamashita, 327 U.S. 1, 12 (1946).

It is axiomatic that this war power includes the power not only to use lethal force when necessary against enemy forces engaged in hostilities against the United States, but also to subdue and incapacitate the enemy by the lesser means of capturing and detaining individuals who are part of or support those enemy forces, or who have committed a belligerent act or directly supported hostilities. The "universal agreement and practice" under "the law of war" holds that lawful and unlawful combatants alike are "subject to capture and detention." Quirin, 317 U.S. at 30-31; see also Eisentrager, 339 U.S. at 786 ("This Court has characterized as 'well-established' the 'power of the military to exercise jurisdiction over members of the armed forces, those directly connected with such forces, . . . enemy belligerents, [and] prisoners of war.'") (quoting Duncan v. Kahanamoku, 327 U.S. 304, 313-14 (1946)); Moyer v. Peabody, 212 U.S. 78, 84-85 (1909) (holding that a state governor's power to call out troops to quash an insurrection means "that he may kill persons who resist and, of course, that he may use the milder measure of seizing the bodies of those whom he considers to stand in the way of restoring peace. Such arrests are . . . by way of precaution to

prevent the exercise of hostile power."); William E.S. Flory, Prisoners of War 41-42 (1942); Howard S. Levie, Prisoners of War in International Armed Conflict, 59 Int'l Law Studies 5 n.18 (U.S. Naval War College 1977); 2 L. Oppenheim, International Law §§ 107-108, at 280 (H. Lauterpacht ed., 5th ed. 1935); William Winthrop, Military Law and Precedents 788 (2d ed. 1920); John Shuckburgh Risley, The Law of War 108 (1897).<sup>8</sup>

Indeed, at least five Justices of the Supreme Court appear to find this proposition self-evident. The four-Justice Hamdi plurality, while grounding its reasoning in the congressional Authorization for Use of Military Force rather than in the President's inherent Article II powers, held that detention of enemy combatants – even, unlike in this case, detention of citizen enemy combatants – "is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use." 124 S. Ct. at 2640.

The Plurality explained:

The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by "universal agreement and practice," are "important incident[s] of war." Ex parte Quirin, 317 U.S., at 28, 63 S. Ct. 2. The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again. Naqvi, Doubtful Prisoner-of-War Status, 84 Int'l Rev. Red Cross 571, 572 (2002) ("[C]aptivity in war is 'neither revenge, nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war'" (quoting decision of Nuremberg Military Tribunal, reprinted in 41 Am. J. Int'l L. 172, 229 (1947)); W. Winthrop, Military Law and Precedents 788 (rev. 2d ed. 1920) ("The time has long passed when 'no quarter' was the rule on the battlefield. . . . It is now recognized that 'Captivity is neither a punishment nor an act of vengeance,' but 'merely a temporary detention which is devoid of all penal character.' . . . 'A prisoner of war is no convict; his imprisonment is a simple war measure.' " (citations omitted)); cf. In re Territo, 156

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<sup>8</sup> The practice of capturing and detaining enemy combatants in wartime is deeply rooted in this Nation's history, having been a part of every major war in which the United States has been engaged. See Lt. Col. G. Lewis & Capt. J. Mewha, History of Prisoner of War Utilization by the United States Army 1776-1945, Dep't of the Army Pamphlet No. 20-213 (1955).

F.2d 142, 145 (C.A.9 1946) ("The object of capture is to prevent the captured individual from serving the enemy. He is disarmed and from then on must be removed as completely as practicable from the front, treated humanely, and in time exchanged, repatriated, or otherwise released" (footnotes omitted)).

Id.<sup>9</sup> Justice Thomas, while dissenting from the Court's ultimate judgment in Hamdi, expressed full agreement that the President's war power "quite obviously includes the ability to detain those . . . who fight against our troops or those of our allies." Id. at 2679 (Thomas, J., dissenting).<sup>10</sup>

Perhaps because it was so clear that the Government's allegations concerning petitioner Hamdi, if accepted, placed him squarely within the core of what it means to be an enemy combatant, the Plurality in Hamdi did not undertake to define the outer boundaries of that category, even with respect to United States citizens. Rather, the Plurality remarked that "[t]he legal category of enemy combatant has not been elaborated upon in great detail" and left "[t]he permissible bounds of the category [to] be defined by the lower courts as subsequent cases are presented to them." 124 S. Ct. at 2642 n.1.<sup>11</sup> The cases before this Court, of course, involve the delineation of the "permissible

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<sup>9</sup> Detention is equally vital to the war effort for a second reason: it enables the Military to gather vital intelligence from captured combatants concerning the capabilities, internal operations, and intentions of the enemy. See Levie, supra, at 108-09 (emphasizing importance of interrogation of enemy detainees; "[s]eeking such information has . . . become an important technique in modern warfare"); Encyclopedia of Prisoners of War and Internment 147-48 (Jonathan F. Vance ed., 2000) ("Prisoners of war have always been regarded as vital sources of information by the armies that capture them . . ."). Such intelligence-gathering is especially critical in the current conflict because of the unconventional way in which the enemy operates.

<sup>10</sup> This express recognition by at least five Justices that detention of enemy combatants is, at a minimum, a form of "necessary and appropriate force" under the congressional Authorization for Use of Military Force is fatal to the claims of many of the petitioners that their detention violates the War Powers Clause, U.S. Const. art. I, § 8, cl. 11, for lacking congressional authorization.

<sup>11</sup> In another part of its opinion, the Plurality quoted language appearing in the Government's brief, which in turn was quoted from an informal DoD "fact sheet" generally describing the enemy combatants who are being detained at Guantanamo. See 124 S. Ct. at 2639 (quoting Brief for (continued...))

bounds" of wartime detention of enemy aliens, outside U.S. sovereign territory, rather than the detention of citizens in the United States. But even if the Hamdi Plurality's discussion were fully applicable to the circumstances here, nothing therein suggests that the Executive's authority to detain enemy combatants is narrowly confined by factual details of Hamdi's situation, such as the particular country in which he was fighting or captured, or the fact that he was carrying a weapon when captured. To the contrary, both the Court's reasoning and the longstanding principles it cites from the law of war militate against drawing any such arbitrary lines.

As reflected in the Order establishing the CSRTs, an enemy combatant is "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." CSRT Order ¶ a. It is difficult to conceive how this articulation of the criteria for enemy combatant status would not be within the Executive's war-making power, both under Article II and pursuant to authority under the AUMF, in the current war. "The object of capture is to prevent the captured individual from serving the enemy," In re Territo, 156 F.2d 142, 145 (9th Cir. 1946), quoted in

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<sup>11</sup>(...continued)

Respondents at 3 (quoting Dep't of Defense, Fact Sheet: Guantanamo Detainees <[www.defenselink.mil/news/Feb2004/d20040220det.pdf](http://www.defenselink.mil/news/Feb2004/d20040220det.pdf)>)). The Government did not intend for this language to serve as a functional legal definition and did not submit it to the Court as such, and the Court used it only as a construct "for this particular case," rather than as a conclusive definition set in stone to govern all future cases. Id. at 2639. In any event, the quoted language is not materially different from the definition being employed by DoD in the CSRT procedures applied to Guantanamo Bay detainees. Compare Hamdi Brief for Respondents at 3 ("'was part of or supporting forces hostile to the United States or coalition partners, and engaged in an armed conflict against the United States'"), with July 7, 2004 Order Establishing Combatant Status Review Tribunal ("CSRT Order") ¶ a ("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") (submitted herewith as Ex. A).

Hamdi, 124 S. Ct. at 2640. Obviously, this object is well served, and not exceeded, by defining as enemy combatants those who "are part of or supporting" the enemy, including those who have "committed a belligerent act or [] directly supported hostilities." CSRT Order ¶ a; cf. Quirin, 317 U.S. at 45 (using language "part of or associated with the armed forces of the enemy" to delineate those subject to detention under the law of war).

**B. No Basis Exists in the Constitution, the Laws of War, or Otherwise for Petitioners' Attempts to Place Arbitrary Limits on the Commander in Chief's Detention Authority**

Petitioners variously contend that the Executive's detention powers do not cover enemy combatants captured outside Afghanistan and/or captured in the first instance by forces of a country other than the United States, or do not allow detention of individuals who were not carrying a weapon at the time of their capture. They apparently draw these contentions by latching onto the particular facts of Hamdi's case (i.e., Hamdi was captured with a rifle in Afghanistan), as if those facts defined exclusive prerequisites for all enemy combatant detentions, including the detention of aliens. Petitioners also protest what they characterize as detention for an "indefinite" period. None of these bids to limit the power of the President, under both Article II and under Congress's authorization, has any merit.

The detention powers of the Executive, no less than the terrorist threat they aim to repel and defeat, obviously do not stop at the geographic borders of Afghanistan. In Quirin, the seven enemy combatants whose detention was upheld were captured in New York and Chicago, not sites of active combat and thousands of miles from the World War II theater of operations. 317 U.S. at 21. The Court, nevertheless, soundly rejected the argument that they were "any the less belligerents if . . .

they have not . . . entered the theatre or zone of active military operations." Id. at 38.<sup>12</sup> Moreover, there is no textual basis in the AUMF for an Afghanistan-specific limitation; to the contrary, the AUMF speaks broadly of "all necessary and appropriate force against those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks' or 'harbored such organizations or persons, in order to prevent any future acts of international terrorism . . . ." Hamdi, 124 S. Ct. at 2635 (quoting 115 Stat. 224) (emphasis added). Although Afghanistan had served as a home base or hub for al Qaeda, that organization's far-flung terrorist activities have hardly been confined to that country. The September 11, 2001 attacks occurred on American soil, their plot having been hatched and preparations made in places as scattered as Malaysia, Germany, the United Arab Emirates, and Pakistan, by nationals of a number of different countries.<sup>13</sup> Prior to September 11, 2001, al Qaeda had perpetrated prior acts of terrorism against the United States in locations as far from Afghanistan as the port of Aden in Yemen, Kenya, and Tanzania,<sup>14</sup> and since September 11, 2001, deadly attacks on civilians in, among other places, Spain,

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<sup>12</sup> Accord King v. Superintendent of Vine Street Police Station; Ex parte Liebmann, 1916-1 K.B. 268, 277-78 (justifying the World War I era detention of a German national taken into custody in England, far from the battlefield, on the ground that "[t]he inventions and discoveries of recent years, and especially the existing means of communications, have so widened the fields of possible hostility that there is scarcely any limit on the earth, in the air, or in the waters which it is possible to put upon the exercise of acts of hostility, and real danger to the realm may therefore exist, although impossible of discovery, at distances far from where the actual clash of arms is taking place.").

<sup>13</sup> The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States 156-68, 236-37 (2004) ("9/11 Report"). The Commission remarked that "[i]t should by now be apparent how significant travel was in the planning undertaken by a terrorist organization as far-flung as al Qaeda. The story of the plot includes references to dozens of international trips." Id. at 168.

<sup>14</sup> 9/11 Report at 115-16, 190-91.

Turkey, Indonesia, Morocco, Iraq, and Saudi Arabia have been attributed to al Qaeda and its affiliates. It defies both common sense and elementary notions of security to suggest that, in confronting this unambiguously global menace, the President and his Armed Forces are somehow powerless to take appropriate action to immobilize enemy combatants who, by definition, have participated in or supported enemy forces, see CSRT Order ¶ a, just because they were taken into custody somewhere other than in Afghanistan.

It is similarly without moment that a particular enemy combatant was transferred to United States custody after having been initially captured by another government or organization. Of course, the United States is allied and collaborating with many other nations in both the military campaign in Afghanistan and the war against al Qaeda more generally. It is common practice for allies to transfer enemy combatant detainees amongst themselves. See Levie, supra, at 104-06; Lewis & Mewha, supra, at 58 (referring to "influx of prisoners of war" under American control in World War I, "caused by transfers from the Allies"), 83 (U.S. accepted transfer of 150,000 British-captured prisoners-of-war in World War II); cf. Article 12 of the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316 (provisions regarding transfer of prisoners of war between multiple detaining powers).

Nor is the category of enemy combatants limited to individuals observed to be personally carrying weapons at the moment of capture. The most hardened and dangerous terrorist might, by sheer happenstance, not have a firearm on his person (or might have expediently discarded or hidden it) when taken into custody. Or enemy combatants may prefer types of weapons that are not

necessarily personally issued and hand-carried.<sup>15</sup> As the September 11 attacks make clear, non-traditional weapons can be deadly on a massive scale. Furthermore, it is settled under the law of war that the Military's authority to detain individuals extends beyond traditional combatants and includes individuals such as clerks, laborers, and even "civil[ian] persons engaged in military duty or in immediate connection with an army." Winthrop, supra, at 789.<sup>16</sup>

Petitioners also have protested about their detention being temporally "indefinite," which they maintain exceeds the Executive's powers under the laws of war. It is sufficient to note, however, that circumstances have not changed materially in the little over three months since the Hamdi Plurality observed that hostilities remain ongoing, 124 S. Ct. at 2642-43, thus amply justifying continued

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<sup>15</sup> In Quirin, although the Supreme Court's opinion does not address in certain terms whether or not the seven individuals it held were properly detained as enemy combatants possessed weapons on their persons at the time of their capture, it seems likely that they did not, since the Court mentioned that upon landing at Atlantic beaches they buried their supplies (including weapons) and proceeded in civilian dress, and that their intent was to engage in acts of sabotage rather than conventional combat. 317 U.S. at 21.

<sup>16</sup> Accord Territo, 156 F.2d at 144 (noting, and not disturbing on appeal, district court's conclusion that "whether petitioner was a combatant or non-combatant member of the armed forces of the Italian army" was immaterial to legality of American military authorities' detention of Italian private who served doing manual labor in army engineers corps); Lewis & Mewha, supra, at 214-15 (discussing Allied capture and custody in France of members of German non-uniformed paramilitary construction organization); Digest of Opinions of the Judge Advocate General of the Army 392 (William Winthrop ed., 1880) (synopsizing Civil War era decision: "An engineer captured while doing duty on a steamer of the enemy, held properly detained as a prisoner of war; civil employees of the enemy serving with its army in the field being regarded as on the same footing in this respect with the soldiers of such army."); Liebmann, 1916-1 K.B. at 274-75 (upholding World War I era detention of non-combatant German national on the ground that "a German civilian in this country may be a danger in promoting unrest, suspicion, doubts of victory, in communicating intelligence, in assisting in the movements of submarines and Zeppelins – a far greater danger, indeed, than a German soldier or sailor"); cf. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4(A)(4), 6 U.S.T. 3316, 3320 (recognizing right of detaining power to seize and confine "[p]ersons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces").



detentions of enemy combatants for the time being.<sup>17</sup> The daily headlines make equally clear that the war against al Qaeda continues to rage outside of Afghanistan, with recent bombings in Indonesia and other locations and beheadings of civilians in Iraq attributed to al Qaeda or its affiliates or cobelligerents, as well as messages from al Qaeda's leadership threatening fresh strikes against the United States.<sup>18</sup>

In any event, even if hostilities against Taliban remnants and al Qaeda persist for some time into the future, that does not necessarily imply that any particular present detainee's confinement as an enemy combatant will be equally prolonged. Detainees at Guantanamo Bay are continually being released or transferred to the custody of another government (generally, their home government) based on factors such as whether the detainee is of further intelligence value to the United States, and whether the detainee is believed to pose a continuing threat to the United States or its allies. As of the date this brief is filed, more than 200 Guantanamo Bay detainees, including some who once maintained habeas petitions in this Court, have been so released or transferred.<sup>19</sup> Further releases and/or transfers are likely to occur in the future, as a result of recently established Administrative

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<sup>17</sup> See, e.g., Amir Shah, Attackers Kill Three Afghan Soldiers, Wash. Post A20 (Sept. 30, 2004) (describing skirmishes between Afghan and U.S. troops and Taliban insurgents in Zabul and Paktika provinces on September 27 and 29, 2004); Associated Press, U.S. Forces Kill 22 Afghan Insurgents, N.Y. Times (Sept. 13, 2004) (reporting on combat between U.S. troops and Taliban and al Qaeda-linked insurgents in Zabul province and Kandahar, Afghanistan on September 12, 2004).

<sup>18</sup> Dan Eggen & Dana Priest, No. 2 Al Qaeda Leader Urges Attacks Against U.S. and Allies, Wash. Post A17 (Oct. 2, 2004); Steve Fainaru, Group Says It Has Killed Another American Hostage, Wash. Post A21 (Sept. 22, 2004); James Risen, In Tape, Top Aide to bin Laden Vows New Strikes at U.S., N.Y. Times (Sept. 10, 2004); Jane Perlez, Blast in Indonesia Kills 8 Near Australian Embassy, N.Y. Times (Sept. 9, 2004).

<sup>19</sup> See DoD Press Release No. 932-04, dated Sept. 22, 2004, available at <<<http://www.defenselink.mil/releases/2004/nr20040922-1306.html>>>.

Review Procedures to assess at least annually whether each enemy combatant at Guantanamo Bay (not subject to charge or under sentence from a military commission) should be released, transferred, or continue to be detained.<sup>20</sup> Conversely, some Guantanamo detainees are being tried or will be tried by military commissions for war crimes. See generally Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, § 4 (Nov. 13, 2001). If such a detainee were adjudged guilty and sentenced to imprisonment, his future detention would be a function of the (definite) criminal sentence resulting from that legal process, consistent with both Supreme Court precedent and longstanding principles of the laws of war.<sup>21</sup>

For all these reasons, the present enemy combatant detentions at Guantanamo while hostilities remain ongoing simply cannot be reasonably criticized as "indefinite." If ever there will

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<sup>20</sup> See Memorandum dated September 14, 2004, re: Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba, available at <<<http://www.defenselink.mil/news/Sep2004/d20040914adminreview.pdf>>> ("ARB Memo"); see infra note 56. Consistent with the nature of the determination and other factors, the Administrative Review Procedures will permit each enemy combatant to explain why he believes he is no longer a threat to the United States and its allies in the ongoing armed conflict against al Qaeda and its affiliates and supporters or why his release would otherwise be appropriate. The process will also involve, where not inconsistent with national security interests, permitting a detainee's home country and relatives to submit information to the Review Board. See ARB Memo Encl. (3) ¶¶ 3.d, 3.e.2, 3.f(1)(a), Encl. (4) ¶¶ 1.d, 1.g, 1.m, 2.c.

<sup>21</sup> See Madsen v. Kinsella, 343 U.S. 341, 360 (1952) ("The authority for such [military] commissions does not necessarily expire upon cessation of hostilities or even, for all purposes, with a treaty of peace."); Application of Matsushita, 327 U.S. 1, 12 (1946) ("[I]n most instances the practical administration of the system of military justice under the law of war would fail if such authority [for trial by military commission] were thought to end with the cessation of hostilities."); Eisentrager, 339 U.S. at 786 ("The jurisdiction of military authorities, during or following hostilities, to punish those guilty of offenses against the laws of war is long-established." (emphasis added)); cf. Article 119 of the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316 ("Prisoners of war against whom criminal proceedings for an indictable offence are pending may be detained until the end of such proceedings, and, if necessary, until the completion of the punishment. The same shall apply to prisoners of war already convicted for an indictable offence.").

be an occasion when the temporal bounds of enemy combatant detention are an appropriate subject of judicial resolution,<sup>22</sup> now is not that time and this is not that case.

## II. PETITIONERS' CONSTITUTIONAL CLAIMS SHOULD BE DISMISSED

### A. Because Petitioners Are Aliens Held Outside the Sovereign Territory of the United States, They Have No Basis to Challenge the Constitutionality of Their Detentions

Petitioners' challenges to their detention based on the Constitution fail as a matter of law. None of the petitioners is a United States citizen. Each was detained in foreign territory and is being held at Guantanamo Bay, Cuba. As aliens detained by the Military outside the sovereign territory of the United States, see Rasul, 124 S. Ct. at 2691-93, and lacking a sufficient connection to this country, petitioners have no cognizable constitutional rights.

"It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of 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 obtains 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

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<sup>22</sup> As with the other substantive challenges raised in the petitions, determining the timing of the cessation of hostilities, defined by one scholar as "a cessation of hostilities as the result of surrender or of such circumstances or conditions of an armistice as to render it out of the question for the defeated party to resume hostilities," Levie, supra, at 427-28 (internal quotation omitted), is so "delicate, complex, and involve large elements of prophecy," Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948), that it is nonjusticiable. See Ludecke v. Watkins, 335 U.S. 160, 169 (1948) ("Whether and when it would be open to this Court to find that a war though merely formally kept alive had in fact ended, is a question too fraught with gravity even to be adequately formulated when not compelled."); United States v. The Three Friends, 166 U.S. 1, 63 (1897) ("[I]t belongs to the political department to determine when belligerency shall be recognized, and its action must be accepted according to the terms and intention expressed.").

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. Department of State, 292 F.3d 797, 799 (D.C. Cir. 2002) (quoting People's Mojahedin Org. of Iran v. Department of State, 182 F.3d 17, 22 (D.C. Cir. 1999)) (emphasis added).<sup>23</sup>

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 of 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

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<sup>23</sup> 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, 233 F.3d 596, 603 (D.C. Cir. 2000) (rejecting extraterritorial application of Fifth Amendment), rev'd in part on other grounds sub nom. Christopher v. Harbury, 536 U.S. 403 (2002); 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.").

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." Verdugo-Urquidez, 494 U.S. at 269 (emphasis added); see also id. (Eisentrager's "rejection of extraterritorial application of the Fifth Amendment was emphatic").

The distinction for constitutional purposes between sovereignty on the one hand and control or jurisdiction on the other is not meaningless semantics. Rather, it flows directly from the historical origin of the Constitution as a compact between the people of the country and the government.<sup>24</sup> Because overseas aliens are not a part of the contract that created the United States, they are not beneficiaries of its protections. See United States v. Verdugo-Urquidez, 856 F.2d 1214, 1233 (9th Cir. 1988) ("No one can seriously doubt that the compact applies only to the people who empowered

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<sup>24</sup> See Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 471 (1793) (Jay, C.J.) ("[T]he Constitution of the United States is . . . a compact made by the people of the United States to govern themselves."); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (Marshall, C.J.) ("The government of the Union . . . is, emphatically and truly, a government of the people. In form, and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."); League v. De Young, 52 U.S. (11 How.) 185, 203 (1850) ("The Constitution of the United States was made by, and for the protection of, the people of the United States.").

the government of the United States for the benefit of themselves and their posterity, not to other peoples of the world who neither ceded authority to it in exchange for certain guarantees of liberty nor otherwise consented to its rule.") (opinion of Judge Wallace, dissenting from the majority opinion that was subsequently overruled by the Supreme Court at 494 U.S. 259 (1990)); Paul B. Stephan, III, Constitutional Limits on International Rendition of Criminal Suspects, 20 Va. J. Int'l L. 777, 782 (1980) (noting "the long held understanding that, in general, foreign nationals abroad are neither parties to nor beneficiaries of the agreement between the federal government and its people embodied in the Constitution."). Thus, as the Supreme Court has stated plainly, "[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens." United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936).<sup>25</sup>

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

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<sup>25</sup> Although aliens are not parties to the social contract of the Constitution while they are on foreign shores, their constitutional status can improve if they voluntarily enter and are received into the borders of this country, because then they begin to join the people of the United States and assume correlative obligations. See Eisler v. United States, 170 F.2d 273, 279 (D.C. Cir. 1948) ("Once an alien lawfully enters and resides in this country he becomes invested with the rights, except those incidental to citizenship, guaranteed by the Constitution to all people within our borders. Correlatively, an alien resident owes a temporary allegiance to the Government of the United States, and he assumes duties and obligations which do not differ materially from those of native-born or naturalized citizens . . .") (citation omitted). The aliens in the cases at bar, who were apprehended on foreign soil and brought to a naval base in Cuba, have none of these lawful connections to the United States, no duties of allegiance, and, therefore, no reciprocal constitutional protections.

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 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).<sup>26</sup>

Given the absence of U.S. sovereignty over Guantanamo Bay and petitioners' status as aliens, it is plain that petitioners lack cognizable constitutional rights with respect to their detentions. 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 Am. 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. See also Haitian Refugee Center,

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<sup>26</sup> In its Memorandum Opinion originally dismissing the petition in the Rasul case, this Court (Judge Kollar-Kotelly) previously 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), aff'd, Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003), reversed and remanded on other grounds, Rasul v. Bush, 124 S. Ct. 2686 (2004). This conclusion was not disputed by the D.C. Circuit or the Supreme Court.

Inc. v. Baker, 953 F.2d 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." ).<sup>27</sup>

Even if this Court were to disagree with the Eleventh Circuit and conclude that Guantanamo

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<sup>27</sup> Petitioners may attempt to rely on the vacated decision in Haitian Centers Council, Inc. v. McNary, 969 F.2d 1326 (2d Cir. 1992), vacated as moot, Sale v. Haitian Centers Council, Inc., 509 U.S. 918 (1993), which involved claims by migrants interdicted by the Coast Guard and housed at Guantanamo Bay. The Second Circuit in that case indicated that there were "serious questions going to the merits of appellees' claim that the fifth amendment applies to non-accused, non-hostile aliens held incommunicado on a military base within the exclusive control of the United States." Id. at 1343 (emphasis omitted). The court "note[d] that, in the present case, applying the fifth amendment would not appear to be either 'impracticable' or 'anomalous' since the United States has exclusive control over Guantanamo Bay, and given the undisputed applicability of the federal criminal laws to incidents that occur there and the apparent familiarity of the governmental personnel at the base with the guarantees of due process, fundamental fairness and humane treatment that this country purports to afford to all persons." Id.; see also Gherebi v. Bush, 374 F.3d 727, 737 n.14 (9th Cir. 2004). The court concluded that, "based upon the unique facts and circumstances of this case," there were "serious questions" as to whether, once the migrants had been "screened in" – i.e., found by the government to possess a credible fear of returning to their country of origin that would allow them to pursue a claim for asylum in the United States – they could "avail themselves of the due process clause of the fifth amendment." McNary, 969 F.2d at 1345-46.

Any reliance by petitioners on McNary would be misplaced. To begin with, the petitioners here are not "non-accused, non-hostile aliens" seeking asylum in the United States, see id. at 1343; they are enemy combatants detained for national security reasons during a time of ongoing military conflict. The "unique facts and circumstances" of McNary are thus far removed from the equally unique facts and circumstances here. In addition, more broadly, the suggestion in McNary that the Fifth Amendment may have application to aliens outside the sovereign territory of the United States is simply wrong. As discussed above, Eisentrager and its progeny make clear that the touchstone for the application of the Constitution to aliens is sovereignty, not control. Whether or not Congress may have extended criminal law to Guantanamo Bay by statute is irrelevant to the question of whether the Constitution extends to aliens there. Finally, the specific holding in McNary – that there are serious questions as to whether "screened in" aliens may assert particular due process interests – has no bearing here. Under the Second Circuit's analysis, once the aliens in McNary had been deemed to have a credible fear of persecution that would allow them to pursue a claim of asylum in the United States, they had a "reasonable expectation . . . in not being wrongly repatriated" that was protected by due process. See id. at 1345. Petitioners here do not seek refuge in the United States and have no reasonable expectation of imminent release; they are enemy combatants who may be detained until the ongoing military conflict ends.



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, 494 U.S. 259 (1990), would still bar the assertion of constitutional rights by petitioners. 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." Id. at 271 (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 of the sort to indicate any substantial connection with our country." Verdugo-Urquidez, 494 U.S. at 271.<sup>28</sup> Respondent in that case, "an alien who ha[d] had no previous significant voluntary connection with the United States" and was being held in the United States against his will, was not entitled to the protection of the Fourth Amendment. Id. Even more clearly here, petitioners – who do not allege to have any "significant voluntary connection with the United States" and whose detentions in Guantanamo Bay by the Military are instead "involuntary" – do not have a sufficient connection with the United States to give rise to constitutional protection.<sup>29</sup>

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<sup>28</sup> The need for an alien to have a voluntary connection to the United States in order to receive constitutional protections is consistent with the notion of the Constitution as a social contract. See supra note 25.

<sup>29</sup> 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 (continued...)

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 petitioners, 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 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 the 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

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<sup>29</sup>(...continued)

(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. Department 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, the fact that petitioners lack any "voluntary connection with the United States" (and are not subject to criminal trial in the U.S.) makes constitutional protection unavailable. See Verdugo-Urquidez, 494 U.S. at 271.

aliens in U.S. custody overseas do not have constitutional rights that can be enforced in a proceeding seeking a writ of habeas corpus. See Eisentrager, 339 U.S. at 778.<sup>30</sup>

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:

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<sup>30</sup> In Rasul, the Court also noted that certain aspects of Eisentrager had been overruled by Braden v. 30th Jud. Cir. Ct. of Ky., 410 U.S. 484 (1973). But the Rasul Court made clear that Braden's impact on Eisentrager was limited merely 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. That "statutory predicate" was that the "presence" of the habeas petitioner within the "jurisdiction" of the habeas court constituted a statutory prerequisite to habeas jurisdiction. 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 (1948) (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 Eisentrager'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 prisoner's ability to seek statutory habeas relief in Kentucky.

Such a construction would mean that during military occupation irreconcilable enemy elements, guerrilla fighters, and 'were-wolves'<sup>31</sup> 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.

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 784-85 (internal citation omitted).

In particular, despite petitioners' arguments to the contrary, footnote 15 of Rasul ("Petitioners' allegations . . . unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States'. 28 U.S.C. § 2241(c)(3).") does not sub silentio overrule Eisentrager and other repeated holdings of the Supreme Court 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.

As an initial matter, the mere notation in the footnote that the allegations described "'custody in violation of the Constitution or laws or treaties of the United States'" (emphasis added) says nothing about the Constitution in particular, as opposed to "laws" or "treaties," and does not resolve the fundamental antecedent question of whether petitioners are entitled to the protection of any or all of the listed items. In any event, footnote 15 must be read in the crucial context of the paragraph

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<sup>31</sup> "Were-wolves" were special covert forces that the Nazis began training shortly before Germany's surrender to conduct terrorist activities during the impending Allied occupation. Al Odah v. United States, 321 F.3d 1134, 1140 (D.C. Cir. 2003) (citing <<[http://www.archives.gov/iwg/declassified\\_records/oss\\_records\\_263\\_wilhelm\\_hoettl.html](http://www.archives.gov/iwg/declassified_records/oss_records_263_wilhelm_hoettl.html)>>), reversed and remanded on other grounds sub nom. Rasul v. Bush, 124 S. Ct. 2686 (2004).

in which it is embedded, a paragraph bookended by sentences clearly and unmistakably limiting its scope to jurisdiction. The first sentence of that paragraph says, "In the end, the answer to the question presented is clear." 124 S. Ct. at 2698 (emphasis added). The "question presented" is that which framed the four corners of the Supreme Court's review, i.e., "Whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba."<sup>32</sup> Likewise, the paragraph concludes, "We therefore hold that § 2241 confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges . . . .," 124 S. Ct. at 2698, strongly militating against construing any language in the body of the paragraph to transcend statutory jurisdiction and prejudge the case's ultimate merits on remand.

If there were any doubt that the Court's ruling confined itself to the jurisdictional question, that doubt ought to be put to rest by the second-to-last sentence of the opinion: "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."<sup>33</sup> 124 S. Ct. at 2699 (emphasis added). Indeed, the Court remanded Rasul to this

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<sup>32</sup> This language appears verbatim both in the Court's original grant of certiorari, 124 S. Ct. 534 (2003), and in the first sentence of the majority opinion, 124 S. Ct. at 2690. Indeed, the original grant of certiorari is notable because the Court limited its grant to that question presented, rejecting other questions presented proposed by the Rasul petitioners. The narrowness of what was before the Court in Rasul was again reinforced 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 Arg. Tr., 2004 WL 943637, at 12-13.

<sup>33</sup> Supreme Court precedent specifically counsels against conflating jurisdiction and the merits. In Feres v. United States, 340 U.S. 135 (1950), the Supreme Court held that a servicemember cannot sue the United States under the Federal Tort Claims Act for negligent torts incident to military service. Considering the statutory jurisdictional issue at the outset, the Court  
(continued...)

Court "to consider in the first instance the merits of petitioners' claims." Id. at 2698 (emphasis added). Thus, any argument by petitioners that the Supreme Court reached a decision on the merits of the constitutional claims raised in Rasul must be rejected.

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. Petitioners' various claims under the Constitution should be rejected.

**B. Assuming Arguendo That Petitioners Possess Cognizable Constitutional Rights, Those Rights Are Not Violated by the Detention in Question**

As shown above, petitioners – enemy combatant aliens detained by the Military outside the United States and without a sufficient connection to the United States – lack any cognizable constitutional rights. Assuming, arguendo, that the Constitution applies to petitioners, however, the constitutional claims asserted in the petitions do not provide a basis for relief.

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<sup>33</sup>(...continued)  
stated:

Looking to the detail of the Act, it is true that it provides, broadly, that the District Court 'shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages \* \* \*.' This confers jurisdiction to render judgment upon all such claims. But it does not say that all claims must be allowed. Jurisdiction is necessary to deny a claim on its merits as matter of law as much as to adjudge that liability exists. We interpret this language to mean all it says, but no more. Jurisdiction of the defendant now exists where the defendant was immune from suit before; it remains for courts, in exercise of their jurisdiction, to determine whether any claim is recognizable in law.

Id. at 140-41 (footnote omitted). Illustratively, the Supreme Court went on to affirm, in two of the three cases consolidated in Feres, dismissals by the lower courts for failure to state a claim upon which relief may be granted. Feres thus puts the lie to any contention that, simply because petitioners' allegations have been determined to meet the jurisdictional prerequisites as defined in the relevant statute, those allegations necessarily must state meritorious claims.

## 1. The Combatant Status Review Tribunals Satisfy the Due Process Clause of the Fifth Amendment

As discussed above in the Background section, each and every one of the petitioners is having his status as an enemy combatant reviewed in a Combatant Status Review Tribunal ("CSRT"). As a result, even assuming the applicability of the Fifth Amendment's Due Process Clause to petitioners' circumstances, the detentions pass muster because the CSRTs provide each petitioner with process that is more than constitutionally adequate.

The Fifth Amendment provides that the Government may not "depriv[e]" any "person . . . of . . . liberty . . . without due process of law." U.S. Const., amend. V. However, it has long been clear that constitutional due process does not require a proceeding with the entire panoply of features associated with conventional judicial-type hearings. At least since Mathews v. Eldridge, 424 U.S. 319 (1976), it has been recognized that "[t]he judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances." Id. at 348. Rather, "[t]he essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.'" Id. (quoting Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring)) (alteration in original); see also Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ("due process is flexible and calls for such procedural protections as the particular situation demands"); Jifry v. FAA, 370 F.3d 1174, 1183 (D.C. Cir. 2004) (where national security considerations at stake, due process held satisfied where subject of decision had opportunity to file a written reply, and entire administrative record was independently reviewed by a higher authority within the agency).

Indeed, in Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004), discussing the due process

entitlements of a United States citizen designated as an enemy combatant, a plurality of the Supreme Court held that the Due Process Clause requires nothing more than "notice of the factual basis for [the citizen-detainee's] classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." Id. at 2648. The Plurality went on to emphasize that, in light of the core separation-of-powers concerns and military exigencies at stake, the Due Process Clause would not be offended by tailoring such proceedings to include aspects – such as permitting hearsay from the Government, establishing a presumption in favor of the Government, and limiting factual disputes to the alleged combatant's acts – that are not characteristic of traditional judicial proceedings. Id. at 2648, 2649. The Plurality also observed that "[t]here remains the possibility that the [due process] standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal," and proffered as a benchmark for comparison the tribunals, generally known as Article 5 Tribunals, that determine the status of enemy detainees who assert prisoner-of-war status under the Geneva Conventions. Id. at 2651 (citing Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Regulation 190-8, § 1-6 (1997)).

At the outset, one powerful indication that the CSRTs satisfy constitutional due process is that they are modeled directly on the very Article 5 Tribunals cited approvingly by the Hamdi Plurality. It would be anomalous for the Hamdi Plurality to have cited the Article 5 Tribunals as an exemplar of an "an appropriately authorized and properly constituted military tribunal" that could provide "such process" meeting "the standards we have articulated" if there were any serious constitutional problem with them. Hamdi, 124 S. Ct. at 2651. And it necessarily follows that procedures for the CSRTs, which as discussed below are patterned after the Article 5 Tribunals and in fact exceed them in the degree of process given, do not fall constitutionally short of what is



required. The CSRTs and the Article 5 Tribunals have the following features, among others, in common:

- Tribunals are composed of three commissioned officers plus a non-voting officer to serve as recorder;<sup>34</sup>
- Tribunal members are sworn to faithfully and impartially execute their duties;<sup>35</sup>
- The detainee has the right to attend the open portions of the proceedings;<sup>36</sup>
- An interpreter is provided to the detainee if necessary;<sup>37</sup>
- The detainee has the right to (a) call witnesses if reasonably available, (b) question witnesses called by the tribunal, and (c) testify or otherwise address the tribunal;<sup>38</sup>
- The detainee may not be forced to testify;<sup>39</sup>

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<sup>34</sup> Compare CSRT Order ¶ e; CSRT Implementation Memorandum Encl. (1) ¶ C, with Army Reg. 190-8, § 1-6(c). The "CSRT Order" as cited herein is the July 7, 2004 Order Establishing Combatant Status Review Tribunal, submitted herewith as Ex. A, and also available online at <<<http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>>>. The "CSRT Implementation Memorandum" as cited herein is the Memorandum dated July 29, 2004 regarding Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba, submitted herewith as Ex. B, and also available online at <<<http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>>>. The pertinent portions of Army Reg. 190-8 cited herein are submitted herewith as Ex. C, and the full Regulation is available online at <<[http://www.army.mil/usapa/epubs/pdf/r190\\_8.pdf](http://www.army.mil/usapa/epubs/pdf/r190_8.pdf)>>.

<sup>35</sup> Compare CSRT Order ¶ g(2); CSRT Implementation Memorandum Encl. (1) ¶ H(1), with Army Reg. 190-8, § 1-6(e)(1). See also CSRT Implementation Memorandum Encl. (8), p. 2 (language of oath).

<sup>36</sup> Compare CSRT Order ¶ g(4); CSRT Implementation Memorandum Encl. (1) ¶ F(3), with Army Reg. 190-8, § 1-6(e)(5).

<sup>37</sup> Compare CSRT Order ¶ g(5); CSRT Implementation Memorandum Encl. (1) ¶ F(5), with Army Reg. 190-8, § 1-6(e)(5).

<sup>38</sup> Compare CSRT Order ¶¶ g(8), g(10); CSRT Implementation Memorandum Encl. (1) ¶¶ F(6), F(7), with Army Reg. 190-8, § 1-6(e)(6), (e)(7).

<sup>39</sup> Compare CSRT Order ¶ g(11); CSRT Implementation Memorandum Encl. (1) ¶¶ F(4),  
(continued...)

- The tribunals make decisions by majority vote;<sup>40</sup>
- The decision is made based on a preponderance of the evidence;<sup>41</sup>
- The tribunals create a written report of their decision;<sup>42</sup> and
- The tribunal record is reviewed by the Staff Judge Advocate for legal sufficiency.<sup>43</sup>

In fact, in a number of respects, the CSRTs provide more process, and additional protections, compared to the Article 5 Tribunals. For instance, the CSRTs contain express qualifications to ensure the independence and lack of prejudgment of the tribunal. See CSRT Order ¶ e (tribunal members are not to have been "involved in the apprehension, detention, interrogation, or previous determination of status of the detainee"). There is no comparable language in the regulations for the Article 5 Tribunals. The CSRTs, unlike the Article 5 Tribunals, give the detainee a personal representative to assist him in preparing his case. See CSRT Order ¶ c; Implementation Memorandum Encl. (1) ¶ C(3), Encl. (3). In the CSRTs, but not in the Article 5 Tribunals, the Recorder is obligated to search government files for, and provide to the Tribunal, any "evidence to suggest that the detainee should not be designated as an enemy combatant." See Implementation

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<sup>39</sup>(...continued)  
F(7), with Army Reg. 190-8, § 1-6(e)(8).

<sup>40</sup> Compare CSRT Order ¶ g(12); CSRT Implementation Memorandum Encl. (1) ¶ G(12), with Army Reg. 190-8, § 1-6(e)(9).

<sup>41</sup> Compare CSRT Order ¶ g(12); CSRT Implementation Memorandum Encl. (1) ¶ G(11), with Army Reg. 190-8, § 1-6(e)(9).

<sup>42</sup> Compare CSRT Implementation Memorandum Encl. (1) ¶ H(9), with Army Reg. 190-8, § 1-6(e)(10).

<sup>43</sup> Compare CSRT Order ¶ h; CSRT Implementation Memorandum Encl. (1) ¶¶ C(4), I(7), with Army Reg. 190-8, § 1-6(g).

Memorandum Encl. (2), ¶ B(1). In the CSRTs, unlike in the Article 5 Tribunals, the detainee is provided with an unclassified summary of the evidence supporting his classification in advance of the hearing. See CSRT Order ¶ g(1); Implementation Memorandum Encl. (1) ¶¶ F(8), H(5). The CSRTs allow the detainee to introduce relevant documentary evidence, whereas the Article 5 Tribunals contain no analogous provision. See CSRT Order ¶ g(10); Implementation Memorandum Encl. (1) ¶ F(6). Finally, the result of every CSRT is automatically reviewed by a higher authority, who is empowered to return the record to the tribunal for further proceedings if appropriate; there is no counterpart provision in the Article 5 Tribunals. See CSRT Order ¶ h; Implementation Memorandum Encl. (1) ¶ I(8).<sup>44</sup>

Aside from their resemblance to the Article 5 Tribunals that received the Hamdi Plurality's imprimatur, the CSRTs clearly pass muster under the traditional test for analyzing due process issues. The Hamdi Plurality held that what process is due to U.S. citizens detained as enemy combatants is governed by the test articulated in Mathews v. Eldridge, 424 U.S. 319 (1976). Hamdi, 124 S. Ct. at 2646. "Mathews dictates that the process due in any given instance is determined by weighing 'the private interest that will be affected by the official action' against the Government's asserted interest, 'including the function involved' and the burdens the Government would face in providing greater process." Id. (quoting Mathews, 424 U.S. at 335). The Hamdi Plurality discussed these competing interests, acknowledging "the weighty and sensitive governmental interests in

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<sup>44</sup> The CSRT procedures differ from the Article 5 Tribunals in the respect that in the former there exists a rebuttable presumption in favor of the genuineness and accuracy of the Government's evidence. However, the Hamdi Plurality clearly stated that "the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided." Hamdi, 124 S. Ct. at 2649. In the CSRTs, the presumption by its very terms is rebuttable, and, as discussed below, the detainee clearly has a fair opportunity to present evidence to the Tribunal in an attempt to rebut the evidence.

ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States," id. at 2647, as well as the need to "tailor[] [enemy combatant proceedings] to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict," id. at 2658. Beyond the handful of specific suggestions discussed supra,<sup>45</sup> however, the Court generally left for the lower courts the delineation of exactly what procedures suffice as due process in these circumstances.

Particularly given the grave national security interests on the other side of the ledger,<sup>46</sup> the CSRT proceedings more than satisfy the Due Process Clause's simple and unadorned requirement, if applicable, that the enemy combatant detainee receive "notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." Hamdi, 124 S. Ct. at 2648. At the outset, "the Recorder shall provide the detainee in advance of the proceedings with notice of the unclassified factual basis for the detainees' designation as an enemy combatant." CSRT Order ¶ g(1). To the extent that petitioners may claim the notice falls short of what is constitutionally required because they only receive unclassified information, Circuit precedent clearly forecloses any argument that petitioners are entitled to receive classified information as part of the notice contemplated by the Due Process Clause. See Jifry v.

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<sup>45</sup> See Hamdi, 124 S. Ct. at 2648, 2649 (approving use of hearsay, presumption that classification was proper, and limiting factual disputes to the alleged combatant's acts).

<sup>46</sup> Setting forth a precursor to the Mathews v. Eldridge balancing test that became the foundation for the Court's modern due process jurisprudence, Justice Frankfurter called the Government's interest in national security "the greatest of all public interests." Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 164 (1951) (Frankfurter, J., concurring). The Justice also stressed that, in the context of national security, core separation of powers concerns dictate that the weighing of interests be conducted "with due regard to the fact that this Court is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government." Id.

FAA, 370 F.3d 1174, 1184 (D.C. Cir. 2004); People's Mojahedin Org. v. Dep't of State, 327 F.3d 1238, 1242 (D.C. Cir. 2003) (citing Nat'l Council of Resistance of Iran v. Dep't of State, 251 F.3d 192, 207-09 (D.C. Cir. 2001)). Indeed, it would approach absurdity to suggest that the Military is constitutionally obligated to disregard laws governing the handling of national security information, and release to presumed enemy combatants at war with the United States information the disclosure of which would harm national security.<sup>47</sup>

Likewise, the CSRT proceedings afford an enemy combatant detainee with "a fair opportunity to rebut the Government's factual assertions." Hamdi, 124 S. Ct. at 2648. The Recorder of the Tribunal is obligated to gather all "such reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant," CSRT Implementation Memorandum Encl. (1), ¶ E(3), including "evidence to suggest that the detainee should not be designated as an enemy combatant," id. Encl. (2), ¶ B(1) (emphasis added). The personal representative is given access to this universe of evidence for use in assisting the detainee to develop his case. Id. Encl. (3), ¶¶ B(1), C(2), C(4). The detainee is permitted to attend the open portions of the proceedings. CSRT Order ¶ g(4); CSRT Implementation Memorandum Encl. (1) ¶ F(3). The detainee is permitted to call witnesses if reasonably available; to submit alternative forms of testimony, including affidavits or other memorializations of witness testimony (obtained with the assistance of CSRT staff); and to question those witnesses called by

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<sup>47</sup> Moreover, not being able personally to see classified information will not prejudice a detainee in having his case presented to the Tribunal, because the detainee's personal representative, who by qualification must have a security clearance, has access to such information, and "may, outside the presence of the detainee, comment upon classified information submitted by the Recorder that bears upon the presentation made on the detainee's behalf, if it would aid the Tribunal's deliberations." CSRT Implementation Memorandum Encl. (2), ¶ C(4), Encl. (3), ¶¶ A(2), C(5).

the Tribunal. CSRT Order ¶ g(8); CSRT Implementation Memorandum Encl. (1) ¶¶ F(6), H(7), H(9). The detainee may testify or otherwise address the Tribunal in oral or written form (although he cannot be compelled to testify), and may introduce relevant documentary evidence. CSRT Order ¶ g(10); CSRT Implementation Memorandum Encl. (1) ¶¶ F(7). Moreover, as noted above, the detainee has a personal representative and, if necessary, an interpreter. CSRT Order ¶¶ c, g(5); CSRT Implementation Memorandum Encl. (1) ¶¶ C(3), F(5), Encl. (3). These procedures more than suffice to "meet the goal of ensuring that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error while giving due regard to the Executive once it has put forth meaningful support for its conclusion that the detainee is in fact an enemy combatant." Hamdi, 124 S. Ct. at 2649. In the circumstances of this case, due process requires nothing more.<sup>48</sup>

Finally, the opportunity for rebuttal is "before a neutral decisionmaker." The CSRT Order

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<sup>48</sup> The limitation that only "reasonably available" witnesses may be called by the detainee does not cause the CSRTs to fall short of providing due process. It is long settled that the Due Process Clause does not contain a right to compel the attendance of witnesses. Low Wah Suey v. Backus, 225 U.S. 460, 470-71 (1912); Hyser v. Reed, 318 F.2d 225, 239-40 (D.C. Cir. 1963). In particular, it cannot seriously be argued that due process would require empowering a presumed enemy combatant to call U.S. military personnel to appear physically at a hearing when doing so "would adversely affect combat or support operations" (the standard for when U.S. military witnesses are deemed not "reasonably available"). CSRT Implementation Memorandum Encl. (1) ¶ G(9); see also Johnson v. Eisentrager, 339 U.S. 763, 779 (1950) ("It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home."). Indeed, it is in light of such military exigencies that the Hamdi Plurality opinion explicitly stated that proceedings to determine status could rely on written or other hearsay evidence in lieu of live testimony. Hamdi, 124 S. Ct. at 2649, 2652. The Due Process Clause does not inherently favor live testimony over other forms of information-gathering. See Mathews, 424 U.S. at 343-44; cf. Wolff v. McDonnell, 418 U.S. 539, 566 (1974) (holding that inmate facing possible revocation of good-time credits was not entitled under the Due Process Clause to "the unqualified right to call witnesses," because such an "unrestricted right to call witnesses . . . carries obvious potential for disruption" and prison officials "must have the necessary discretion without being subject to unduly crippling impediments").

provides that "[a] Tribunal shall be composed of three neutral commissioned officers of the U.S. Armed Forces, each of whom possesses the appropriate security clearance and none of whom was involved in the apprehension, detention, interrogation, or previous determination of status of the detainee." CSRT Order ¶ e (emphasis added). Under the Supreme Court's due process jurisprudence, the mere fact that the members of the Tribunal are drawn from the vast United States Military is not a valid basis for questioning their impartiality. See Wolff v. McDonnell, 418 U.S. 539, 570-71 (1974) (holding that it did not violate due process for prison adjustment committee charged with determining whether to revoke good-time credits to be composed of three prison officials).<sup>49</sup> Moreover, any such argument would prove too much, because, as noted above, the Supreme Court plurality in Hamdi invoked as a potential model of due process in these circumstances the Article 5 Tribunals, which, of course, have the same composition of three uniformed officers (and do not even have the limitations, embodied in the CSRT procedures, that they be "neutral" and that they not have been "involved in the apprehension, detention, interrogation,

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<sup>49</sup> It is common, and clearly does not offend due process, for decisionmaking bodies in adjudicatory regimes within government agencies to be composed of in-house officials of the agency. Indeed, 5 U.S.C. § 554(d) ("An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review"), presupposes such situations. The Supreme Court has sustained over due process objections even systems in which the decisionmaker had participated in developing the facts himself. See Withrow v. Larkin, 421 U.S. 35, 49 (1975) ("[W]e have sustained against due process objection a system in which a Social Security examiner has responsibility for developing the facts and making a decision as to disability claims, and observed that the challenge to this combination of functions 'assumes too much and would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity.'" (citing and quoting Richardson v. Perales, 402 U.S. 389, 410 (1971))). It necessarily follows that there is no due process violation where, as in the case of the CSRTs, the procedures are crafted to screen out from participation any person who has been "involved in the apprehension, detention, interrogation, or previous determination of status of the detainee." CSRT Order ¶ e.

or previous determination of status of the detainee").

The CSRTs have drawn objections that the process does not include representation by counsel or access to retained counsel. But no valid constitutional basis exists for such an objection.<sup>50</sup> In Wolff v. McDonnell, the Court held that the Due Process Clause of the Fifth Amendment did not require that prisoners be permitted to retain counsel in informal proceedings to revoke good-time credits. 418 U.S. at 569-70; accord Burgener v. Cal. Adult Auth., 407 F. Supp. 555, 559 (N.D. Cal. 1976) (holding that prisoners were not entitled under the Due Process Clause to be represented by counsel at term-fixing hearings). The Wolff Court reasoned that "[t]he insertion of counsel into the disciplinary process would inevitably give the proceedings a more adversary cast and tend to reduce their utility as a means to further correctional goals." 418 U.S. at 570; see also Gagnon v. Scarpelli, 411 U.S. 778, 787 (1973) (fact that "lawyers, by training and disposition, are advocates and bound by professional duty to present all available evidence and arguments in support of their clients' positions and to contest with vigor all adverse evidence and views" counseled against according categorical right to counsel in informal parole and probation revocation proceedings because it would lend those proceedings an undesired adversarial bent and cause them to become more prolonged and costly).<sup>51</sup> Those concerns are magnified exponentially here, where the context is not

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<sup>50</sup> In this section we focus on the Due Process Clause, but, as discussed infra, no other constitutional provision provides a basis for a right to counsel either. See infra § II.B.3 (discussing Sixth Amendment and Self-Incrimination Clause of the Fifth Amendment).

<sup>51</sup> The Wolff Court suggested that inmates who were illiterate or otherwise unable to marshal the appropriate facts in a complex case should be permitted to "seek the aid of a fellow inmate, or if that is forbidden, to have adequate substitute aid in the form of help from the staff or from a sufficiently competent inmate designated by the staff." Wolff, 418 U.S. at 570. In the CSRTs, a personal representative, who is a senior commissioned officer of the U.S. Armed Forces in the rank or grade of O-4 or above, is provided universally to all detainees – not just those with some mental  
(continued...)



the administration of domestic prisons but the Executive's carrying out the incidents of its warmaking function. The CSRTs are not trials to adjudicate detainees' guilt or innocence, but a fact-gathering exercise where the goal is to determine a detainee's classification, based on as much relevant data and information as can be assembled. Involving counsel could frustrate this goal by polarizing the atmosphere, dragging out proceedings, and impeding the tribunal's objective appraisal of the facts. Wolff, 418 U.S. at 570; Gagnon, 411 U.S. at 787; see also Henry J. Friendly, "Some Kind of Hearing", 123 U. Pa. L. Rev. 1267, 1288 (1975) ("Under our adversary system the role of counsel is not to make sure the truth is ascertained but to advance his client's cause by any ethical means. Within the limits of professional propriety, causing delay and sowing confusion not only are his right but may be his duty.").

Weighed against these "burdens that the additional or substitute procedural requirement would entail," "the probable value, if any," of counsel participation in CSRTs is slight. Mathews, 424 U.S. at 335, cited in Hamdi, 124 S. Ct. at 2646. The CSRTs' focus is limited: whether the detainee "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." CSRT Order ¶ (a) (definition of enemy combatant); see also Hamdi, 124 S. Ct. at 2649 (suggesting that "factual disputes at enemy-combatant hearings [could be] limited to the alleged combatant's acts"). There is no reason to suspect that a detainee needs a lawyer's assistance to bring out the plain facts in his possession that bear on that question. Moreover, the absence of lawyers in this process is mitigated by the presence of personal representatives, an enhancement that goes well beyond the Article 5 Tribunals cited

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<sup>51</sup>(...continued)  
limitation or faced with a particularly complicated case – to assist them through all aspects of the process.

approvingly by the Hamdi Plurality. The personal representative fulfills many of the functions that counsel, if present, might provide: "explain[ing] the nature of the CSRT process to the detainee, explain[ing] his opportunity to present evidence and assist[ing] the detainee in collecting relevant and reasonably available information and in preparing and presenting information to the Tribunal."<sup>52</sup> CSRT Implementation Memorandum Encl. (3), ¶ B(1).

In short, the traditional adversarial model of justice, with full representation by counsel, is not required in every context. The Due Process Clause is flexible enough to recognize as much. See Mathews, 424 U.S. at 348 ("The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances."); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162-63 (1951) (Frankfurter, J., concurring) ("'[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. . . . It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process."). And what is at stake here is a classification decision during wartime, rather than a determination of a detainee's guilt or innocence. Assuming petitioners have rights under the Due Process Clause in the first place, the CSRTs have plainly given them all the process to which they are entitled.<sup>53</sup>

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<sup>52</sup> Petitioners have complained that the personal representative does not owe an ethical obligation to the detainee and that no attorney-client privilege attaches to communications with a detainee. The situation is fully disclosed to the detainee, however; to guard against any misunderstanding of the relationship, the CSRT procedures provide that "[u]pon first contact with the detainee, the Personal Representative shall explain to the detainee that no confidential relationship exists or may be formed between the detainee and the Personal Representative." CSRT Implementation Memorandum Encl. (3) ¶ C(1).

<sup>53</sup> It follows then that petitioners are entitled to no additional process for purposes of evidentiary development in this Court. See Hamdi, 124 S. Ct. at 2651 ("In the absence of such (continued...)

## 2. Any Judicial Review of the Results of the Combatant Status Review Tribunals Must Be Extraordinarily Deferential

If petitioners can claim protection under the Constitution at all (respondents, again, submit that they cannot), the fact that petitioners will have received via the CSRTs all the process to which they are entitled on the question of their combatant status counsels an extraordinarily circumscribed role for this Court in examining the outcome of that process. The nature of any such examination is constrained by profound separation of powers concerns, alluded to earlier, that would be implicated were the Judiciary to second-guess the factual bases for the Commander in Chief's exercise of his authority to determine the combatant status of detainees.

Indeed, "courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." Dep't of the Navy v. Egan, 484 U.S. 518, 530 (1988); see Hamdi, 124 S. Ct. at 2647 ("Without doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them"); Franklin v. Massachusetts, 505 U.S. at 818 (stating that the principle of judicial deference "pervades the area of national security"); Haig v. Agee, 453 U.S. 280, 292 (1981) (recognizing that "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention"). The Executive's determinations with respect to who should be and who are enemy combatants is a quintessentially military judgment, representing a core exercise of the Commander in Chief authority. See Hamdi, 124 S. Ct. at 2647;

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<sup>53</sup>(...continued)

process [akin to that provided in Article 5 Tribunals], however, a court that receives a petition for a writ of habeas corpus from an alleged [citizen-]enemy combatant must itself ensure that the minimum requirements of due process are achieved." (emphasis added).

see also id. at 2640 (capture and detention of combatants is an "important incident of war").<sup>54</sup> Moreover, the Executive has a unique institutional capacity to determine enemy combatant status. In the course of hostilities, the Military, through its operations and intelligence-gathering, has an unmatched vantage point from which to learn about an enemy and make such judgments for the purpose of waging war successfully to completion. At the same time, the Executive is politically accountable for decisions made in prosecuting war and in defending the Nation. See Hamdi, 124 S. Ct. at 2647; cf. Ludecke v. Watkins, 335 U.S. 160, 170 (1948) (determination of state of war and status of individual as enemy alien are political judgments for which judges "have neither technical competence nor official responsibility").

By contrast, the judiciary lacks institutional competence, experience, and accountability to make such military judgments at the core of the war-making powers. See Tozer v. LTV Corp., 792 F.2d 403, 405 (4th Cir. 1986) ("The judicial branch contains no Department of Defense or Armed Services Committee or other ongoing fund of expertise on which its personnel may draw. Nor is it seemly that a democracy's most serious decisions, those providing for common survival and defense, be made by its least accountable branch of government."); Curran v. Laird, 420 F.2d 122, 130 (D.C. Cir. 1969) (en banc) ("It is – and must – be true that the Executive should be accorded wide and normally unassailable discretion with respect to the conduct of the national defense and the prosecution of national objectives through military means."). These concerns are especially pronounced given the unconventional nature of the current war and enemy, involving individuals of

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<sup>54</sup> Cf. Hirota v. MacArthur, 338 U.S. 197, 215 (1949) (Douglas, J., concurring) ("[T]he capture and control of those who were responsible for the Pearl Harbor incident was a political question on which the President as Commander-in-Chief, and as spokesman for the nation in foreign affairs, had the final say.").

many nationalities fighting without uniform or insignia and often in an unorthodox or covert fashion. Cf. Zadvydas, 533 U.S. at 696 (noting that "terrorism or other special circumstances" may counsel "heightened deference to the judgments of the political branches with respect to matters of national security").

Involvement of the judiciary in second-guessing the determinations of the Military regarding combatant status would embroil the courts in making judgments beyond their ken concerning the propriety and need for detention to prevent individuals or classes of individuals from potentially returning to the fight or the support thereof, or the need for such detention for intelligence gathering purposes during ongoing hostilities. Criteria for and determinations of combatant status strike at the heart of the Military's ability to conduct war successfully and implicate the safety of the Nation's troops and, ultimately, its citizens, as well as the safety and support of allied and coalition forces and countries. In fact, certain aspects of the substantive issues raised by the petitions in these cases are suffused with quintessential political questions – for example, whether enemy aliens taken into custody outside Afghanistan, or first captured by coalition forces and delivered into U.S. custody, may be detained – and the answers to such questions are reserved to the political branches and, in the context of these cases and in light of the AUMF, to the Executive in particular.<sup>55</sup> Thus, the need for extraordinary deference to decisions of the Military regarding enemy combatant status is manifest. See Eisentrager, 339 U.S. at 779 (noting that litigation by enemy combatants over the

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<sup>55</sup> See Baker v. Carr, 369 U.S. 186, 217 (1962) (controversy is nonjusticiable political question where there is textually demonstrable commitment to coordinate political branch; lack of judicially discoverable and manageable standards; impossibility of deciding case without making a political policy determination; impossibility of undertaking independent resolution without expressing lack of respect due coordinate branches of government; unusual need for unquestioning adherence to a political decision already made; potentiality of embarrassment from multiple pronouncements by various departments on a question).

propriety of their detention could result in "a conflict between judicial and military opinion highly comforting to the enemies of the United States").

This need is particularly clear-cut and appropriate in cases, such as these, involving the detention of alien enemy combatants, for in dealing with alien enemies, the President acts not only as Commander in Chief, but as "the guiding organ in the conduct of our foreign affairs." See Ludecke, 335 U.S. at 173; see also Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952) ("any policy towards aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government"); Eisentrager, 339 U.S. at 769-76 (describing circumscribed rights of aliens as compared to citizens, especially during wartime).

Given these factors, the only proper role for the Court with respect to an enemy combatant status determination resulting from the CSRT process would be, at most, merely to confirm that a factual basis exists supporting the Military's determination that a detainee is, indeed, an enemy combatant, taking into account the constitutionally sensitive nature of the determination.<sup>56</sup> In habeas

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<sup>56</sup> As previously explained, see supra note 26, a determination, in addition to and separate from the determination of enemy combatant status, has also been and will be made periodically by the Military concerning whether the continuing detention of one properly designated as an enemy combatant is in the interest of the United States. This determination is more complex than the determination of an individual detainee's enemy combatant status; it involves a weighing of threat risks, intelligence value, and other factors to determine whether continued detention of the enemy combatant (as opposed to release or transfer to the custody of another government) is appropriate. See id. This determination of whether an enemy combatant may nonetheless be released or transferred is not relevant to the issues before the Court, given that the Military may properly detain an enemy combatant for the duration of hostilities. See supra pp. 16-19. In any event, it is beyond question that the Court would have absolutely no role in reviewing such a determination; the weighing of factors by the Executive in such a case is not justiciable. See Dist. No. 1, Pacific Coast Dist., Marine Engs. Beneficial Ass'n v. Maritime Admin., 215 F.3d 37, 42 (D.C. Cir. 2000) (Executive's "judgments on questions of foreign policy and national interest . . . are not subjects fit (continued...)

challenges to other analogous, but much less constitutionally sensitive, executive determinations arising from administrative processes, the Supreme Court has applied a "some evidence" standard of review. That standard, if any, should apply in these cases to the extent the Court reaches the issue of whether petitioners are properly designated enemy combatants.

The Court applied the "some evidence" standard, for example, in Superintendent v. Hill, 472 U.S. 445 (1985). Hill involved judicial examination of the determination of an informal prison disciplinary proceeding concerning the revocation of good-time credits and the concomitant extension of the prisoner-plaintiffs' incarceration.<sup>57</sup> The Court, sensitive to the context of the case,

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<sup>56</sup>(...continued)  
for judicial involvement"). Indeed, the D.C. Circuit has specifically held that the Executive Branch's determination regarding the existence of a national security risk is not justiciable. See People's Mojahedin Org. of Iran v. United States Dep't of State, 182 F.3d 17, 23 (D.C. Cir. 1999) (determination by the Secretary of State that "the terrorist activity of the organization threatens the security of United States nationals or the national security of the United States" was "nonjusticiable."). Thus, the balancing of national security risk levels and other factors involved in a determination concerning the appropriateness of the continued detention of an enemy combatant is a matter entirely inappropriate for judicial review. There simply would be no "judicially discoverable and manageable standards" for resolving the propriety of the Executive Branch's decision in this circumstance. See Baker v. Carr, 369 U.S. 186, 217 (1962); see also Nat'l Fed'n of Fed. Employees v. United States, 905 F.2d 400, 405 (D.C. Cir. 1990) (APA claim challenging decisions concerning closure and realignment of military bases was nonjusticiable due to lack of judicially manageable standards because it would "necessarily involve second-guessing the Secretary's assessment of the nation's military force structure and the military value of the bases within that structure"; "We think the federal judiciary is ill-equipped to conduct reviews of the nation's military policy."); Industria Panificadora, S.A. v. United States, 763 F. Supp. 1154, 1160 (D.D.C. 1991) ("[D]ecisions which affect our national security involve policy decisions beyond the scope of judicial expertise. 'To attempt to decide such a matter without the necessary expertise and in the absence of judicially manageable standards would be to entangle the court in matters constitutionally given to the executive branch.'" (citation omitted)), aff'd on other grounds, 957 F.2d 886 (D.C. Cir. 1992).

<sup>57</sup> Such proceedings also were at issue in Wolff v. McDonnell, 418 U.S. 539 (1974). There, the Court held that due process in such proceedings required written notice of charges; an opportunity, consistent with safety and correctional goals, to present evidence; and a written  
(continued...)

determined that due process is satisfied if "there [i]s some evidence from which the conclusion of the administrative tribunal could be deduced." Id. at 455 (quoting United States ex rel. Vajtauer v. Comm'r, 273 U.S. 103, 106 (1927)). Applying the standard does not require

examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. Instead, the relevant question is whether there is any evidence in the record that could support the conclusion reached . . . .

472 U.S. at 455-56; see also id. at 457 (even "meager" evidence is sufficient to meet "some evidence" standard). According to the Court, "[r]equiring a modicum of evidence" to support a decision ensures that the "record is not so devoid of evidence that the findings" are "without support or otherwise arbitrary." 472 U.S. at 455-57. See also, e.g., INS v. St. Cyr, 533 U.S. 289, 306 (2001) (noting with respect to deportation orders under historical immigration laws that "the sole means by which an alien could test the legality of his or her deportation order was by bringing a habeas corpus action in district court. In such cases, other than the question whether there was some evidence to support the order, the courts generally did not review factual determinations made by the Executive.") (citations omitted); Eagles v. Samuels, 329 U.S. 304, 312 (1946) (in habeas proceeding attacking selective service panel determination, necessary showing requires more than mere error in the proceeding or its result; rather, absent deprivation of "fundamental" procedural safeguards, or action beyond legal authority or "without evidence to support" it, "the inquiry is at an end"); United States ex rel. Vajtauer v. Comm'r, 273 U.S. 103, 106 (1927) (holding with respect to deportation orders that "[u]pon a collateral review in habeas corpus proceedings, it is sufficient that there was some evidence from which the conclusion of the administrative tribunal could be deduced").

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<sup>57</sup>(...continued)

statement of evidence relied on by the decisionmaker and the reasons for the decision. Id. at 563-67; see supra pp. 39, 40-41. Hill involved review of the outcome of such a proceeding.



If there is to be any review at all, application of the "some evidence" standard to petitioners' enemy combatant status determinations would be consistent with the profound separation of powers concerns and the limited competence and experience of the Judiciary in undertaking to review such military judgments and, in effect, second-guess a military tribunal's determination. Because the standard functions as an aspect of due process and not as a truly substantive review of the decision considered,<sup>58</sup> it accounts for considerations of separation of powers and judicial restraint, while assuring that an individual is not being detained merely arbitrarily, consistent with the purpose of habeas review.

Application of the some evidence standard also would be consistent with the Hamdi decision. The Hamdi Plurality rejected an argument in that case that the Court should accept the "some evidence" standard as a standard of proof, *i.e.*, a standard for the quantum of evidence by which it could be determined in the first instance that a citizen-detainee was an enemy combatant, at least in the absence of process being provided the citizen-detainee to challenge the military's factual assertions pertaining to combatant status. See 124 S. Ct. at 2651 ("This ['some evidence'] standard therefore is ill suited to the situation in which a habeas petitioner has received no prior proceedings before any tribunal and had no prior opportunity to rebut the Executive's factual assertions before a neutral decisionmaker."). The Plurality, however, specifically noted the applicability of "some evidence" as a standard of review for courts to use in examining decisions emanating from administrative-type proceedings in which appropriate process had been provided, that is, proceedings

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<sup>58</sup> See Butler v. Oak Creek-Franklin School Dist., 172 F. Supp. 2d 1102, 1118 (E.D. Wis. 2001) ("some evidence" standard not intended as "substantive check on accuracy" of fact-finding).

"with process at least of the sort . . . constitutionally mandated [by Hamdi<sup>59</sup>] in the citizen enemy-combatant setting." Id.

Accordingly, if judicial review of the outcomes of individual CSRT proceedings is required at all, it should go no further than to determine whether there is "some evidence" supporting the findings of activity or status that the President, in the exercise of his powers as Commander in Chief, has determined to warrant removal of an alien from the field of battle.

As to application of this standard to specific CSRT determinations of enemy combatant status in these cases, pursuant to the September 20, 2004 Coordination Order Setting Filing Schedule and Directing the Filing of Correspondence Previously Submitted to the Court, respondents are filing individual factual returns pertaining to each petitioner in these cases<sup>60</sup> on a rolling basis through the week of October 18, 2004. The factual returns submitted to date describe or include unclassified evidence demonstrating that the petitioners to whom the returns pertain were affiliated with or provided assistance or armed aid to Taliban or al Qaeda forces.<sup>61</sup> A complete demonstration of the factual bases for the determinations that petitioners are enemy combatants will await respondents' submission of the classified and unclassified portions of all of the pertinent CSRT records, and

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<sup>59</sup> See supra § II.B.1.

<sup>60</sup> With respect to one petitioner in the Abdah case, Aref Abd Il Rheem, respondents have no record indicating that petitioner is a detainee. Counsel for respondents has asked counsel for petitioner for additional information that may assist in identifying petitioner. In the absence of proof or acknowledgment that the petitioner is detained by respondents, however, the claims pertaining to this petitioner should be dismissed.

<sup>61</sup> See Factual Returns for Petitioners O.K. (filed in O.K. Sept. 15, 2004), Al Ajmi (filed in Al Odah Sept. 17, 2004), Al Zamil (filed in Al Odah Sept. 17, 2004), Al Haj (filed in Anam Sept. 17, 2004), Ali Almarwalh (filed in Anam Oct. 1, 2004), Obaid (filed in Abdah Oct. 1, 2004), Othman (filed in Abdah Oct. 1, 2004).

further briefing explaining the evidence supporting the enemy combatant status determinations would be appropriate. These submissions will demonstrate, at a minimum, that some evidence exists supporting each determination of enemy combatant status, such that the habeas petitions in these cases should be dismissed without further evidentiary proceedings.

### **3. Petitioners' Remaining Constitutional Arguments Are Without Merit**

Beyond Fifth Amendment claims, some of the petitioners raise, or at least elliptically refer to, the Sixth, Eighth, or Fourteenth Amendments, and the Suspension Clause, as potential constitutional bases for relief. The Sixth Amendment does not provide petitioners with a right to counsel to challenge their enemy combatant status. 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). With respect to the issue of whether petitioners are properly detained as enemy combatants, the Sixth Amendment simply does not apply, and petitioners fail to state a Sixth Amendment claim. See Hamdi v. Rumsfeld, 124 S. Ct. at 2640 (explaining that captivity in war is not criminal punishment).<sup>62</sup>

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<sup>62</sup> Likewise, petitioners also lack 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) (plurality) ("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).

Similarly, the Cruel and Unusual Punishment Clause of the Eighth Amendment does not apply with respect to the issue of whether petitioners are properly detained as enemy combatants because this provision applies only after an individual is convicted of a crime. See, e.g., City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983); Ingraham v. Wright, 430 U.S. 651, 667-71 (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. And here, detention as an enemy combatant is not "punitive" in nature. See Hamdi, 124 S. Ct. at 2640.

Any Fourteenth Amendment argument by petitioners also 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"). Petitioners' claims implicate the federal government, so they lack a cause of action under the Fourteenth Amendment due process clause.

Finally, a number of petitioners purport to assert "claims" that the President's Order of November 13, 2001 violates the Suspension Clause.<sup>63</sup> See, e.g., Anam Petition ¶ 92 ("To the extent the Executive Order of November 13, 2001, disallows any challenge to the legality of Detained Petitioners' detention by way of habeas corpus, the Order and its enforcement constitute an unlawful Suspension of the Writ, in violation of Article I of the United States Constitution."). However, this is not a true "claim" in the sense of an independent ground entitling petitioners to release or other relief, but merely a legal argument about the jurisdiction of the courts. More to the point, it is a legal

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<sup>63</sup> U.S. Const. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or Invasion the public Safety may require it.").

argument attacking a strawman, and the Court need not address it. Respondents do not contend that the President's Order of November 13, 2001 operates to suspend the habeas corpus jurisdiction of the federal courts. Indeed, the fact that these cases are pending and being litigated demonstrates that it has not been construed this way. In addition, as discussed above, see supra note 6, since respondents do not rely upon the President's Order of November 13, 2001 as a basis for enemy combatant detention, that Order has nothing to do with any of the petitioners save for a tiny minority whom the President has determined in writing to be "individual[s] subject to this order."<sup>64</sup> Thus, petitioners' Suspension Clause "claims" do not entitle them to any form of relief.

### **III. PETITIONERS' NON-CONSTITUTIONAL CLAIMS PROVIDE NO BASIS FOR RELIEF AND SHOULD BE DISMISSED**

Petitioners also attempt to contest their detentions under statutes such as the Alien Tort Statute and the APA, international law, and military regulation. These challenges fail, just as petitioners' constitutional challenges fail.

#### **A. Petitioners Fail to State Claims Under the Alien Tort Statute**

A number of the petitioners challenge their detention under the Alien Tort Statute ("ATS"), which provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

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<sup>64</sup> Similarly, the allegations on behalf of petitioner in O.K. that military trial jurisdiction under the Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. §§ 801, 821, cannot be exercised over him as a minor, see O.K. Petition at ¶¶ 43-47, provide petitioner no basis for relief. Petitioner has not been subjected to trial by a military commission. In addition, by its terms, the UCMJ applies to courts-martial, but does not constrain trials by military commission. See 10 U.S.C. § 821 ("The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions . . . of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions."). In any event, the UCMJ does not require any minimum age to exert military jurisdiction over an enemy combatant. Moreover, petitioner O.K. is no longer a minor, making these allegations moot. See O.K. Petition at ¶ 13.

28 U.S.C. § 1350. These claims should be rejected.

**1. The Court Lacks Jurisdiction to Consider Petitioners' ATS Claims**

**a. The ATS Does Not Waive Sovereign Immunity**

The United States is subject to suit only to the extent that it has explicitly waived its sovereign immunity. Dep't of the Army v. Blue Fox, Inc., 525 U.S. 255, 260 (1999). In other words, the Court has jurisdiction over petitioners' ATS claims against the United States only if a waiver is provided either in the ATS or elsewhere. Id. The D.C. Circuit has squarely held, however, that "[t]he [ATS] itself does not provide a waiver of sovereign immunity." Industria Panificadora, S.A. v. United States, 957 F.2d 886, 887 (D.C. Cir.) (1992) (per curiam); see also Goldstar (Panama) S.A. v. United States, 967 F.2d 965, 968 (4th Cir. 1992); Sanchez-Espinoza v. Reagan, 770 F.2d 202, 207 (D.C. Cir. 1985); Canadian Transp. Co. v. United States, 663 F.2d 1081, 1082 (D.C. Cir. 1980). Accordingly, considering the ATS alone, the United States and its agencies are immune from ATS litigation under petitioners' claims.

**b. The APA Waiver of Sovereign Immunity Is Not Applicable To Petitioners' ATS Claims**

Petitioners also fail to establish that the United States has consented to ATS suits under statutes separate from the ATS. Goldstar, 967 F.2d at 968. Petitioners cite the APA, 5 U.S.C. § 701 et seq., at various places in their petitions, but any suggestion that the APA waives sovereign immunity for petitioners' ATS or other claims is misguided.<sup>65</sup> See, e.g., El-Banna Petition ¶ 4;

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<sup>65</sup> Many petitioners also purport to assert independent claims for relief under the APA. However, a suit for judicial review of agency action will lie only to the extent that the grievance being asserted is one that is "within the meaning of a relevant statute." 5 U.S.C. § 702; see Am. Fed'n of Gov't Employees, AFL-CIO v. Rumsfeld, 321 F.3d 139, 144-45 (D.C. Cir. 2003) (affirming dismissal of action and rejecting plaintiffs' reliance on § 702 where plaintiffs cited no "relevant (continued...)")

Almurbati Petition ¶ 5. The APA waives the government's immunity from suits challenging administrative agency action and seeking relief other than money damages. It provides as follows:

An action . . . seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States.

5 U.S.C. § 702. For the reasons explained below, the APA does not apply or provide the necessary waiver of sovereign immunity that would confer jurisdiction on the Court over petitioners' ATS (or other) claims.<sup>66</sup>

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<sup>65</sup>(...continued)

statute"); Rasmussen v. United States, 421 F.2d 776, 779 (8th Cir. 1970) ("It is quite clear from the text of the APA that it alone will not supply standing to obtain judicial review. The person must point to a separate 'aggrieved person' statute which applies to him."). In other words, a claim for review must be grounded in a federal statute apart from the APA itself so that the Court will have a meaningful basis for evaluating whether the agency's action was valid and conformed to law. Here, other than perhaps the ATS, petitioners cite no "relevant statute" apart from the APA itself. Hence, their APA claims should be dismissed. In any event, for all the reasons discussed in this memorandum, DoD's detention of the petitioners as enemy combatants is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," nor are any of the other grounds for setting aside agency action under the APA present. 5 U.S.C. § 706.

<sup>66</sup> In Sanchez-Espinoza v. Reagan, 770 F.2d at 207, the Court suggested in dictum that the APA's waiver of sovereign immunity might be "arguably available" for tort claims brought under the ATS. The Court did not speculate as to the circumstances under which the waiver could be available for such claims. In fact, the Court held that under the circumstances before it, sovereign immunity was not waived. It found that the case involved sensitive foreign policy matters best left to the political branches of government, so the Court would be abusing its discretion by interceding to grant the wholly discretionary relief requested. Id. at 208. For the Court to grant relief in the instant case not only would constitute an abuse of discretion, but also would violate a series of established APA principles, as further explained below.

**i. The Exercise of Military Authority Challenged in This Litigation is Excepted From Review Under the APA**

The APA expressly exempts from its limited waiver of immunity suits challenging "military authority exercised in the field in time of war or in occupied territory," 5 U.S.C. § 701(b)(1)(G), as well as suits seeking judicial review of "courts martial and military commissions," *id.* § 701(b)(1)(F). As the D.C. Circuit has recognized, § 701(b)(1)(G) insulates from judicial review "dispute[s] over military strategy," and applies not only to the exercise of military authority "in combat zones," but also to the exercise of such authority "in the aftermath of . . . battle." Doe v. Sullivan, 938 F.2d 1370, 1380 (D.C. Cir. 1980). As explained *supra*, petitioners' detentions are a "fundamental and accepted . . . incident" to the ongoing war. See Hamdi, 124 S. Ct. at 2640. Consequently, their challenges fall directly within these exceptions to judicial review.

The term "in the field" is not restricted to the field of battle. Al Odah v. United States, 321 F.3d 1134, 1150 (D.C. Cir. 2003) (Randolph, J., concurring), reversed and remanded on other grounds, Rasul v. Bush, 124 S. Ct. 2686 (2004); see also Ex parte Quirin, 317 U.S. 1, 21 (1942) (rejecting the argument that enemy combatants were any less belligerents because they had not entered the zone of active military operations). Moreover, it is of no moment that petitioners were captured without Congress having formally declared war against any foreign state, since "[t]ime of war,' as the APA uses it, is not so confined." Al Odah, 321 F.3d at 1150. Instead, "the military actions ordered by the President, with the approval of Congress, are continuing; those military actions are part of the war against the al Qaeda terrorist network; and those actions constitute 'war,' not necessarily as the Constitution uses the word, but as the APA uses it." *Id.*; cf. Koochi v. United States, 976 F.2d 1328, 1333-35 (9th Cir. 1992) (holding that the term "time of war" in Federal Tort



Claims Act, 28 U.S.C. § 2680(j), does not require an express declaration of war but includes "an organized series of hostile encounters on a significant scale with the military forces of another nation"). Although there has been no formal congressional declaration of war, the United States has committed its forces into combat, and the judiciary should not be thrust into reviewing military decision-making that is excluded from the APA's coverage. Al Odah, 321 F.3d at 1150 (Randolph, J., concurring).

**ii. Because it Would Be an Abuse of Discretion for the Court to Provide Discretionary Nonmonetary Relief with Respect to Sensitive Military and Foreign Affairs Matters Involved in This Litigation, the APA Does Not Apply to Provide a Waiver of Sovereign Immunity for Petitioners' Claims**

Review of petitioners' detention claims in this case is also precluded under 5 U.S.C. § 702(1), which states that the APA's judicial review provision does not affect "other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground." This provision compels the denial of petitioners' requests for declaratory and injunctive relief. Such types of relief are within the Court's discretion to grant or deny,<sup>67</sup> and the Court's interference with the sensitive national security and foreign affairs matters at issue is not warranted. Thus, the APA does not apply to provide a waiver of sovereign immunity for petitioners' ATS claims.

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<sup>67</sup> See TVA v. Hill, 437 U.S. 153, 193-94 (1978) ("a federal judge sitting as a chancellor is not mechanically obligated to grant an injunction for every violation of law," and "[s]ince all or almost all equitable remedies are discretionary, the balancing of equities and hardships is appropriate in almost any case as a guide to the chancellor's discretion") (internal quotation marks and citation omitted).

In Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985), the Court determined that it would be an abuse of discretion to grant nonmonetary relief under the ATS and APA where the Court would be required to intercede in sensitive foreign affairs matters. Id. at 208. The suit challenged the United States' alleged support of "Contra" forces bearing arms against the Nicaraguan government. The Court found that all the bases for nonmonetary relief, including injunction and declaratory judgment, were discretionary. Id. at 207-08. Pursuant to 5 U.S.C. § 702(1), it held that "[a]t least where the authority for our interjection into so sensitive a foreign affairs matter as this are statutes no more specifically addressed to such concerns than the Alien Tort Statute and the APA, we think it would be an abuse of our discretion to provide discretionary relief." Id. at 208.

The legislative history of § 702 reinforces this conclusion. The provision was enacted as part of the 1976 amendments implementing the recommendations of the Administrative Conference of the United States, which were designed, inter alia, to ensure that the waiver of sovereign immunity in the APA did not allow courts to "decide issues about foreign affairs, military policy, and other subjects inappropriate for judicial action." See Sovereign Immunity Hearing Before the Subcomm. on the Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 91st Cong., 2d Sess. 135 (1970) (report of the Administrative Conference Committee on Judicial Review).

In the present case, petitioners seek a declaration that their detentions in connection with active hostilities involving the United States are unlawful, and they seek an order requiring their release from custody. As in Sanchez-Espinoza, this declaratory and injunctive relief is discretionary. The determination of their claims would unavoidably enmesh the Court in foreign affairs and national security matters that are at least as sensitive as the activities at issue in Sanchez-Espinoza. Therefore, under § 702, it would be an abuse of discretion for the Court to declare activities of the

President and the Secretary of Defense unlawful or to enjoin them from further detaining petitioners. Thus, the APA does not apply to provide a waiver of sovereign immunity for petitioners' ATS claims.

**iii. The APA's Waiver of Immunity Does Not Apply Because The President Is Not an "Agency" and "Other Adequate Remedies" Are Available**

Section 704 of the APA provides that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. Thus, it provides for the review only of agency action for which there is "no other adequate remedy in a court." With respect to the first of these requirements, petitioners have challenged action which is not that of an "agency" subject to review. Petitioners allege that they have been wrongfully detained pursuant to the President's orders and authorization.<sup>68</sup> Indeed, the detentions at issue were the direct result of action taken by or in response to the orders of the President<sup>69</sup> pursuant to the exercise of his constitutional powers and the express congressional authorization in the AUMF. However, "the President is not an agency within the meaning of the

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<sup>68</sup> See, e.g., Almurbati Petition ¶¶ 20, 21 (alleging detention pursuant to the September 18, 2001 Authorization for Use of Military Force; the November 13, 2001 Executive Order on Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism; and under the President's authority as Commander in Chief); Al Odah Petition ¶¶ 9-13 (same); Khalid Petition ¶¶ 21-22 (same); El-Banna Petition ¶¶ 3, 29, 34 (same); O.K. Petition ¶ 6 (same); Kurnaz Petition ¶¶ 9-10, 20, 25-27 (same).

<sup>69</sup> The duties of the other respondents in this case, who are DoD officials, are to implement the orders of the President as Commander in Chief. See, e.g., U.S. Const. Art. II, § 2, cl. 1 (providing that "[t]he President shall be Commander in Chief of the Army and Navy of the United States"); id. (providing that the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective offices . . ."); Mitchell v. Forsyth, 472 U.S. 511, 536-37 (1985) (Burger, C.J., concurring) (Cabinet officer "is an 'aide' and arm of the President in the execution of the President's constitutional duty to 'take Care that the Laws be faithfully executed.'").

Act." Franklin v. Massachusetts, 505 U.S. at 796; see Dakota Central Tel. Co. v. State of South Dakota, 250 U.S. 163, 184 (1919); Armstrong v. Bush, 924 F.2d 282, 289 (D.C. Cir. 1991). Therefore, his actions are "not subject to" APA requirements. Franklin, 505 U.S. at 801. With respect to petitioners' detentions, then, "there is no final agency action that may be reviewed under the APA standards." Id. at 796.<sup>70</sup>

Regarding the second requirement of 5 U.S.C. § 704, petitioners have an adequate, alternative judicial remedy for the alleged wrongful actions. See Bowen v. Massachusetts, 487 U.S. 879, 903 (1988) ("Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action"). Alleging that they are incarcerated and being indefinitely held in unlawful custody, petitioners assert jurisdiction under the habeas statutes, 28 U.S.C. §§ 2241, 2242. See, e.g., El-Banna Complaint ¶¶ 4, 5; Almurbati Complaint ¶¶ 5, 6; see Preiser v. Rodriguez, 411 U.S. 475, 484 (1973) ("[T]he essence of habeas corpus is an attack by a person in custody upon the legality of that custody"). Habeas corpus is not only an adequate remedy for petitioners' claims; it is the exclusive remedy. It is well settled that "[c]hallenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus." Muhammad v. Close, 540 U.S. 749, 124 S. Ct. 1303, 1304 (2004); accord Preiser, 411 U.S. at 489-90; Bourke v. Hawk-Sawyer, 269 F.3d 1072, 1074 (D.C. Cir. 2001); Chatman-Bey v.

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<sup>70</sup> It is also doubtful that the President's orders and decisions regarding detention of enemy combatants even constitute "agency action" for whose judicial review the APA waives sovereign immunity. See 5 U.S.C. § 702 (waiver of sovereign immunity predicated on "agency action"); 5 U.S.C. § 551(13) (defining "agency action" as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act"); see also 5 U.S.C. § 701(b)(2) (incorporating definitions from § 551 for purposes of Chapter 7). At best, they are "unusual candidates" for agency action. See Franklin, 505 U.S. at 796; see also Armstrong, 924 F.2d at 289 (finding that the President is not required "to comply with APA rulemaking procedures when issuing executive orders").

Thornburgh, 864 F.2d 804, 809-10 & n.5 (D.C. Cir. 1988); Monk v. Secretary of the Navy, 793 F.2d 364, 366 (D.C. Cir. 1986). In fact, the APA makes express that a plaintiff may not resort to the general provisions of the APA to maintain a legal action that should be brought (if at all) in habeas. 5 U.S.C. § 703;<sup>71</sup> see also Valenti v. Clark, 83 F. Supp. 167, 168 (D.D.C. 1949) (ruling that complaint cannot be maintained under APA because plaintiff's sole remedy is by way of habeas petition).

Moreover, habeas is the only appropriate federal remedy even if petitioners put a different label on their pleadings. See Preiser, 411 U.S. at 489-90. For example, they cannot escape jurisdiction under the habeas statutes merely by attacking alleged aspects of their detention to demonstrate its unlawfulness, when in fact the relief they seek is release. Monk, 793 F.2d at 367 (stating that when a prisoner challenges action other than his underlying conviction, the nature of the relief requested determines whether habeas corpus is the exclusive remedy, and if the prisoner seeks relief that will result in immediate or more speedy release, then habeas is the exclusive remedy); Razzoli v. Federal Bureau of Prisons, 230 F.3d 371, 373 (D.C. Cir. 2000) ("[W]e adhere to Chatman-Bey: for a federal prisoner, habeas is indeed exclusive even when a non-habeas claim would have a merely probabilistic impact on the duration of custody"); Rasul v. Bush, 215 F. Supp. 2d at 63-64 (same). All but one of the petitioners seek a declaration that their detention is unlawful and expressly request this remedy in their prayers for relief.<sup>72</sup> Because the essence of their complaint is

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<sup>71</sup> "The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including . . . habeas corpus, in a court of competent jurisdiction."

<sup>72</sup> A variation occurs in the Al Odah amended complaint, whose prayer for relief asks for a  
(continued...)

a challenge to the fact of custody, a petition for writ of a habeas corpus is their only avenue for relief. Rasul, 215 F. Supp. 2d at 63-64.

That certain petitioners seek damages<sup>73</sup> also does not alter the conclusion that the challenge to their detentions must be treated as a writ for habeas corpus.<sup>74</sup> Petitioners seek damages that result directly from the fact of their detentions as enemy combatants. See Monk, 793 F.2d at 368. In order to grant the damages petitioners request, therefore, the Court must first determine the lawfulness of those detentions. See id.; cf. Heck v. Humphrey, 512 U.S. 477, 487 (1994) (imprisonment must be declared invalid by writ of habeas corpus or otherwise before prisoner can recover damages the award of which would imply invalidity of imprisonment). Yet because the determination sought by petitioners might result in their release from custody, it must be made in an action for habeas corpus. See Monk, 793 F.2d at 368.

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<sup>72</sup>(...continued)

hearing before a neutral tribunal. However, this prayer for relief, like those of petitioners in the other cases, "is nothing more than a frontal assault on [plaintiffs'] confinement." Rasul, 215 F. Supp. 2d at 63. Similarly, the Al Odah petitioners' requests "to meet with their families," "be informed of the charges, if any, against them," and "designate and consult with counsel of their choice" are "directly related to their request to be brought before a court which would determine the extent of their entitlement to rights." Id. The crucial fact is that the Al Odah petitioners have not "brought a declaratory judgment action seeking to invalidate some procedure that would not impact the duration of their confinement." Id. at 64. Instead, the declaratory relief they seek would end their confinement. Therefore, habeas is the exclusive federal remedy. Id.

<sup>73</sup> See Almurbati, El Banna, Khalid, Kurnaz, and O.K. Petitions.

<sup>74</sup> Even if these petitioners did not have an adequate remedy under the habeas statutes and could properly sue under the APA, or under the ATS pursuant to the APA's waiver of sovereign immunity, a damages claim against the government would not be available to them because the APA waives the government's sovereign immunity from suit only in actions seeking relief "other than money damages." 5 U.S.C. § 702.

Finally, petitioners have no right to maintain an action under the APA even if they believe they could obtain a more effective remedy under that statute than under the habeas provisions. See Council of and for the Blind of Del. County Valley, Inc. v. Regan, 709 F.2d 1521, 1532 (D.C. Cir. 1983) (en banc) (observing that the other available remedy was adequate even if less effective than the APA remedy). This reflects Congress's intent that the APA not create an additional remedy for particular agency action for which Congress has established a specific review process. Bowen v. Massachusetts, 487 U.S. 879, 903 (1988); Women's Equity Action League v. Cavazos, 906 F.2d 742, 750-51 (D.C. Cir. 1990) (holding that APA review is precluded where another statutory remedy exists for the specific form of discrimination alleged) (citing Council of and for the Blind, 709 F.2d at 1531-33). This is even true notwithstanding the fact that the party before the court may not be entitled to that remedy. See Correctional Servs. Corp. v. Malesko, 534 U.S. 61, 72 (2001) (noting that in FDIC v. Meyer, 510 U.S. 471 (1994), the Court "found sufficient" a remedy against the individual officer "which respondent did not timely pursue"); see also Mitchell v. United States, 930 F.2d 893, 897 (Fed. Cir. 1991) (holding that available remedy in Claims Court was adequate even though the plaintiff's claim in that court may have been time-barred); McGregor v. Greer, 748 F. Supp. 881, 884 (D.D.C. 1990) (holding that Civil Service Reform Act provided an adequate remedy for employee to challenge discharge even though the Act specifically exempted her, as a Schedule C excepted service employee, from its remedial provisions). Therefore, petitioners can challenge the legality of their detention only in a proper habeas petition; the APA does not apply to provide a waiver of sovereign immunity for petitioners' ATS claims.

**iv. The Challenged Actions Are Excepted from the APA Waiver Provision to The Extent They Are Committed to Agency Discretion by Law**

The APA does not apply to agency action that "is committed to agency discretion by law." 5 U.S.C. § 701(a)(2); see Lincoln v. Vigil, 508 U.S. 182, 191 (1993) (section 701(a)(2) covers matters that have been "traditionally left to agency discretion"). A law can be taken to have committed the decisionmaking to the agency's judgment absolutely when it "is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." Heckler v. Chaney, 470 U.S. 821, 830 (1985). Thus, the presumption of substantive judicial review in administrative law "runs aground when it encounters concerns of national security." Dep't of the Navy v. Egan, 484 U.S. 518, 527 (1988). It similarly "runs aground" with respect to foreign policy matters. Franklin, 505 U.S. at 818-19.

As explained supra at pages 6-8, some of the substantive issues raised by the petitions in these cases – for example, whether enemy aliens taken into custody outside Afghanistan, or first captured by coalition forces and delivered into U.S. custody, may be detained – rise to the level of quintessential political questions, the answers to which are reserved in this context to the Executive Branch and, thus, are committed to agency discretion. Indeed, in the AUMF, Congress authorizes the President "to use all necessary and appropriate force" against those persons "he determines" were involved in the September 11, 2001 terrorist attacks. 115 Stat. 224 (emphasis added). The purpose of this authorization is "to prevent any future acts of international terrorism" against the United States by such persons. Id. Congress observed that these acts of violence "continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States." 115 Stat. 224. Thus, Congress expressly accorded the President full decisionmaking power in order



to enable him to protect national security and properly conduct foreign policy. Moreover, the President's authority to carry out the AUMF stems from his power as Commander in Chief. See supra § I.A. Thus, the APA's waiver of sovereign immunity would not apply with respect to matters inextricably tied to the exercise of the President's core power as Commander in Chief to the extent such matters are committed to his discretion.<sup>75</sup>

## **2. Petitioners Have Failed to State a Cognizable Claim Under the ATS**

Even if the United States' sovereign immunity could be assumed away, petitioners nonetheless have not stated a cognizable cause of action under the ATS insofar as they ask the Court to declare their detentions unlawful. The Supreme Court recently held that courts should exercise "judicial caution" in recognizing private causes of action under the ATS, which erects "a high bar to new private causes of action for violating international law." Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2763 (2004). In Sosa, a Mexican national, who was acquitted of murder after being abducted and transported to the United States to face prosecution, brought an action under the ATS against the Mexican citizen hired by the DEA to abduct him. Construing the ATS as encompassing only a "modest number of international law violations with a potential for personal liability," the Court stated that any claim based on the present-day law of nations should "rest on a norm of international character accepted by the civilized world and defined with . . . specificity." Id. at 2761-62. The Court held that the petitioner's arbitrary detention claim did not support the creation of a federal remedy under the ATS.

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<sup>75</sup> As argued supra at § II.B.2, the most that a court could do with respect to the detention issue is to ascertain whether "some evidence" exists for a detainee-specific classification decision. This mere function of confirming that due process has occurred does not contemplate a truly substantive reconsideration of the issues involved in detention that are committed to the President's power as Commander in Chief.

As the rationale for its decision, the Court stated that it was reluctant to infer intent to provide a private cause of action where the statute did not supply one expressly. Id. at 2763. It further reasoned that "attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences," and, thus, courts should be "particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." Id.

Applying this reasoning to the present case, the Court should not grant declaratory relief in connection with petitioners' detention claims. There are no clear international legal norms recognizing a cause of action for such equitable relief. See, e.g., Sosa, 124 S. Ct. at 2767 (finding no self-executing rule of international law prohibiting arbitrary arrest or detention). Judicial restraint is particularly appropriate in view of the sensitive foreign policy and national security concerns that underlie the President's decision to detain petitioners.

These foreign policy considerations provide an additional, independent justification for withholding relief here based on what the Court in Sosa called "a policy of case-specific deference to the political branches." Sosa, 124 S. Ct. at 2766 n.20. The Court explained that, aside from the other principles limiting the availability of relief in federal courts for violations of customary international law, "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy." Id. Thus, the potential for judicial interference in the conduct of foreign and national security affairs, by itself, defeats jurisdiction under the ATS for petitioners' detention claims.

## **B. Petitioners Fail to State a Claim Under International Law**

Petitioners likewise fail to state a claim under international law. They generally allege that respondents have violated "customary international law" and "obligations" of the United States under international law, see, e.g., Khalid Petition ¶ 59, but the only specific examples they provide are the Geneva Conventions, the International Covenant on Civil and Political Rights (ICCPR), and the American Declaration on the Rights and Duties of Man (ADRDM).<sup>76</sup> None of their claims is valid.

Petitioners are 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 ("Third Geneva Convention").

Even assuming that petitioners are protected by this specialized law of war, including the Geneva Conventions, 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 Conventions, these claims are not cognizable in federal court because the rights of aliens "are vindicated under [the Geneva Conventions] only through 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 conventions, its analysis is fully applicable here.

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<sup>76</sup> O.K. raises additional examples allegedly applicable to minors. These are addressed infra.

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. See, e.g., Committee of United States Citizens Living in Nicaragua v. Reagan, 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). 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).

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.<sup>77</sup> 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 (1829) (Marshall, C.J.) (holding that a non-self-executing treaty "addresses itself to the political, not the judicial department; and the

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<sup>77</sup> Of course, the reference in 28 U.S.C. § 2241 to "custody in violation of . . . treaties" does not render every United States treaty automatically self-executing for habeas purposes. See, e.g., Bannerman v. Snyder, 325 F.3d 722, 724 (6th Cir. 2003) ("§ 2241 cannot be construed as an implementation of non-self-executing provisions of treaties so as to render them judicially enforceable").

legislature must execute the [treaty] before it can become a rule for the Court"), overruled on other grounds by *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 64 (1833).<sup>78</sup>

The Geneva Conventions do 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 current Geneva Conventions – the "obvious scheme" of the Geneva Conventions is that the "responsibility for observance and enforcement" of their provisions is "upon political and military authorities," not the courts. 339 U.S. at 789 n.14. Indeed, the courts are virtually unanimous in the conclusion that the Geneva Conventions are not self-executing. See *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) (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 *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442 & n.10 (1989) (holding

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<sup>78</sup> 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.").

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); FTC 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").<sup>79</sup>

This conclusion is supported by the text of the treaties, which contain no explicit provision for enforcement by any form of private petition. Furthermore, the terms of the treaties relating to enforcement focus 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"); Fourth Geneva Convention, 1956 WL 54810 (U.S. Treaty), T.I.A.S. No. 3365, 6 U.S.T. 3516, art. 12 (same). Put simply, "the corrective machinery specified in the treaty itself is nonjudicial." Holmes v. Laird, 459 F.2d 1211, 1222 (D.C. Cir. 1972). Consequently, petitioners fail to state a claim for relief under the Conventions.<sup>80</sup>

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<sup>79</sup> Although one federal judge described the Third Geneva Convention as self-executing, see United States v. Lindh, 212 F. Supp. 2d 541, 553-54 (E.D. Va. 2002), his view was not supported by persuasive authority, but merely by a single law review article that, itself, does not contain any assertion that the Third Geneva Convention is self-executing, and the decision lies in sharp contrast to the uniform rulings of other courts that have concluded that the Conventions is not self-executing.

<sup>80</sup> Even if the Third Geneva Convention were somehow self-executing, petitioners' claims based on the Convention would still fail on the merits, because, among other things, the President has determined that the Third Geneva Convention does not apply at all to the al Qaeda detainees, because it is not a state party to the Convention, and that neither the Taliban nor al Qaeda detainees  
(continued...)

Petitioners' claims under the International Covenant on Civil and Political Rights (ICCPR), Art. 14, 999 U.N.T.S. 171, 6 I.L.M. 368 (1992), are similarly invalid. The United States 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. Rec. S4781, S4784 (April 2, 1992). Accordingly, the ICCPR does not create privately enforceable rights in United States courts. See Sosa, 124 S. Ct. at 2767 (ICCPR was ratified "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 the American Declaration on the Rights and Duties of Man (ADRDM), O.A.S. Off. Rec. OEA/Ser. LV/I.4 Rev. (1965). This provision is simply a multinational resolution that the United States has not ratified; thus, it does not have the force or effect of law. See 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

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<sup>80</sup>(...continued)

are entitled to prisoner of war status under the terms of the Convention. See White House Fact Sheet (Feb. 7, 2002), available at <<<http://www.whitehouse.gov/news/releases/2002/02>>>. This determination is not reviewable, given the foreign policy and national security concerns implicated in the present context and the Presidential prerogatives in those domains. See cases cited supra note 56 (matters related to foreign policy and national security are not fit subjects for judicial review); see also Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) ("[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative."). But even if it were, it would at least be entitled to substantial deference. See Kolovrat v. Oregon, 366 U.S. 187, 194 (1961) ("While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight.").

obligations on the part of any" member nations).<sup>81</sup>

### **C. Petitioners Cannot Assert a Claim Under Army Regulation 190-8**

Petitioners attempt to overcome their inability to assert a claim under the Geneva Conventions themselves by invoking unspecified "military regulations" or Army Regulation 190-8 (entitled "Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees"). But nothing in the language or structure of that regulation suggests that it creates any private right of action for a detainee. The regulation instead merely constitutes the implementation of the 1949 Geneva Convention by the Executive Branch. See Army Regulation 190-8 § 1-1.b (submitted herewith as Ex. C). In particular, it "provides policy, procedures, and responsibilities" for the Military with respect to "the administration, treatment, employment, and compensation" of detainees, see id. § 1-1.a., and states expressly that "[i]n the event of conflicts or discrepancies between this regulation and the Geneva Conventions, the provisions of the Geneva Conventions take precedence,"

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<sup>81</sup> To the extent petitioners' general allegations of international law violations encompass the American Convention on Human Rights (ACHR), 1144 U.N.T.S. 123, 9 I.L.M. 673 (1969), they are similarly misguided. Like the ADRDM, the ACHR is unratified and therefore lacks 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").

Petitioner in O.K. alleges claims under two additional treaties – the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, S. Treaty Doc. No. 106-37, 2000 WL 33366017 ("Optional Protocol"), and the International Labour Organization's Convention 182, Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, S. Treaty Doc. No. 106-5, 1999 WL 33292717 ("ILO Convention 182"). See O.K. Petition ¶¶ 57-59, 72-76. These claims are also invalid because neither treaty creates privately enforceable rights in United States courts and, even they did, neither treaty addresses the detention of children as enemy combatants. Both the Optional Protocol and ILO Convention 182 condemn the compulsory recruitment for the armed forces of persons younger than 18, but neither precludes voluntary military service of persons under 18. See Optional Protocol, art. 2, 3.3; ILO Convention 182, art. 3(a). Regardless, any claims that could be raised under these treaties are now moot because petitioner O.K. has reached the age of 18. See O.K. Petition ¶ 13.



id. § 1-1.b.(4).

Petitioners' mere reliance on 28 U.S.C. § 2241 does not automatically create a viable claim under Army Regulation 190-8. As emphasized above, it is "obvious" that "responsibility for observance" of the rights conferred by the Geneva Conventions "is upon political and military authorities." Eisentrager, 339 U.S. at 789 n.14. Here, by promulgating Army Regulation 190-8, the Executive Branch has exercised its prerogative to ensure internal compliance with the Geneva Conventions by providing guidance for the Military with respect to treatment of detainees. See Army Reg. 190-8 § 1-1.a; see also preliminary statement to Army Reg. 190-8 ("This regulation implements Department Of Defense Directive 2310.1 and establishes policies and planning guidance for the treatment, care, accountability, legal status, and administrative procedures for" detainees (emphasis added)); Department of Defense Directive 2310.1 ¶ 3 ("It is DoD policy that . . . [t]he U.S. Military Services shall comply with the principles, spirit, and intent of the international law of war, both customary and codified, to include the Geneva Conventions." (citations omitted)) (available at <<<http://www.dtic.mil/whs/directives/corres/html2/d23101x.htm>>>). The issuance of the regulation – which was undertaken as a matter of discretion by the Executive Branch without statutory direction by Congress – therefore cannot be understood to have created actionable rights or somehow opened the door to lawsuits by detainees who otherwise would be unable to seek relief via habeas under the Geneva Conventions themselves. To conclude otherwise would undermine the holdings of the numerous cases that have concluded that the Geneva Conventions does not create judicially enforceable rights, and, furthermore, would discourage the Executive Branch from exercising its prerogative to use regulations as a means of providing internal guidance for compliance with treaties.

Moreover, the Court should be particularly reluctant to allow any challenge under Army

Regulation 190-8, given that the regulation and any application thereof lie at the intersection of two areas particularly ill-suited to judicial resolution – foreign policy and national security. See Haig, 453 U.S. at 292 ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention."). The Supreme Court has explained that "[t]he very nature of executive decisions as to foreign policy is political, not judicial," and indeed, such "decisions [are] of a kind for which the Judiciary has neither aptitude, facilities nor responsibility." Chicago & S. Air Lines, 333 U.S. at 111. See cases cited supra note 56. Here, were the Court to decide whether the Military had complied with Army Regulation 190-8, which implements the Geneva Conventions, it would essentially be forced to opine on whether the Military's treatment of detainees satisfied the terms of the Conventions. Given the Executive's constitutional prerogatives with respect to military policy, especially during a time of war, as well as the implications for international diplomacy of the Executive's decisions concerning internal enforcement of the Geneva Conventions, the Court should decline petitioners' invitation to find a justiciable claim with respect to alleged violations of Army Regulation 190-8.

Apparently recognizing the limitations of any direct challenge under Army Regulation 190-8, petitioners in some of the pending cases erroneously rely on the APA to assert a claim that the Military has violated Army Regulation 190-8. See, e.g., O.K. Petition at ¶¶ 64-66, 80-82. However, the APA does not provide a waiver of sovereign immunity which would be necessary for such a claim to be justiciable. As noted above, Army Regulation 190-8 implements international law relating to detainees, and in particular, establishes policies and procedures for carrying out the terms of the Geneva Convention. Army Reg. 190-8, § 1-1.b. Because it embodies the foreign policy of the United States with respect to international treaties, which is a matter traditionally left to the

exclusive discretion of the Executive Branch, the regulation and the decisions whether and to what extent it should apply, constitute agency actions that are "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), and, therefore, beyond the reach of the judiciary. See supra § III.A.1.b.iv.<sup>82</sup> Thus, the APA does not waive the sovereign immunity of the United States in connection with petitioners' claims under Army Regulation 190-8, and those claims must be rejected.

### **CONCLUSION**

For the reasons stated above, respondents respectfully request that their motions to dismiss or for judgment as a matter of law be granted, that writs of habeas corpus not issue, and that all relief requested by petitioners be denied.

Dated: October 4, 2004

Respectfully submitted,

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<sup>82</sup> The detentions here are also not reviewable for other reasons discussed supra at §§ III.A.1.b.i, ii, iii.

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