IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LAKHDAR BOUMEDIENE, *et al.* Petitioners, v. GEORGE WALKER BUSH, President of the United States, *et al.*, Respondents.	)	Civil Action No. 04-CV-1166 (RJL)

GOVERNMENT'S RESPONSE TO PETITIONERS' SUPPLEMENTAL MEMORANDUM REGARDING THE DEFINITION OF ENEMY COMBATANT

The government respectfully responds to petitioners' supplemental memorandum addressing the definition of enemy combatant, which criticizes the Court's acceptance of the definition of enemy combatancy adopted by the Department of Defense for Combatant Status Review Tribunals ("CSRTs"). The Court deferred to the CSRT definition in recognition that the definition was "crafted by the Executive, not the courts, and blessed by Congress," and "passes muster" under the Constitution and the Authorization for the Use of Military Force ("AUMF"). Mem. Order at 2 (Oct. 27, 2008). The definition provides that

> 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.

Id. at 3-4.

Petitioners present no new arguments in their "supplemental" brief that the definition is not authorized by the AUMF, the Constitution or the law of war. Rather, they once again contend that the definition means that they "could have been lawfully attacked and killed on sight and without warning." Pet's Supp. Mem. at 4. They made the same argument in their initial brief addressing the definition of enemy combatancy, Dkt. No. 222 at 11-12, and the Court properly rejected their effort to involve the Court in restricting the terms of the AUMF and the lawful scope of Executive power based on hyperbole.

Once again, petitioners try to conflate the lawfulness of detaining enemy combatants with the lawfulness of using lethal force. They pose a false choice of either affording terrorists and their supporters full criminal trials – the petitioners' preference, which would cripple the United States's ability to detain many such individuals – or sanctioning in all circumstances the use of lethal force against enemy combatants encountered away from traditional battlefields. But, adhering to the law of war, the United States would not authorize the use of unnecessary and disproportionate lethal force against unarmed enemy combatants in circumstances such as those at issue here, where petitioners were transferred to U.S. custody peacefully. *See, e.g.*, *The Law of Land Warfare*, Army Field Manual, FM 27-10 ¶ 28 ("It is especially forbidden . . . to declare that no quarter will be given."), ¶ 41 ("loss of life and damage to property incidental to attacks must not be excessive in relation to the military advantage expected to be gained"); *cf.* Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, opened for signature Aug. 12, 1949, 6 U.S.T. 3316, 3318-20, 75 U.N.T.S. 135, 136-38 (providing that "members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely").

Petitioners' hyperbole fails to obscure the real-world consequences of the legal rule they unsuccessfully sought: no foreign terrorist, no matter how closely associated with or supportive of al-Qaida or the Taliban, could be detained by the United States absent extradition pursuant to a criminal indictment, with the exception of some vague category petitioners reluctantly recognize encompassing senior "members" of al-Qaida. As this Court concluded, such an untenable rule is inconsistent with the AUMF and the Constitution, and is unsupported by the law of war.

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Respectfully submitted,

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