IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

	)	**Civil Action Nos.**
	)	**02-CV-0299 (CKK), 02-CV-0828 (CKK),**
	)	**02-CV-1130 (CKK), 04-CV-1135 (ESH),**
	)	**04-CV-1136 (JDB), 04-CV-1137 (RMC),**
***In re* Guantánamo Detainee Cases**	)	**04-CV-1142 (RJL), 04-CV-1144 (RWR),**
	)	**04-CV-1164 (RBW), 04-CV-1166 (RJL),**
	)	**04-CV-1194 (HHK), 04-CV-1227 (RBW)**
	)	**04-CV-1254 (HHK), 04-CV-1519 (JR)**
	)	

PETITIONERS' MEMORANDUM IN OPPOSITION TO
RESPONDENTS' MOTION TO DISMISS

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MISCELLANEOUS

In *Rasul v. Bush*, the Supreme Court held that the Guantanamo Bay Naval Base is within the "territorial jurisdiction" of the United States, and that aliens held at the base – "no less than American citizens" – are entitled to judicial review of their detentions under the federal habeas statute, 28 U.S.C. § 2241. 124 S. Ct. 2686, 2696 (2004). Rejecting the government's assertion of unreviewable power, the Court stressed that the judicial obligation to determine the lawfulness of detentions applies "in wartime as well as in times of peace." *Id.* at 2693.

The government now seeks to dismiss these cases on the ground that, although the Guantanamo detainees may petition the federal courts for a writ of habeas corpus, they have no rights that would entitle them to judicial relief. The government's argument, if accepted, would leave the right of habeas review recognized in *Rasul* an empty one, "a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will." *Edwards v. California*, 314 U.S. 160, 186 (1941) (Jackson, J., concurring).

Contrary to the government's contention, the detainees have judicially enforceable rights under the U.S. Constitution, international law and common law. These substantive rights provide the basis for granting habeas relief here. The detainees are entitled to due process.

STANDARDS OF REVIEW

The government faces high hurdles in moving for dismissal under Rule 12(b)(6) or judgment on the pleadings under Rule 12(c). Under Rule 12(b)(6), Petitioners' factual allegations must be taken as true and every inference resolved in Petitioners' favor. *See*, *e.g.*, *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113 (D.C. Cir. 2000). The Court may consider only "the facts alleged in the complaint, any documents either attached to or incorporated in the com-

plaint and matters of which [the Court] may take judicial notice." *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997). Dismissal is warranted only if the government can establish "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957).

Petitioners have alleged that they are innocent civilians who are being detained by the federal government in error and without due process, access to counsel, or charges. Dismissal under these circumstances is inappropriate. As the Supreme Court stated in reversing the district court's dismissal of Rasul's petition for lack of jurisdiction, a district court must "consider in the first instance the merits of the [detainees'] claims." *Rasul v. Bush*, 124 S. Ct. at 2699.

The government's request for judgment under Rule 12(c) must also be rejected. In deciding a motion under Rule 12(c), the Court must "accept as true the allegations in the [Petitioners'] pleading, and as false all controverted assertions of the [government]," and the government must show "that no material issue of fact remains to be solved." *Haynesworth v. Miller*, 820 F.2d 1245, 1249 n.11 (D.C. Cir. 1987). If the Court considers facts outside the pleadings, the government's motion becomes one for summary judgment, *Yates v. District of Columbia*, 324 F.3d 724, 725 (D.C. Cir. 2003) (per curiam), and the Court must offer all parties a "reasonable opportunity to present all material made pertinent to such a motion by Rule 56." *Stearns v. Veterans of Foreign Wars*, 500 F.2d 788, 790 n.7 (D.C. Cir. 1974).

The only basis on which the government might seek to justify judgment on the pleadings is that Petitioners' challenge to the Combatant Status Review Tribunals must fail because the tribunals afford the detainees the requisite due process. But counsel for the detainees have been denied knowledge of whatever process that their clients have been afforded. Crucial

phases of the CRST proceedings have been held in secret, and counsel for the detainees have been excluded from any participation. Counsel do not know what classified evidence has been presented against their clients, how such evidence was obtained, or how the CRSTs have used such evidence in making their combatant-status determinations. Nor do counsel have any first-hand knowledge of how these tribunals have operated or whether they have relied on statements that should be given no weight because they were obtained through coercion or bribery.[1] The only "facts" about the proceedings known to counsel are the government's untested *assertions* of fact. Under these circumstances, and for the reasons described more fully below, any motion that is to be decided under a summary judgment standard should be denied as premature.

STATEMENT OF FACTS

Most of the petitioners were seized in the final months of 2001 and have been imprisoned at the Guantanamo Bay Naval Base since early 2002. They have been held virtually *incommunicado* without access to their families, counsel, or the courts. They allege that they are innocent of any wrongdoing, that they have not participated in terrorism or any hostile acts against the United States, and that they were wrongly taken into custody.

While at Guantanamo Petitioners have apparently been subjected to constant and reportedly abusive interrogation. The Government has acknowledged using interrogation tech-

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[1] For example, Faruq Ali Ahmed (named in the *Abdah* Petition as Farouk Ali Ahmed Saif) testified before a CSRT that he was in Afghanistan to teach the Koran to children. According to the "personal representative" assigned to assist him at his CSRT hearing, Ahmed was deemed an enemy combatant by the tribunal based on the testimony of a fellow detainee who "with some certainty . . . has lied about other detainees to receive preferable treatment and to cause them problems while in custody." *Personal Representative Comments Regarding the Record of Proceedings*, Ahmed Factual Return (*Abdah* Docket No. 30). As the personal representative explained, "Had the Tribunal taken this evidence out as unreliable, then the position we have taken is that a teacher of the Koran (to the Taliban's children) is an enemy combatant (partially because he slept under a Taliban roof)." *Id.*

niques specifically designed to break the detainees' will and make them feel helpless and completely dependent on their captors.[2] Interrogation techniques approved for use at Guantanamo by the most senior Department of Defense lawyer include isolation for up to 30 days, 28-hour interrogations, extreme and prolonged stress positions, sleep deprivation, sensory assaults, removal of clothing, hooding, and the use of dogs to create anxiety just short of terror.[3] At least 17 interrogation techniques authorized for use at Guantanamo go beyond those permitted by the Army Interrogation Manual.[4] In approving these interrogation techniques, the government evidently relied on the legal conclusions of the White House Counsel, the Department of Justice, and the Department of Defense.[5]

According to recent reports, the government's treatment of the detainees at Guantanamo has crossed the line into torture. Citing interviews with "several people who worked in

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[2] *See Pentagon Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations* at 65 (Apr. 4, 2003) ("Pentagon Working Group Report"). The government memoranda cited in this paragraph are available at http://www.washingtonpost.com/wp-dyn/articles/A62516-2004Jun22.html.

[3] *See* Action Memo from William J. Haynes II, General Counsel, DOD, to Secretary of Defense (Nov. 27, 2002); *Pentagon Working Group Report* at 62-65.

[4] *See* Memorandum from Secretary of Defense to Commander, U.S. Southern Command (Apr. 16, 2004); Action Memo from William J. Haynes II, General Counsel, DOD, to Secretary of Defense (Dec. 2, 2002).

[5] *See* Memorandum from Jay S. Bybee, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel, DOD (Jan. 22, 2002) (concluding that the Geneva Conventions do not apply to the conflict in Afghanistan and that U.S. officials cannot be charged with war crimes for interrogation methods used on al Qaida or Taliban detainees, and further concluding that the President's constitutional authority to manage a military campaign relieves him of strictures posed by anti-torture laws); Memorandum from U.S. Department of Justice, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Aug. 1, 2002 (concluding that "for an act to constitute torture . . . it must inflict pain that is difficult to endure . . . [it] must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. For purely mental pain or suffering to amount to torture . . . it must result in significant psychological harm of significant duration, e.g. lasting months or even years").

the prison, . . . military guards, intelligence agents and others," one report described a "regular procedure" at Guantanamo as involving:

> making uncooperative prisoners strip to their underpants, having them sit in a chair while shackled hand and foot to a bolt in the floor, and forcing them to endure strobe lights and screamingly loud rock and rap music played through two close loudspeakers, while the air conditioning was turned up to maximum levels. . . . Such sessions could last up to 14 hours with breaks.

Neil A. Lewis, "Broad Use Cited of Harsh Tactics at Base in Cuba," N.Y. Times, Oct. 17, 2004, at A1. According to an official who reportedly witnessed this procedure, the effect on the detainees was dramatic: "It fried them." *Id.* Another person reportedly familiar with the procedure said that it left the detainees "just completely out of it." *Id.*[6]

It is also becoming apparent that many of those held at Guantanamo have no connection to terrorism. The *Financial Times* recently quoted Brigadier General Martin Lucenti, acting commander of the military task force that runs the detention center at Guantanamo Bay, as stating: "Of the 550 [detainees] that we have, I would say most of them, the majority of them, will either be released or transferred to their own countries. . . . Most of these guys weren't fighting. They were running."[7] The government has sought to downplay General Lucenti's state-

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[6] Details of the cruel and degrading conditions suffered by the detainees at Guantanamo are set out at length in a statement by several recently released British detainees. *See* Shafiq Rasul, Asif Iqbal & Rhuhel Ahmed, *Composite Statement: Detention in Afghanistan and Guantanamo Bay*, at 300 (available at http://www.ccr-ny.org/v2/reports/docs/GitmocompositestatementFINAL23july04.pdf). This past week, the Department of Defense informed the Associated Press that a number of interrogators at Guantanamo have been demoted or reprimanded after investigations into accusations of abuse at the facility. *See Report Details Guantanamo Abuses*, AP, Nov. 4, 2004.

[7] *See* Mark Huband, *US Officer Predicts Guantanamo Releases*, Financial Times, Oct. 4, 2004, *available at* http://news.ft.com/cms/s/192851d2-163b-11d9-b835-00000e2511c8.html; John Mintz, *Most at Guantanamo to Be Freed or Sent Home, Officer Says*, Wash. Post, Oct. 6, 2004, at A16.

ment, but his statement is consistent with other recently quoted remarks by an active duty intelligence officer at Guantanamo, who reportedly stated that "the United States is holding dozens of prisoners at the U.S. Navy Base at Guantanamo who have no meaningful connection to al-Qaida or the Taliban and is denying them access to legal representation. . . . There are a large number of people at Guantanamo who shouldn't be there."[8] These statements are consistent with statements made by DOD officials since petitioners were first detained at Guantanamo.[9]

Despite the length of their imprisonment, and the number and methods of interrogations to which they have been subjected, virtually none of the petitioners in the above-captioned cases has been charged with any crime.[10]

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[8] Samara Kalk Derby, *How Expert Gets Detainees to Talk*, Capital Times & Wisc. State J., 1A (Aug. 16, 2004).

[9] *See* Tim Golden and Don Van Natta, Jr., *U.S. Said to Overstate Value of Guantanamo Detainees*, N.Y. Times, June 21, 2004, at A1 (stating that "[o]fficials of the Department of Defense now acknowledge that the military's initial screening of the prisoners for possible shipment to Guantanamo was flawed"); *id.* (citing 2002 report by "senior CIA analyst" concluding that "a substantial number of the detainees appeared to be either low-level militants . . . or simply innocents in the wrong place at the wrong time"); *Frontline: Son of Al Qaeda*, PBS, Apr. 11, 2004, transcript available at http://www.pbs.org/wgbh/pages/frontline/shows/khadr/interviews/khadr.html (quoting CIA source who had spent a year undercover at Guantanamo as estimating that "only like 10 percent of the people that are really dangerous, that should be there and the rest are people that don't have anything to do with it, don't even, don't even understand what they're doing here"). The government's assertion that holding the Guantanamo detainees enables the military to gather vital intelligence has been called into question by senior military officials, including Steve Rodriguez, the Head of Interrogations at Guantanamo. *See Peter Jennings Reporting: Guantanamo*, ABC, June 25, 2004 (quoting Mr. Rodriguez as stating that only "20, 30, 40, maybe even 50 [of the Guantanamo detainees] are providing critical information today"); *id.* (quoting Lt. Col. Anthony Christino as stating that there is a continuing intelligence value . . . for [s]omewhere around a few dozen, a score at the most" of the Guantanamo detainees). *See* http:// abcnews.go.com/2020/2020_guantanamo_040625_1.html.

[10] The government has filed charges against Petioner David Hicks, who separately has challenged the charges against him and the military tribunal proceedings with respect to those charges. Because the government contends that Hicks' status as a purported enemy combatant independently justifies his continued detention, Hicks joins Petitioners here in challenging the CSRT process.

ARGUMENT

I. THE PRESIDENT'S EXERCISE OF HIS WAR POWERS IS SUBJECT TO JUDICIAL REVIEW.

The Supreme Court has stated that "[w]hat are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions." *Sterling v. Constantin*, 287 U.S. 378, 401 (1932). Thus, although the Executive Branch has repeatedly argued that the exercise of the war power is subject to little or no judicial scrutiny, the Supreme Court has repeatedly rejected those arguments, holding that the Executive Branch does not have unreviewable authority to punish desertion by soldiers on the field of battle, *Trop v. Dulles*, 356 U.S. 86 (1958); to maintain steel production during wartime, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); to punish acts of sabotage by enemy aliens, *Ex parte Quirin*, 317 U.S. 1 (1942); to seize enemy property, *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814); to annex territory seized by military conquest, *Fleming v. Page*, 50 U.S. (9 How.) 603 (1850); to intern resident aliens and U.S. citizens, *Korematsu v. United States*, 323 U.S. 214 (1944); to exercise court martial authority over former soldiers, *Toth v. Quarles*, 350 U.S. 11 (1955); to impose punishment on military dependants abroad, *Reid v. Covert*, 354 U.S. 1 (1957); or to declare martial law and try civilians, *Ex parte Milligan,* 71 U.S. 2 (1866).

The principle of judicial review has special importance in wartime: "It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile." *United States v. Robel*, 389 U.S. 258, 264 (1967). Judicial review of Executive Branch action in wartime is crucial because "the war power does not remove constitutional limitations safeguarding essential liberties." *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934).

The government argues that the President's war powers permit him to detain "enemy combatants," to determine the scope of this newly minted category, to devise procedures to determining whether an individual falls within that category, and to apply those procedures, free of judicial constraints. *See* Gov't Mem. at 6-19. The government's position is inconsistent with the Supreme Court's recognition of the right of the Guantanamo detainees to judicial review of their detentions. *See Rasul*, 124 S. Ct. at 2696.

The government offers old wine in new bottles. In *Rasul*, the government argued that "[e]xercising jurisdiction over habeas actions filed on behalf of the Guantanamo detainees would directly interfere with the Executive conduct of the military campaign against al Qaeda and its supporters." *See* Gov't Mem. at 42. Here, the government argues that judicial review of Petitioners' claims would constitute "an unprecedented judicial intervention into the conduct of war operations." Gov't Mem. 1. Exercising jurisdiction over a detainee's habeas action would be pointless if a court had no authority to order the end of an unlawful detention. The Supreme Court cannot have intended that result.

II. THE DETAINEES HAVE STATED CLAIMS ON WHICH HABEAS RELIEF CAN BE GRANTED.

Contrary to the government's contention, Petitioners have stated a claim on which habeas relief can be granted. The Supreme Court has already determined that the Guantanamo detainees have stated a claim. Pertinent case law, moreover, confirms that the detainees have due process rights under the Constitution that they may vindicate through habeas actions. The detainees also have rights under the Geneva Conventions and other international law that may be vindicated in a habeas action. Finally, the detainees have common law rights that inhere in the

habeas statute and do not depend upon the cognizability of rights otherwise provided by the Constitution, laws or treaties of the United States.

A. The Supreme Court Has Already Ruled That The Guantanamo Detainees Have Stated A Claim On Which Habeas Relief Can Be Granted

The government argues that although the Supreme Court held in *Rasul* that the federal courts have jurisdiction to consider the detainees' claims, the detainees have no cognizable rights under the Constitution, laws or treaties of the United States and their claims must therefore be dismissed. The Supreme Court, however, stated in *Rasul*:

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

Rasul, 124 S. Ct. at 2698 n.15 (quoting 28 U.S.C. § 2241(c)(3) (emphasis added)).

In that sentence, the Supreme Court made clear that the Guantanamo detainees have stated a claim for relief that must be considered on the merits. If the detainees' allegations are true − if they can demonstrate in a factual hearing in this Court that they have not engaged in combat or terrorism against the United States, that they have been held by the Executive in long-term detention in Guantanamo for more than two years, and that they had no access to counsel and have been charged with no wrongdoing – then they will be entitled to the writ.

The government has argued in one of the detainee cases that footnote 15 of *Rasul* is nothing but "cryptic dicta." Response to Complaint, *Al Odah v. United States*, No. 02-CV-0828, slip. op. at 16 n.6. This Court may not disregard footnote 15 on this basis. First, even if the footnote were dicta, "[c]arefully considered language of the Supreme Court, even if techni-

cally dictum, generally must be treated as authoritative." *United States v. Oakar,* 111 F.3d 146, 153 (D.C. Cir. 1997) (internal quotation omitted)). But footnote 15 is not dicta. The government had argued in *Rasul* that the federal courts had no jurisdiction because the Guantanamo detainees have no cognizable rights under the Constitution or laws or treaties of the United States. The Supreme Court's statement that the detainees' allegations "unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States,'" was a necessary response to that argument.

The government argues that the question of habeas jurisdiction decided by *Rasul* is distinct from the question of whether the detainees have stated a cognizable claim on habeas. To take just one example, however, 28 U.S.C. § 2241(c)(1) − the common law prong of the habeas statute − requires the Court to grant the writ to any person "in custody under or by color of the authority of the United States," unless the government can establish that the detention accords with common law principles of due process.[11] Nothing more is need to state a claim in habeas.

Because the Supreme Court has ruled that this Court has jurisdiction over the Guantanamo detainees's habeas actions, and because the Supreme Court did not intend to create a remedy without a right, the government's motion must be denied.

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[11] *See Flores-Miramontes v. INS*, 212 F.3d 1133, 1142 (9th Cir. 2000) (noting that section 2241 codifies the original habeas statute and that "relief for people detained by executive officials of the federal government, including aliens, has been guaranteed by statute since 1789, and in fact was available at common law when the Constitution was enacted"); *see also United States v. Villato*, 2 U.S. 370 (C.C.D. Pa. 1797) (releasing alien wrongly accused of treason); *Somerset v. Stewart*, 98 Eng. Rep. 499 (K.B. 1772) (releasing slave on habeas corpus at common law).

B. The Fact That The Detainees Are Imprisoned At Guantanamo Does Not Preclude Them From Asserting Rights That May Be Vindicated On Habeas.

The government contends that, because it has chosen to imprison the petitioners at Guantanamo, they have no rights under the Constitution, laws or treaties of the United States and therefore cannot pursue habeas or other claims in the U.S. courts. Relying on *Johnson v. Eisentrager* and its progeny, the government argues that constitutional rights may be asserted only by aliens held in territories over which the United States is sovereign. Gov't Mem. at 19–30. Because Cuba retains "ultimate" and technical sovereignty over Guantanamo under a 1903 lease agreement, the government contends that the aliens it chooses to hold there can assert no constitutional or other rights in the federal courts. These assertions are at odds with the holding of *Rasul* and Justice Kennedy's concurrence in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277–78 (1990) and the cases cited therein – all of which were relied upon by the *Rasul* court in support of its holding in footnote 15.

Our system tolerates the government's exercises of power over individuals because that power is subject to enforceable constitutional limitations. *See* Louis Henkin, *Rights: American and Human*, 79 Colum. L. Rev. 405, 408–09 (1979). In *Reid v. Covert*, 354 U.S. 1 (1957), and *Kinsella v. United States ex rel. Singelton*, 361 U.S. 234 (1960), the Court considered the applicability of the Bill of Rights in light of this balance, and held that the government must provide the safeguards of Article III and the Fifth and Sixth Amendments before inflicting punishment on civilian citizens accompanying United States armed forces abroad. Although *Reid v. Covert* involved citizens, it cast aside the earlier assumption that constitutional rights were somehow territorially restricted. *See*, *e.g.*, *In re Ross*, 140 U.S. 453, 464 (1891). After *Reid*, lower courts extended constitutional analysis to extraterritorial law enforcement actions

against noncitizens. *See*, *e.g.*, *United States v. Cortes*, 588 F.2d 106, 110 (5th Cir. 1975); *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974).

When the Supreme Court addressed this issue in *Verdugo*, the Chief Justice's opinion emphasized the Fourth Amendment's textual reference to a right "of the people," 494 U.S. at 265, and the alien's lack of sufficient "connections" to the United States. 494 U.S. at 265, 271, 273–75. But Justice Kennedy, the indispensable fifth member of the *Verdugo* majority, relied on a different rationale − that the extraterritorial application of the Bill of Rights should be determined by a contextual due process analysis to decide whether adherence to a particular constitutional guarantee would be "impractical and anomalous." 494 U.S. at 277–78 (Kennedy, J., concurring). Applying that analysis, Justice Kennedy found that the imposition of Fourth Amendment warrant procedures on searches by U.S. agents in foreign countries would be impracticable, because conceptions of privacy may prevail in other countries. *Id.* at 278. Application of the Fourth Amendment, Justice Kennedy stated, would be impracticable due to the "absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials." *Id*.

These factors limiting the application of constitutional guarantees abroad are absent here. Guantanamo Bay is under the exclusive jurisdiction and control of the United States, and military officers and judges at Guantanamo stand ready to execute any command of this Court. The Chief Justice's opinion in *Verdugo* explicitly bracketed the question presented now: "[T]he extent to which respondent might claim the protection of the Fourth Amendment if the duration of his stay in the United States were to be prolonged – by a prison sentence, for example – we need not decide." *Id.* at 271-72.

"When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977) (internal quotation and citation omitted). Although Justice Kennedy concurred in the majority opinion, he also wrote separately to clarify his understanding of its meaning. *See Verdugo*, 494 U.S. at 275, 278 (Kennedy, J., concurring). Because it provides the narrowest ground for the result reached by a majority of the Court, Justice Kennedy's concurrence controls.[12]

The Supreme Court has never suggested that U.S. courts can deny nonresident alien plaintiffs fair trials because of their location outside of the United States. As long as jurisdiction over the defendant has been proper, our courts have undeniably stood open to suits by nonresident alien plaintiffs. *See, e.g.*, *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813); *Taylor v. Carpenter*, 23 F. Cases 742, 744 (C.C.D. Mass. 1844) (No. 13,784) (Story, Cir. J.) ("[T]hey are entitled, being alien friends, to the same protection of their rights as citi-

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[12] In *Catrett v. Johns-Manville Sales Corp.*, 826 F.2d 33 (D.C. Cir. 1987), the court rejected an argument that a concurring opinion in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), by Justice White, who had also joined the majority opinion, constituted the actual holding of the Supreme Court. *Johns-Manville Sales*, 826 F.2d at 32 n.1. In that case, however, the narrower view ascribed to Justice White was not apparent from his concurrence; rather, the interpretation of Justice White's concurrence came from Justice Brennan's dissent. *See id.* *Verdugo* requires no such game of telephone. Justice Kennedy's concurrence explicitly states that "the Due Process Clause of the Fifth Amendment protects the defendant." *Verdugo*, 494 U.S. at 278 (Kennedy, J., concurring). The weight of Justice Kennedy's concurrence in *Verdugo* is confirmed by the fact that the majority in *Rasul* cited the concurrence (albeit as a *cf.*) and the "cases cited therein."

zens."). If the Due Process Clause does not apply to the Guantanamo detainees, the government could starve them, beat them, and kill them, without any meaningful accountability.[13]

The government's assertion that *Rasul v. Bush* did not alter the force of *Eisentrager*, *see* Gov't Mem. at 20, is incorrect. In *Rasul*, the Court stated that "nothing in *Eisentrager* or in any of our other cases categorically excludes aliens detained in military custody outside the United States from the 'privilege of litigation' in U.S. courts," and the Court described military custody as "immaterial to the question of the District Court's jurisdiction over [the petitioners] nonhabeas statutory claims." 124 S. Ct. at 2698–99. The Court stated that "[t]he courts of the United States have been traditionally open to nonresident aliens," *id*. at 2698, and rejected the dissent's reliance on *Eisentrager* to support the proposition that presence in the United States is a prerequisite to judicial protection. *See* 124 S. Ct. at 2710 n.6 (Scalia, J., dissenting) (quoting *Eisentrager*, 339 U.S. at 777–78).

Cases from this Circuit suggesting that the Constitution does not apply extraterritorially are distinguishable on their facts and do not survive the Court's decision in *Rasul*. Some cases have looked to whether an individual had "substantial connections" with the United States;

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[13] The *Insular Cases*, discussed by Justice Kennedy in his concurrence in *Verdugo*, hold that "fundamental" constitutional rights extend by their own force to "unincorporated" territories. *See, e.g.*, *Downes v. Bidwell*, 182 U.S. 244 (1901). The *Insular Cases* thus guarantee fundamental constitution rights in territory where the United States possesses governing authority; it is the exercise of exclusive jurisdiction and control, rather than nominal sovereignty, that obligates the United States to recognize fundamental rights. *See, e.g., Examining Bd. of Eng'rs, Architects, & Surveyors v. Flores de Otero*, 426 U.S. 572 (1976) (holding under the *Insular Cases* that the fundamental constitutional right to equal protection applies to citizens and aliens alike within the unincorporated territory of Puerto Rico); *Canal Zone v. Scott*, 502 F.2d 566, 568 (5th Cir. 1974) ("[N]on-citizens and citizens of the United States resident in such territories are treated alike, since it is the territorial nature of the Canal Zone and not the citizenship of the defendant that is dispositive.").[13] *Rasul*'s reliance on these cases explains its holding that those in unincorporated territories like Guantanamo have rights.

unlike the Guantanamo detainees, the petitioners in those cases had a genuine opportunity to form such connections.[14] No case by the D.C. Circuit approves the denial of constitutional protections based on a person's lack of "substantial connections" with the U.S. absent such an opportunity. Such approval would be particularly inappropriate where the government exercises total dominion over a person in what "is in every practical respect a United States territory." *Rasul*, 124 S. Ct. at 2700 (Kennedy, J., concurring).

In other D.C. Circuit cases, the facts showed that it was foreign authority, exercised in a wholly foreign jurisdiction, that worked the claimed constitutional deprivation. *See Harbury v. Deutch*, 233 F.3d 596, 599 (D.C. Cir. 2000), *rev'd on other grounds by Christopher v. Harbury*, 536 U.S. 403 (2002); *Holmes v. Laird*, 459 F.2d 1211, 1214 (D.C. Cir. 1972). In the instant case, Petitioners invoke the Constitution to defend against authority exercised by the United States in a territory where the United States has absolute control. *Rasul*, 124 S. Ct. at 2700.

The Due Process Clause is phrased in universal terms, protecting any "person" rather than "citizens" or members of "the people," as the Fourth Amendment does. The Clause contains no language suggesting any limitations as to place. Nonresident aliens are unquestionably "persons" capable of having due process rights. The Supreme Court has long held that aliens

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[14] *See*, *e.g.*, *Jifry v. FAA*, 370 F.3d 1174, 1183 (D.C. Cir. 2004) (citing *32 County* and *People's Mojahedin* for proposition that non-resident aliens needed "substantial connections" to U.S. to be protected under Due Process Clause, but declining to address whether Saudi pilots met that possible requirement); *32 County Sovereignty Committee v. Dep't of State*, 292 F.3d 797, 799 (D.C. Cir. 2002) (Irish political organization that could have controlled U.S. property but did not could not assert constitutional rights); *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999) (deciding that Constitution did not apply because no financial institutions held any of the petitioners' property).

outside the United States are entitled to due process when they are sued as civil defendants in United States courts. *See Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987). And the Court has emphasized that this right "represents a restriction on judicial power not as a matter of sovereignty, but as a matter of judicial liberty." *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). The Government's claim that the Guantanamo detainees have no rights that may be vindicated on habeas must therefore be rejected.[15]

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[15] Respondents refer, in a single short footnote at the end of their arguments on dismissal of Petitioners' constitutional claims, to jurisdictional claims made by petitioner O.K. *See* Gov't Mem. at 53 n.64. None of Respondents' arguments there, however, address constitutional claims. In fact, Respondents' first sentence admits that these claims are jurisdictional, not constitutional. Respondents later mistakenly assert that "the UCMJ does not require any minimum age to exert military jurisdiction over an enemy combatant." Gov't Mem. at 53, n.64. On the contrary, 10 U.S.C. §802(c) not only governs any military tribunal, but also limits by age and "mental competency" all military jurisdiction over "a person serving with an armed force" – "notwithstanding any other provision of law." The minimum age limitation set out in § 802(c)(2) does not reach anyone below the age of 17. Section 802(b) also limits jurisdiction to persons who have "the capacity to understand the significance of enlisting in the armed forces." Section 821 is not an affirmative grant of jurisdiction to military commissions or other tribunals, but only a statement that the UCMJ does not deprive such tribunals of jurisdiction if that jurisdiction is grounded elsewhere. O.K. is asserted to have been serving with an armed force, *see* Respondents' Factual Return for O.K., Combatant Status Review Board, Exhibit R-1, ¶ 3, and this jurisdictional failure thus applies to any designation of O.K. as an enemy combatant or as a potential defendant before a military commission.

O.K. argues that the Military lacks any jurisdiction over him by virtue of his age, only fifteen, at the time of the acts which gave rise to his designation as an alleged enemy combatant. O.K. Amended Petition, at ¶¶ 13, 43–47. O.K.'s current age is therefore irrelevant, contrary to the Respondents' assertions in footnote 64. The jurisdictional claim is obviously beyond one of constitutional dimension, and would, if it prevails, deprive the Military of all authority over O.K. by virtue of lack of personal jurisdiction. Fed. R. Civ. P. 12(b)(2); *see In re Herman*, 56 F. Supp. 733 (N.D. Tex. 1944) (habeas corpus lies for imprisonment for refusal to obey an order when the detainee was never properly inducted into the armed services).

In any event, Respondents have chosen to relegate this important jurisdictional issue to a single short footnote dealing with constitutional challenges to all petitioners. This important jurisdictional question is not one that can be decided (or waived) on such a basis, and requires full briefing and argument for its resolution. Petitioner O.K. reserves the right to full briefing and argument on the merits of this important issue.

C. The Guantanamo Detainees Have Rights Under International Law That May Be Vindicated On Habeas.

Petitioners challenge their detention under the habeas statute not only because it violates the Constitution but also because it violates international law human rights and humanitarian law against unlawful detention. The prohibition is recognized under both customary international law and treaties ratified by the United States. The Government, however, asserts that Petitioners have "fail[ed] to state a claim" with respect to international law and that "none of their claims is valid." Gov't Mem. at 67. The Government's position is simply wrong.

1. The Geneva Conventions Are Self-Executing And Enforceable Via Habeas.

Courts may enforce duly ratified treaties that are "self-executing." A self-executing treaty is one that "operates of itself without the aid of any legislative provision." *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829), *overruled in part on other grounds*, *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833). Such a treaty "expressly or impliedly" permits private actions by individuals to enforce its provisions. *Head Money Cases*, 112 U.S. 580, 598-99 (1884); *Comm. of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929 (D.C. Cir. 1988); *Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976); *Z&F Assets Realization Corp. v. Hull*, 114 F.2d 464, 470-71 (D.C. Cir. 1940). A treaty may "contain both self-executing and non-self-executing provisions." *Lidas, Inc. v. United States*, 238 F.3d 1076, 1080 (9th Cir. 2001).

To determine whether a treaty is self-executing, a court typically looks to "the intent of the signatory parties as manifested by the language of the instrument, and, if the language is uncertain, it must then look to the circumstances surrounding its execution." *Diggs*, 555 F.2d

at 851. The "critical" factors are "the purposes of the treaty and the objectives of its creators." *Islamic Republic of Iran v. Boeing Co.*, 771 F.2d 1279, 1283 (9th Cir. 1985).

The relevant provisions of the Geneva Conventions do not state whether they require implementing legislation. Thus, a court must look to the intent of the drafters, the intent of the Senate in ratifying the Conventions, and the purposes and objectives of the Conventions.

Evidence that the drafters intended the Conventions to be self-executing is provided by article 129 of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("Geneva III" or "Third Convention"). Article 129 is the only provision that speaks to domestic legislation, *see United States v. Noriega*, 808 F. Supp. 791, 798 n.8 (S.D. Fla. 1992). It states that signatories should enact any legislation necessary to provide any *additional* penal sanctions for persons guilty of specified "grave breaches" of the Convention. The Convention, however, does not require legislation implementing the underlying prohibitions or sanctions. If such legislative implementation were necessary for *both* the underlying and the additional sanctions, the Convention would have indicated that necessity either for both or for none.

Consistent with the requirement of article 129, Congress enacted the War Crimes Act, 18 U.S.C. § 2441, imposing criminal liability on any U.S. national committing a "grave breach" of the Conventions. Like the drafters, Congress saw no need to enact legislation providing for enforcement of the underlying prohibitions or sanctions.

The ratification history establishes that the Senate understood the Conventions to be enforceable in domestic courts without implementing legislation. The Foreign Relations Committee stated that the four Conventions are almost entirely self-executing:

> 15. *Extent of Implementing Legislation Required*: From information furnished to the committee it appears that very little in the way of new legislative enactments will be required to give effect to the provisions contained in the four conventions.

Geneva Conventions for the Protection of War Victims: Report of the Senate Comm. on Foreign Relations, S. Rep. No. 9-84, at 30-31 (1955). The Committee identified only four provisions that required implementing legislation, none pertaining to the protections of individuals at issue here. *Id*. at 30-31.[16]

For fifty years, the Executive Branch has implemented the Geneva Conventions without questioning the need for additional legislation. Regulations jointly promulgated by the Army, Navy, Air Force, and Marine Corps have consistently treated the Conventions as binding. *See* Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees § 1-5 (a)(2) (1997) ("AR 190-8"); Dep't of the Army, Field Manual no. 27-10, The Law of Land Warfare, ch. 3, § I ¶ 71 (1956) ("FM27-10") (adopting article 5 verbatim).[17]

Finally, the Conventions were written "first and foremost to protect individuals, and not to serve state interests." *Commentary IV: Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 20 (Jean S. Pictet ed., 1958). For example, in Geneva IV,

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[16] The four provisions concerned (1) a restriction on commercial use of the Red Cross emblem; (2) the provision of workers' compensation rights to injured civilian detainees; (3) exemption of relief shipments from customs; and (4) a requirement that POW camps be identified with the letters PW, PG, or IC.

[17] Army Regulation 190-8 specifically provides that all persons taken into custody by U.S. forces will be provided with the protections of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War until some other legal status is determined by a competent tribunal. *See* §1-6.a–b.

- Article 5 affords "individual . . . rights and privileges under the present Convention," "rights of communication," and "rights of fair and regular trial."

- Article 72 affords the "right to present evidence," the "right to be assisted by a qualified advocate or counsel of their own choice" and the "right at any time to object."

- Article 73 provides that "[a] convicted person shall have the right of appeal."

- Article 78 provides that persons interned for security reasons shall have "the right of appeal."

- Article 80 refers to "rights" of internees.

- Article 147 provides "rights of fair and regular trial."

Likewise, in Geneva III,

- Article 5 provides that "persons shall enjoy the protection of [the Third Convention]" whenever their status as a POW is in doubt.

- Article 7 provides that "[p]risoners of war may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention."

- Article 106 provides that "[e]very prisoner of war shall have . . . the right of appeal."

- Article 129 provides that "[i]n all circumstances, the accused persons shall benefit by safeguards of proper trial and defense".

As one district court has stated in reference to Geneva III,

> [I]t is inconsistent with both the language and spirit of the treaty and with our professed support of its purpose to find that the rights established therein cannot be enforced by the individual POW in a court of law. After all, the ultimate goal of Geneva III is to ensure humane treatment of POWs – not to create some amorphous, unenforceable code of honor among the signatory nations. 'It must not be forgotten that the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests.' [Citing 3 International Committee of the Red Cross, *Commentary to Geneva* (J. Pictet, ed., 1960), at 23.].

Noriega, 808 F. Supp. at 799; *see also United States v. Lindh*, 212 F. Supp. 2d 541, 553-54 (E.D. Va. 2002); Restatement (Third) of the Foreign Relations Law of the United States § 111 (1987), Rpt.'s Note 5 (noting that "obligations not to act, or to act only subject to limitations, are generally self-executing").

Although the Conventions include provisions allowing nations to resolve their differences in interpreting the Conventions by diplomatic means, these provisions do not imply that the Conventions do not allow individuals to assert their protections. Otherwise − even assuming that minor allied and neutral nations could influence a powerful or isolated detaining nation − individuals captured fighting for a regime that no longer exists (such as the foreign nationals fighting on behalf of the former government of Afghanistan) would be left without a remedy.

Indeed, if the Geneva Conventions were entirely non-self-executing, certain provisions would be nonsensical. For example, Geneva III, art. 7 states that "[p]risoners of war may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention." The logic in preventing POWs from waiving rights that might belong only to their nation and that they cannot personally enforce is unclear, at best.

Several courts have recognized that the provisions of the Conventions relating to individual rights are self-executing and provide a private right of action. As one district court has stated, "[Geneva III,] insofar as it is pertinent here, is a self-executing treaty to which the United States is a signatory. It follows from this that the [Geneva III] provisions in issue here are a part of American law and thus binding in federal courts under the Supremacy Clause." *Lindh*, 212 F. Supp. 2d at 553–54 (footnotes omitted); *see also Noriega*, 808 F. Supp. at 797. Another district court has held that the Geneva Conventions "under the Supremacy Clause ha[ve] the force of domestic law." *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 590 (S.D.N.Y.

2002), *remanded on other grounds*, 352 F.3d 695 (2d Cir. 2003), *rev'd on other grounds*, *Hamdi*, 124 S. Ct. 2633, 2711 (2004).

Although the Fourth Circuit in *Hamdi v. Rumsfeld* stated the view that the Conventions are not self-executing, 316 F.3d 450, 468–69 (4th Cir. 2003), its decision was vacated, 124 S. Ct. 2633 (2004) (like the decision of this Circuit in *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *see Rasul v. Bush*, 124 S. Ct. 2686 (2004)). Moreover, contrary to the law of this Circuit, the Fourth Circuit declined to consider legislative intent or recognize that a treaty can provide an implied private right of action. *See Diggs*, 555 F.2d at 851.[18] The court's conclusion that the Geneva Conventions are not self-executing has been much criticized.[19]

Because the Geneva Conventions are self-executing, the detainees' rights under the Convention are cognizable in a habeas action.

2. Petitioners' Claims Under Customary International Law May Be Vindicated On Habeas.

Petitioners allege that their detention constitutes prolonged arbitrary detention in violation of customary international law, a claim distinct from those arising under the treaties

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[18] Judge Bork expressed a view similar to the Fourth Circuit's in his concurring opinion in *Tel-Oren v. Libyan Arab Republi*c, 726 F.2d 774, 809 (D.C. Cir. 1984) (Bork, J., concurring). Like the Fourth Circuit, Judge Bork failed to consider the pertinent legislative history or recognize that treaties can contain both self-executing and non-self-executing provisions. The Supreme Court rejected his reasoning in *Sosa v. Alvarez-Machain,* 124 S. Ct. 2739 (2004), in holding that the law of nations could be enforced under the Alien Tort Claims Act.

[19] *See*, *e.g.*, Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained without Trial*, 44 Harv. Int'l L.J. 503, 515 (2003) (*Hamdi* held that Geneva IV "is entirely non-self-executing, but this conclusion is incorrect."); Michael P. Van Alstine, *Federal Common Law in an Age of Treaties*, 89 Cornell L. Rev. 892, 919 (2004) (*Hamdi* "erroneously defined self-executing treaties to include only those that create affirmative private rights of action.").

discussed above. Customary international law is independent of individual treaties, though it is informed in part by both treaties and other instruments of international law and practice.

Petitioners' customary international law claims are cognizable on habeas because customary international law forms part of the "laws . . . of the United States," 28 U.S.C. § 2241(c)(3), the violation of which may be vindicated on habeas. "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending on it are duly presented for their determination." *The Paquete Habana*, 175 U.S. 677, 700 (1900); *see also Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2764 (2004).

The law of nations on this subject may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law. *United States v. Smith*, 18 U.S. (5 Wheat) 153, 160–61 (1820); *see also The Paquete Habana*, 175 U.S. at 700; *Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 7 (D.D.C. 1998) (customary international law formed by the "general assent of civilized nations," quoting *Filartiga v. Pena Irala*, 630 F.2d 876, 880 (2d Cir. 1980)). Treaties are part of the supreme law of the land, U.S. Const. art. VI, § 2, and the right of an individual to be free from prolonged arbitrary detention imposed by a governmental authority is one of the most fundamental rights recognized under customary international law. This protection is guaranteed under all international conventions that contain a general enumeration of rights, including the ICCPR and the American Convention on Human Rights ("ACHR").[20] The

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[20] The International Covenant for Civil and Political Rights, which the United States ratified in 1992 and which 148 other nations have ratified, mandates that "No one shall be subjected to arbitrary arrest or detention" and that "Anyone who is arrested shall be informed, at the time of (continued…)

Universal Declaration of Human Rights, which is recognized as an authoritative statement of customary international law, contains the obligation to provide detainees with a "fair and public hearing by an independent and impartial tribunal." Dec. 10, 1948, arts. 9–10, G.A. Res. 217A, 3 U.N. GAOR, U.N. Doc. A/810.

The Third Restatement thus concludes that, as a matter of customary international law, a state violates international law if, as a matter of policy, it practices, encourages, or condones "prolonged arbitrary detention." Restatement (Third) of Foreign Relations Law of the United States, at 702 n.6 (1987). Citing the Third Restatement, the Supreme Court in *Sosa* recognized last term that, although the "brief detention" in that case did not rise to the level of a violation of customary international law, policies of prolonged arbitrary detention could constitute violations of customary international law. *Sosa*, 124 S. Ct. at 2768–69. That determining which policies "cross that line" may be difficult only weighs in favor of preserving Petitioners' right to bring international law claims until they have had a full and fair opportunity to challenge in court the purported justification for, and circumstances surrounding, their detention. *Id.* at 2769. Petitioners' allegations − including, for example, that they have been held virtually *incommunicado* for nearly three years − stand in sharp contrast to the allegations in *Sosa*, where

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arrest, of the reasons for his arrest and shall be promptly informed of any charges against him." ICCPR, Dec. 19, 1966, art. 9.1 & 9.2, 999 U.N.T.S. 171. 6 I.L.M. 368. Articles 3 and 4 of the American Convention on Human Rights guarantees that nobody will be imprisoned arbitrarily and that anyone who has been detained will be "promptly notified" of the charges against him. ACHR, Nov. 22, 1969. The European Convention for the Protection of Human Rights and Fundamental Freedoms provides similar rights both against prolonged arbitrary detentions and for a habeas-like proceedings. ECPHRFF, Nov. 4, 1950, art. 5, 213 U.N.T.S. 221. *See also* American Declaration of the Rights and Duties of Man, May 2, 1948, arts. XXV, XXVI, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992); African Charter on Human and People's Rights, June 27, 1981, arts. 6-7, 21 I.L.M. 58; and African Commission Decisions in Communication Nos. 13/94, 139/94, 154/96, 161/97, 69/92.

the plaintiff was detained illegally for "less than a day" and was then transferred to the custody of lawful authorities and promptly arraigned. *Id.* If the allegations in the Petitions are not sufficient to state a claim under customary international law, it is difficult to imagine what allegations could ever survive a motion to dismiss.[21]

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[21] Respondents relegate O.K.'s treaty claims to a single paragraph of a single footnote. *See* Gov't Mem. at 72 n.81. There, they assert that no privately enforceable rights are created by either the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict ("Optional Protocol on Child Soldiers") or the International Labour Organization's Convention 182, Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour ("ILO Convention 182"). *Id.*

Both the Optional Protocol on Child Soldiers and ILO Convention 182 are self-executing. Both treaties were recently adopted with strong assertions during Senate consideration that no implementing legislation would be necessary for their immediate domestic application. In his message of transmittal of the Optional Protocol to the Senate Foreign Relations Committee, President Clinton concluded that "[n]o implementing legislation would be required with respect to U.S. ratification of the Children in Armed Conflict Protocol." *Message from the President of the United States Transmitting Two Optional Protocols to the Convention on the Rights of the Child*, Treaty Doc. 106-37, July 25, 2000, at VI. The Senate hearings on the treaty echoed this conclusion: "No changes in U.S. law will be required to fulfill the obligations of the Protocol." *Report from the Senate Committee on Foreign Relations*, Exec. Rpt. 107-4, June 12, 2002, at 4. Similarly, Labor Secretary Alexis Herman stated to the Senate Foreign Relations Committee in 1999 that "[r]atification of Convention 182 would not in any way require a change in current United States law and practice." *Labor Secretary Herman on Child Labor Abuses*, available at <http://usembassy-australia.state.gov/hyper/WF991021/epf405.htm>.

Further, no executory reservation was attached to either treaty. The Senate attached five understandings and three conditions to the Optional Protocol at the time of its ratification, none of which remotely dealt with self-execution. *Id.* at 10–13. Moreover, ILO 182 has no reservations at all. The Senate attached executory reservations to four other human rights treaties ratified since 1986: the International Convention on the Prevention and Punishment of the Crime of Genocide, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. By its failure to include executory reservations in either the Optional Protocol on Child Soldiers or ILO 182, the Senate showed its intent to make both treaties self-executing.

Respondents further argue that O.K.'s treaty claims are invalid because the content of the treaty does not deal with children as enemy combatants, because both the Optional Protocol and ILO Convention 182 address only compulsory recruitment by armed forces of persons younger than 18, and because "neither [treaty] precludes voluntary military service of persons under 18." Gov't Mem. at 72 n.81. These arguments are, of course, arguments as to interpretation, not ap-

(continued…)

D. The Guantanamo Detainees Have Common Law Rights That Inhere In The Habeas Statute

To obtain habeas relief, Petitioners are not required to establish that their imprisonment violates the Constitution or laws or treaties of the United States. Rather, because the detainees are clearly "in custody under or by color of the authority of the United States," 28 U.S.C. § 2241(c)(1), Petitioners may demand that the government show that it has deprived them of their liberty in accordance with the common law.

The original habeas provision found in section 2241(c)(1) extends the habeas writ to any prisoner held "in custody, under or by color of the authority of the United States." This provision, enacted in 1789 as Section 14 of the First Judiciary Act, is older than the Bill of Rights. As the Supreme Court emphasized in *Rasul*, the protection embodied in this provision is not only antecedent to the Bill of Rights, it is "antecedent to statute, . . . throwing its root deep into the genius of our common law." 124 S. Ct. at 2692.

The Judiciary Act of 1789 granted jurisdiction to federal courts to grant the "great constitutional privilege" of the Writ, and that "for the meaning of the term habeas corpus, resort may unquestionably be had to the common law." *See*, *e.g.*, *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807) (Marshall, C.J.). Where, as here, extra-judicial Executive detention goes to the "historic core" of habeas protection, the historic common law grounding of section 2241(c)(1) is particularly pertinent. *See Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2721 (2004) (explaining that

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plication of the two treaties in question, and thus anticipate more complete argument as to treaty scope, to which Petitioner O.K. reserves the right to full briefing. Finally, Respondent's gratuitous assertion that the issue is mooted by the fact that O.K. has turned 18 while in custody is absurd. *Id.* If a detainee's current age were controlling, rather than his age at the time of the alleged acts giving rise to his designation as an enemy combatant, Respondents would have only to hide a child until adulthood and then argue that his claims arising from conduct (or mistreatment) during childhood were somehow "cured" by that passage.

"physical custody imposed by the Executive" is "the traditional core of the Great Writ"); *Rasul*, 124 S. Ct. at 2692 ("at its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest") (internal citation omitted); *Hamdi*, 124 S. Ct. at 2650 (plurality) (same).

Habeas corpus has always provided a guarantee against arbitrary executive detention by assuring that the petitioner is afforded, at a bare minimum, notice of the charges against him and the opportunity to prove his innocence before a neutral decisionmaker – protections that are reflected in section 2241's "skeletal outline of procedures to be afforded a petitioner in federal habeas review." *Hamdi*, 124 S. Ct. at 2644 (plurality). And most importantly, habeas corpus has historically supplied a remedy to detention when there otherwise would have been none. *See, e.g.*, *Goldswain's Case*, 96 Eng. Rep. 711 (C.P. 1778) (habeas corpus challenging sailor's impressment into the navy); *R. v. White*, 20 Howell's State Trials 1376, 1377 (K.B. 1746) (granting habeas corpus relief to impressed seaman who had "no other remedy"); *see also* A.V. Dicey, *Introduction to the Study of the Law of the Constitution* 219 (8th ed. 1927) (habeas review of impressment of sailors by the Admiralty reflected a "very notorious instance of judicial authority in matters most nearly concerning the executive").

III. CSRT REVIEW DOES NOT OBVIATE THE NEED FOR HABEAS REVIEW

The government created the Combatant Status Review Tribunals ("CSRTs"), *see* Order Establishing Combatant Status Review Tribunal (July 7, 2004), in response to *Rasul* and to the plurality's ruling in *Hamdi* that a detainee's status as an "enemy combatant" must be determined by a "neutral decisionmaker," before whom the detainee is afforded a "fair opportunity" to rebut the government's allegations. *Hamdi*, 124 S. Ct. at 2648 (plurality). Both on its face and as applied to Petitioners, the CSRT process does not meet these due process require-

ments. Even the meager record before the Court shows that there are colorable claims that, as they are applied, the CRSTs do not and cannot satisfy due process requirements. At a minimum, Petitioners should be permitted to develop the facts that would enable the Court to decide their due process claims on the merits.

The Supreme Court in *Rasul* rejected the government's attempt to place its detention of Petitioners beyond judicial review on the basis of the deference due to the Executive in its conduct of military affairs. The government's more specific effort to place the CRST process and results beyond judicial review fares no better. Moreover, the government's prediction that "some evidence" will support the enemy-combatant classifications, *see* Gov't Mem. at 46–51, is irrelevant because that is not the pertinent test. In any event, the claim is premature on a motion to dismiss.

A. On Its Face, The CRST Process Does Not Satisfy Due Process And Provides No Basis To Dismiss The Petitions.

1. The CSRTs Provide No Meaningful Process.

The CSRTs do not satisfy even minimal standards of due process: They do not ensure a neutral decision-maker, they do not provide detainees with counsel, and they do not allow detainees the opportunity effectively to rebut the government's allegations.

(a) The CSRTs are not an impartial decision-maker.

"[D]ue process requires a 'neutral and detached judge in the first instance." *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust,* 508 U.S. 602, 617 (1993) (citation omitted). The actual function of the CSRTs, however, is not to determine whether a detainee is an "enemy combatant" but to formalize the government's prior designations of Petitioners as "enemy combatants." As the CSRT Order notes: "Each detainee subject to this Order has [already] been determined to be an enemy combatant through multiple levels of

review by officers of the Department of Defense." Officials of the Executive branch have also repeatedly stated in press briefings that the detainees are enemy combatants.[22]

The CSRT procedures assign to low-ranking military personnel the task of confirming the longstanding public determinations of their superiors. *See* CSRT Order ¶ e. To find that a detainee is *not* an enemy combatant would require these low-ranking officers to rule that Secretary Rumsfeld and President Bush are wrong − something known to have happened in only 1 out of 295 cases that CRSTs are known to have processed to date. Moreover, Secretary Rumsfeld, who has already determined that the detainees are "enemy combatants," has final review of the CSRT determinations. As the D.C. Circuit has stated in an analogous context, administrative hearings "must be attended, not only with every element of fairness but with the very appearance of complete fairness," and as a result, "[t]he test for disqualification . . . is whether a disinterested observer may conclude that the agency has in some measure adjudged the facts as well as the law in advance of hearing it." *Cinderella Career & Finishing Schools, Inc. v. FTC,* 425 F.2d 583, 591 (D.C. Cir. 1970).

(b) The Government's Definition of "Enemy Combatants" is Overbroad

The CSRT procedures employ an unreasonably expansive definition of "enemy combatants." In *Hamdi*, the government defined an "enemy combatant" as "an individual who

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[22] Gordon England, Secretary of the Navy, *Special Department of Defense Briefin*g (Sept. 8, 2004) (stating that "these people were all involved somewhere. . . . [T]hey were on the field of battle or in some situation that got them into this situation. So certainly there was some data at the time that these individuals were enemy combatants."), *available at* www.defenselink.mil/transcripts/2004/tr20040908-1284.html (visited Nov. 5, 2004); William J. Haynes II, General Counsel of the Department of Defense, *News Briefing on Military Commissions*, (Mar. 21, 2002) (Guantanamo detainees are "enemy combatants that we captured on the battlefield seeking to harm U.S. soldiers or allies" (emphasis added)), *available at* http://www.defenselink.mil/transcripts/2002/t03212002_t0321sd.html (visited Nov. 5, 2004).

. . . was part of or supporting forces hostile to the United States . . . and who engaged in an armed conflict against the United States." 124 S. Ct. at 2639 (internal quotations omitted). The CSRT Order, by contrast, seeks to define an "enemy combatant" to include any person who "was part of or supporting Taliban or al Qaeda forces, or associated forces . . . This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy forces." CSRT Order ¶ (a). Under the government's expanded definition, an individual might be deemed an enemy combatant without having "engaged in an armed conflict against the United States" combat and without having intended to "support[ ] hostilities in aid of enemy forces."[23] Anyone the government deems to have "supported" the Taliban or al Qaeda in any sense (including cooks, secretaries, taxi drivers, school teachers, and nurses), could be detained by the United States indefinitely as "enemy combatants." Indeed, the CSRTs have determined that a detainee's willingness to help pay a criminal defendant's legal bills was grounds for designating the detainee an enemy combatant.

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[23] The government's expanded definition of enemy combatants also conflicts with the Supreme Court's longstanding conclusion that due process does not allow imprisonment or detention based merely on membership in an anti-American organization, but instead requires proof that the individual actively supported the use of violence against the United States. *See, e.g., Scales v. United States,* 367 U.S. 203, 224–25 (1961); *Carlson v. Landon*, 342 U.S. 524, 541 (1952) (holding that detention of aliens could be justified only upon "evidence of membership [in the Communist Party] *plus personal activity* in supporting and extending the Party's philosophy concerning violence" (emphasis added)); *Yates v. United States*, 354 U.S. 298, 318 (1957) (reversing convictions based on "advocacy and teaching of forcible overthrow" of the United States government where those acts were "divorced from any effort to instigate action to that end.").

(c) Detainees Are Denied the Right to Counsel.

The *Hamdi* plurality stated that the petitioner in that case "unquestionably has the right to access to counsel in connection with the proceedings on remand," 124 S. Ct. at 2652 (plurality), and this ruling applies no less to the Guantanamo detainees. *See* Oct. 20, 2004 Order at 4, Al Odah, 02-CV-0828. Counsel for detainees, however, are altogether barred from participating in the CSRT processs.[24] The CSRT procedures instead establish that the military assigns a "personal representative" to assist the detainees. These so-called personal representatives are not lawyers and are not required to have any relevant training. Moreover, the personal representatives do not establish a confidential relationship with the detainees and, instead, may be forced to communicate to other military officials, including the CSRTs, information they glean from the detainees.[25] The exclusion of detainees' counsel from the CSRT process renders the process procedurally deficient.

(d) The CSRTs Do Not Afford Petitioners a "Fair Opportunity" to Rebut the Government's Allegations.

As designed, the CSRTs do not provide detainees with a meaningful opportunity to address even those allegations the government deigns to reveal to them. The deficiencies of the CSRT procedures with respect to this requirement include the following:

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[24] In arguing that detainees have no right to counsel, the government mistakenly relies principally on a Supreme Court case holding that prison inmates, already beneficiaries of the full protections of the Constitution at a prior criminal trial and sentencing, were not entitled to counsel at proceedings to revoke "good-time credits." *Wolff v. McDonnell*, 418 U.S. 539, 569–70 (1974). The government similarly relies on *Gagnon v. Scarpelli*, 411 U.S. 778, 787 (1978), which held that the right to counsel was not categorical at informal parole and probation revocation proceedings. These cases, dealing with what are essentially benefits granted by the state for good behavior after criminal conviction, have no applicability here.

[25] In *Johnson v. Eisentrager*, the defendants had access to counsel of their choice.

- The CSRTs may rely on evidence not revealed to a detainee to make its "enemy combatant" status determination. Indeed, *none* of the enemy-combatant status determinations reflected in the government's returns in these cases rests on unclassified information.[26] The CSRT Order also provides that the detainees may be barred from attending the hearings if, in the unreviewable judgment of military officials, their presence would "compromise national security." CSRT Order ¶ (g)(4).

- Petitioners may be detained indefinitely without any opportunity to confront the witnesses and evidence against them, let alone the "fair opportunity to rebut the government's factual assertions" required by the *Hamdi* plurality. *See Jenkins v. McKeithen,* 395 U.S. 411, 428 (1969) ("We have frequently emphasized that the right to confront and cross-examine witnesses is a fundamental aspect of procedural due process.").

- The CSRT procedures provide no meaningful opportunity for detainees to present evidence or call witnesses. The CSRT Order allows detainees to call witnesses only if the government concludes, in its discretion, that the witnesses are "reasonably available," and the detainees are not allowed to call U.S. military personnel if, in the government' judgment, doing so would "affect combat or support operations." Order § (g)(8). The CSRT Order provides no mechanism by which the detainees may gather any evidence except as allowed by the government.

- The CSRTs establish a presumption of in favor of detention. While the CSRT procedures purport to impose a "preponderance of the evidence" standard (without allowing the detainee access to essential evidence), also establish that "there shall be a rebuttable presumption in favor of the government's evidence." CSRT Order § (g)(12).

2. The Csrts Do Not Comport With *Hamdi.*

The government attempts to justify the CRSTs on the basis of the *Hamdi* plurality's acknowledgment of "a possibility" that military tribunals might be procedurally sufficient. With some procedural modifications, the government appears to have modeled the CRSTs on the Article 5 military tribunals outlined by Army Regulation 190-8, which the Court noted

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[26] The government's reliance on *People's Mojahedin Org. of Iran*, 327 F.3d 1238 (D.C. 2003), is therefore misplaced. In that case the court found that even if the appellant's due process rights were violated by the use of classified evidence, the error was harmless because "the unclassified record taken alone [was] quite adequate to support the Secretary's determination." *Id*. In *Jifry v. F.A.A*., 370 F.3d 1174 (D.C. Cir. 2004), also cited by the government, the court conducted *ex parte in camera* review of the classified material. Petitioners have had no such judicial review of the evidence that supports their *incommunicado* detention.

serves in "related instances," *i.e.*, prisoner of war determination. Gov't. Br. 32–35.[27]

But the CSRT's do not realize the "possibility" briefly considered by the *Hamdi* plurality. The plurality emphasized that due process requires that alleged enemy combatants be given a "fair opportunity to rebut the government's factual assertions before a neutral decision maker." 124 S. Ct. at 2648. For the reasons cited above, the CSRT procedures do not remotely satisfy the standards articulated in *Hamdi*.

Despite the Court's remark in Hamdi, Article V tribunals, as outlined by Army Regulation 190-8, cannot provide the process that is due petitioners, even as modified for the CSRTs. The tribunals outlined in Army Regulation 190-8 are designed to determine prisoner of war status − a status universally acknowledged under international law-not to affirm the designation of "enemy combatant" – a status invented by the government to avoid international law. Under the *Matthews v. Eldridge* test employed by the Supreme Court in *Hamdi*, the degree of process due a captured person in an Article V tribunal will be less than that due detainees here because the balance of factors is different. In an Article V proceeding, the government's interest in a speedy, efficient resolution is great, because such tribunals occur during wartime, on or near a battlefield. Here, Petitioners are being detained far from the battlefield, and some Petitioners originally were seized thousands of miles from any battlefield. Article V tribunals are conducted by active combat troops who must quickly process prisoners and return to fighting. That exigency also is lacking at Guantanamo Bay. Moreover,

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[27] The proposition that military tribunal procedures might afford adequate process was embraced by only four Justices. Justices Souter and Ginsberg rejected the suggestion that military tribunal might "obviate or truncate" habeas review. *See* 124 S. Ct. at 2660 (Souter, *J*., dissenting in part and concurring in the judgment).

a "captured" person determined *not* to be a prisoner of war is not left without rights or protections: Army Regulation 190-8 §106(g) provides that he may not "be executed, imprisoned, or otherwise penalized without further proceedings to determine what acts [he] ha[s] committed and what penalty should be imposed."

Although both procedures present a risk that detainees will be erroneously deprived of their freedom, the risk is moderated in the case of POWs, because they are afforded a panoply of rights. Here, the government has devised a category and a process in which Petitioners are deprived of their rights upon classification as enemy combatants. A person's liberty interest surely includes the right to be free from abusive and degrading treatment. The interest in not being erroneously deprived of liberty surely also is assessed by reference to the conditions, as well as the fact of confinement.[28] In the case of POWs, the Geneva Conventions prohibit torture and abuse; according to the public statements of agents of the government, the detainees at Guantanamo enjoy no such protections, and the government has to great length to develop a legal rationalization for using interrogation and detention techniques on detainees that would not be acceptable treatment for POWs.

B. The Meager Record Demonstrates That, As Applied, The CRSTs Do Not Provide The Detainees With Due Process.

Habeas review does not test merely the adequacy of the official procedures; such review also tests whether the procedures were followed in the case of a given petitioner. Thus, even if the Court were to determine that the CSRT process is not unconstitutional on its

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[28] *See* Ronald Dworkin, *What the Court Really Said*, N.Y. Rev. Books, Aug. 12, 2004 ("The harm imposed by an erroneous classification is plainly much greater when the government holds detainees under the harsh conditions it now imposes than when it subjects them only to the less fearsome conditions of conventional prisoners of war.").

face, dismissal under Rule 12(b)(6) would be inappropriate here because Petitioners contend, and should be allowed to prove, that those procedures have been applied to these Petitioners in an unconstitutional manner. Whether the CSRT procedures were appropriately applied to each Petitioner's case, and whether the result was anything approaching due process, requires a fact-intensive assessment that precludes dismissal under Rule 12(b)(6). *See, e.g.*, *Warren v. District of Columbia,* 353 F.3d 36, 39 (D.C. Cir. 2004).

The limited information that is available points strongly to a grossly inadequate process. The unclassified returns provided by the government and press reports of the CSRT proceedings (which counsel for the detainees were themselves barred from observing), reveal that whatever the adequacy of the paper procedures − and they are clearly inadequate − the CSRTs process as applied to these Petitioners have failed to provide due process.

For one thing, the tribunals have shown gross disregard for Petitioners right to present evidence and witnesses. From the CSRT records made available to date, it appears that a petitioner's request for testimony from a witness not already present in Guantanamo has been allowed in few, if any, cases. Even requests for testimony from other detainees have been summarily dismissed with little explanation:

- The CSRT refused to allow Mustafa Ait Idir to call any witnesses or present any documentary evidence at all simply, because he had initially declined to participate in the proceeding. Memorandum, Legal Sufficiency Review of Combatant Status Review Tribunal, ¶ 1a and d. Unable to present any evidence, Mr. Idir could offer no "proof" that he was not an enemy combatant.

- The personal representative of Ridouane Khalid objected that the CSRT made no effort to contact four former detainees called as witnesses by Mr. Khalid, arbitrarily finding that the prospective witnesses were not "reasonably available" and that their testimony would be cumulative. Khalid, Personal Representative Review of the Record of Proceedings, Enclosure (5) (Oct. 8, 2004). Even the fellow detainee that Khalid was able to call as a witness apparently did not know he had been called at Khalid's request. (His first statement on

> the Tribunal record is: "I would like to know if Redouane Khalid asked for me as a witness." Khalid, Questions by the Personal Representative to the Witness, Enclosure (3), page 8/11 (Sep. 25, 2004.).)

This unreasonableness extends to the CSRTs' summary rejection of efforts by Petitioners to have basic—and often critical—documents admitted into evidence. For example, Petitioner Saber Lahmar requested evidence on his behalf in the form of a document the CSRT identified as "Bosnian government document finding detainee not guilty of attempting to bomb the U.S. Embassy." Unclassified Summary of Basis for Tribunal Decision at 2. The Tribunal President determined that the document was "not reasonably available," purportedly because "the Bosnian government was unable to provide any such document" to the State Department. *Id.* Despite the Tribunal's assertion, documents reasonably fitting the description of what Mr. Mahmar had requested were described in and appended as exhibits to the *habeas* petitions and other Court filings of Mr. Lahmar and the other Bosnian detainees. The habeas petition in turn was part of the Tribunal record, though without the attached decision. *See* Lahmar CSRT, R4.[29]

In another instance the Tribunal informed a detainee that certain documents indicating that he resided in Croatia − not Bosnia − would be useful, but failed to take reasonable steps to assist in obtaining them. The Tribunal President only commented, "I do not know how or what the procedure is, but you really should take the opportunity to get that information." Mustafa Ait Idir Unclassified Summary of Basis for Tribunal Decision at 15. Mr. Idir's unsur-

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[29] In the case of another Bosnian detainee, the Tribunal was able to uncover the Bosnian "investigation order" but again, not the subsequent Court decisions clearing the Bosnian detainees of wrongdoing and restoring their nationality. *See* Hadj Bousella Unclassified Summary of Basis for Tribunal Decision at 3.

prising response "How, when I am at GTMO?"

Nor do the Tribunals appear to provide a reasonable opportunity for Petitioners to challenge the allegations against them. It is apparent from the unclassified summaries that the only real evidence supporting enemy combatant status − if such evidence exists at all − is classified. The unclassified evidence apparently relied on by the Tribunals frequently consists of newspaper articles purporting to identify individuals and organizations as being tied to terrorists.[30] Thus neither Petitioners nor their lawyers (who, as already noted, are excluded from the process) can effectively challenge the only evidence, if it exists at all, which would suggest that Petitioners are enemy combatants. All that is left for Petitioners to do is to engage in fruitless and bizarre exchanges such as these:

> Recorder [reading from unclassified summary of charges]: While living in Bosnia, the Detainee associated with a known Al Qaida operative.
>
> Detainee: Give me his name.
>
> Tribunal President: I do not know.
>
> Detainee: How can I respond to this?
>
> ***
>
> Detainee: If you tell me the name, then I can respond and defend myself against the accusation.
>
> Tribunal President: We are asking you the questions and we need you to respond to what is on the unclassified summary.

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[30] The fact that Tribunals apparently rely on newspaper reports about terrorist connections and plots as persuasive evidence itself reveals serious due process violations. *See*, *e.g.*, Hadj Boudella Unclassified Summary of Basis for Tribunal Decision at 3 (noting that the Tribunal finds "quite persuasive" what "appears to be a news article or a book excerpt" that states that Algeria's Armed Islamic Group is associated with Al Qaeda).

Mustafa Ait Idir Unclassified Summary of Basis for Tribunal Decision at 13. While Petitioners do not dispute that the process afforded must protect certain information, the only protection offered by the CSRT process is a drastic approach in which neither the Petitioner nor his counsel, barred from the process, can challenge the basis for his detention.

The CSRTs also rely on detainee statements produced through coercive and abusive interrogations, without providing a process where their reliability can be challenged. As discussed above, approved interrogation techniques at Guantanamo include isolation for up to 30 days, 28-hour interrogations, extreme and prolonged stress positions, sleep deprivation, sensory assaults, removal of clothing, hooding, and the use of dogs to create anxiety just short of terror. Repeated body cavity searches have been reported by recently released British detainees.[31] Such interrogations may involve shackling the detainees to the floor for up to 14 hours, while flashing strobe lights in their faces, and playing music at extremely high volumes. Using any evidence derived from such interrogations alone renders the CSRT proceedings beyond the bounds of due process. Reliance on information of such dubious accuracy further taints the fairness of the proceedings.

The CSRTs also do not provide detainees with adequate translation of the proceedings. Complaints about the quality of the translations in the CSRTs have been widely reported.[32] Arab-speaking journalists covering the proceedings have noted egregious errors. In

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[31] Shafiq Rasul, Asif Iqbal & Rhuhel Ahmed, *Composite Statement: Detention in Afghanistan and Guantanamo Bay*, at 300 (available at http://www.ccr-ny.org/v2/reports/docs/Gitmo-compositestatementFINAL23july04.pdf).

[32] Confirming that the CSRTs are show trials, the government has permitted the press − but not detainee counsel − to attend the proceedings. As a result, and with no means of obtaining (continued…)

one instance, when a detainee was asked if he had gone to Afghanistan for training before the September 11 attacks, the question was translated as asking whether he left Afghanistan after the attacks. Agence France Press, *US Military Admits Translation Problems at Guantanamo Hearings*, Aug. 26, 2004. In another instance, a detainee said he had traveled to Chechnya, but the translator related that he had joined a cult. American Forces Press Service, *Officials Working on Commission Translation Issues*, Aug. 26, 2004. In several instances, key evidence considered by the Tribunals based on previous interrogations also suffers from poor and misleading translations.[33]

Finally, the CSRTs do not afford due process in practice in that they reject as irrelevant evidence that a detainee's connection with the designated enemy was involuntary and insubstantial. According to an Associated Press report, an Afghan detainee claimed that he was forced to work for the Taliban as a cook, and he sought to call four witnesses to confirm that claim. The presiding CSRT officer denied the request, stating: "Whether or not the detainee was forced to join the Taliban, or in what role they served in the Taliban, is not relevant." Stevenson Jacobs, *Guantanamo: Prisoner Says Taliban Forced Him to Cook*, Associated Press, Aug. 12, 2004. Another witness sought to call witnesses to support his claim that Taliban "came to my house and took me by force. I joined the Taliban by force, not by my own choice. . . . Everybody in Afghanistan knows that if the government asks you, you can't say no." The CSRT panel

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first hand information, Petitioners' counsel are reduced to relying on press accounts regarding the conduct of the CSRTs.

[33] French detainee Khalid's personal representative objected that the Government's allegation Khalid "trained with Kalashnikov rifles in Afghanistan" is false and the result of "statements by Detainee" misunderstood by a "translator that the detainee dealt with prior to this tribunal" in which the translator "did not give a correct translation." Khalid, Summarized Sworn Detainee Statement, Enclosure (3), page 1/11 (Sep. 25, 2004).

denied the detainee's request to call witnesses, concluding that how or why a detainee joined the Taliban is irrelevant. *See* Rhem, *supra*.

In the case of petitioner Khalid, he requested the production of his passport, visa, and return airline ticket to Europe that had been seized upon his detention in Pakistan. These documents were critical in supporting his testimony that he planned to travel for only a few months before returning home to France. These items were seized upon his capture. The Tribunal determined that they could not be located at Guantánamo Bay but apparently made no effort to locate the documents from the authorities in Pakistan who detained him. Khalid, Unclassified Summary of Basis for Tribunal Decision, Enclosure (1), page 2/3 (Sep. 25, 2004).

At bottom, even without factual development there is evidence before the Court to support an inference − an inference to which Petitioners are entitled on a motion to dismiss − that the CSRT process as applied does not satisfy the Petitioners' rights.

C. The Political Question Doctrine Does Not Require Dismissal.

The government further suggests − without stating outright − that Petitioners' suits might be barred by the political question doctrine. Gov't Mem. at 45 & n.55. None of the *Baker v. Carr* factors are met here. There can be no serious claim that "judicially discoverable and manageable standards" are lacking.[34] No legitimate policy determinations can be implicated where Petitioners merely seek to compel the government to articulate the basis for

[34] The government cannot suggest that there is no judicially manageable standard for determining enemy combatant status, when the Supreme Court explicitly accepted the standard the government put forward in that case at the time. *See Hamdi*, 124 S. Ct. at 2639 (adopting the government's standard for defining "enemy combatant" for the purposes of "this case"). The fact that the government has now chosen to simply redefine "enemy combatant" instead of following the Court is in no way to the contrary.

their continued detention. Furthermore, there has been no "textually demonstrable commitment to a coordinate political branch."

D. The Government's Proposed "Standard Of Review" Provides No Basis For Dismissing The Petition.

The government argues that the Court should adopt the deferential "some evidence" standard in reviewing the conclusions of the CRSTs. The conclusions of the CSRT's are illegitimate because they are derived without safeguards to ensure their correctness, and in any event the Executive Branch, by creating an administrative mechanism to make factual findings, cannot displace the fact-finding role of the habeas court.

Even if the Court were to consider the work product of the CSRTs, the cases the government cites for the "some evidence" standard not only do not support its contention that this standard should govern the Court-CSRT relationship here. In each case cited by the government, the standard was applied by a court reviewing the decision of another tribunal that either applied greater due process protections, or was authorized in the first instance by a tribunal that afforded the petitioner greater due process rights. In the case on which the government principally relies, *Superintendent, Mass. Correctional Institute v. Hill*, 472 U.S. 445 (1985), the Supreme Court upheld the use of the some evidence standard in the context of review of a prison disciplinary board's decision to revoke "good time" credits. The prisoners at issue had already been convicted in a trial during which they had received a full panoply of constitutional protections. The Court, moreover, expressly tied its endorsement of the standard to the unique conditions of the prison setting. *Id.* at 454–56.[35]

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[35] *See also Wolff v. McDonnell*, 418 U.S. 539 (1974) (dealing also with prison context); *Eagles v. United States ex rel Samuels*, 329 U.S. 304 (1946) (revoking grant of *habeas* petition (continued…)

Petitioners here have had *no* meaningful process at all, despite already having suffered the deprivation of their liberty for over three years. Although the government quotes the *Hamdi* plurality's discussion of the "some evidence" standard, the Court's comments are worth quoting fully:

> Any process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short. As the government itself has recognized, we have utilized the "some evidence" standard in the past as a standard of review, not as a standard of proof. That is, it primarily has been employed by courts in examining an administrative record developed after an adversarial proceeding . . . .

124 S. Ct. at 2651 (internal citations omitted). As demonstrated above, these Petitioners have had no adversarial proceeding, and there is no competent administrative record to review.

The government appears to argue that the *Mathews v. Eldridge* balancing test, applied by the *Hamdi* plurality to determine the appropriate level of procedural due process, will always favor its position because it asserts that national security concerns so dictate. The government describes *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951), as "[s]etting forth a precursor to the *Mathews v. Eldridge* balancing test that became the foundation for the Court's modern due process jurisprudence." Gov't. Br. at 36 n.46. In *McGrath,* the Court *reversed* lower court decisions upholding the Attorney General's power to designate cer-

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where review was sought of selective service decision in context where there was (i) express congressional delegation pursuant to complex administrative scheme (ii) express prohibition of judicial review of agency action; and (iii) internal agency procedure offering multiple appeals, written record, and opportunity to call witnesses); *United States ex rel. Vajtauer v. Comm'r of Immigration*, 273 U.S. 103, 106 (1927) (applying some evidence standard to review deportation order of alien entered after extensive hearing and appeal procedure ad noting that the reviewing court should enquire into the "essential unfairness of the trial").

tain organizations as "Communist" without providing notice of the grounds for the designation and an opportunity for rebuttal. In striking the balance among competing interests, the Court stated: "[T]he relevant considerations must be fairly, which means coolly, weighed" with due regard to the fact that a court "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." *McGrath*, 341 U.S. at 164.

As Justice Frankfurter stated in *McGrath*, "[t]he requirement of 'due process' is not a fair-weather or timid assurance. It must be respected in periods of calm and in times of trouble; it protects aliens as well as citizens." 341 U.S. at 162. It "is ingrained in our national traditions and designed to maintain them," *id.* at 161, and reflects "stout confidence in the strength of the democratic faith which we profess," *id.* at 163. If the government is unable or unwilling to demonstrate that a particular detainee is a risk to security, and thus should be charged with a particular crime, the public interest lies in protecting his liberty interest. *See Seretse-Khama v. Ashcroft*, 215 F. Supp. 2d 37, 54 (D.D.C. 2002) ("In light of the INS's unduly prolonged detention of Petitioner, and absent any showing that Petitioner presents a clear risk of flight or threat to the safety to the community, there is little doubt that the public interest would be better served here by protecting the Petitioner's liberty interest.").

It is telling that the government freed Hamdi after the Supreme Court held that he was entitled to habeas review of his "enemy combatant" status assisted by counsel of his choosing. Confronted with the mere possibility of such review, the government released him.

IV. PETITIONERS STATE VALID CLAIMS UNDER THE ALIEN TORT STATUTE

Petitioners assert valid claims under the Alien Tort Statute relating to the condi-

tions of their confinement at Guantanamo Bay.[36] They have been detained for approaching three years without any charges of wrongdoing; without meaningful access to counsel, to the courts, or to their families; and in conditions amounting to torture and cruel, inhuman and degrading treatment. The government's actions violate specific, universal, and obligatory norms of customary international law prohibiting this treatment. Because the Administrative Procedure Act provides a waiver of sovereign immunity with respect to claims under the Alien Tort Statute, Petitioners are entitled to judicial review of their claims.

A. The Administrative Procedure Act Provides A Waiver Of Sovereign Immunity With Respect To Petitioners' Claims Under The Alien Tort Statute

Rasul holds that this Court has federal question jurisdiction under 28 U.S.C. § 1331 to consider Petitioners' claims under the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* ("APA"). The APA in turn, establishes that judicial review is available to "any person suffering legal wrong because of agency action." *Id.* § 702. Such "legal wrong" undoubtedly may include violations of the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350. Thus, while the ATS does not itself provide a waiver of sovereign immunity, the APA waives the government's sovereign immunity with respect to Petitioners' ATS claims. *See* 5 U.S.C. § 702 (waiving the sovereign immunity of the United States for any "action in a court of the United States 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").

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[36] Petitioners in *Abdah*, 04-CV-1254, and *Anam*, 04-CV-1194, have not raised any Alien Tort Statute claims.

The APA's waiver of sovereign immunity is a general waiver that applies across the board for all claims of nonmonetary relief against the United States. *Dronenburg v. Zech*, 741 F.2d 1388, 1390 (D.C. Cir. 1984); *Cobell v. Babbitt*, 52 F. Supp. 2d 11, 20–21 (D.D.C. 1999). It is not limited to suits brought under the APA itself, but applies even when suit is brought against the United States or its officers under another statute. *See Black Hills Inst. Of Geologic Research v S.D. School of Mines & Tech*., 12 F.3d 737, 740 (8th Cir. 1993); *Vizenor v. Babbitt*, 927 F. Supp. 1193 (D. Minn. 1996). As (then) Judge Scalia acknowledged for the District of Columbia Circuit in *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208–09 (D.C. Cir. 1985), it is appropriate to argue that the APA waives sovereign immunity for claims against the United States and its officials arising under the ATS, such as Petitioners' claims in this case.

Under the APA, Petitioners are entitled to judicial review of claims that allege unlawful actions by government officials and seek relief other than monetary damages.[37] Specifically, Petitioners here seek a declaration that the conditions of their confinement violate customary international law and international treaties prohibiting prolonged arbitrary detention, torture, and other cruel, inhuman or degrading treatment. Petitioners also seek injunctive relief prohibiting these actions.

1. There Is No Alternative, Adequate Remedy Available To Address Petitioners' ATS Claims

There can be no doubt that the United States Army is an agency within the meaning of Section 701 of the APA. *See Jaffee v. United States*, 592 F.2d 712 (3d Cir. 1979). Nor

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[37] *See* 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial relief thereof.").

can there be any doubt that Petitioners' conditions of confinement in Guantanamo Bay are final agency actions for which there is no appropriate alternative adequate remedy other than judicial review under the APA. Their claims are, therefore, subject to review pursuant to Section 704.[38]

(a) No "special statutory review procedures" apply in this case

Under Section 703, "[t]he 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." Because no statute sets out "special statutory review proceeding[s]" applicable to the actions of the Department of Defense or Department of the Army at issue in this case, Petitioners' request for declaratory and injunctive relief relating to the conditions of their confinement is appropriate. 5 U.S.C. § 703.

The cases cited by the government in support of its contention that "other adequate remedies" exist are inapt; they serve merely to illustrate the principle that where a special statutory scheme provides adequate remedies to address unlawful agency action, that remedies available under that scheme constitute the exclusive avenue of redress.[39] As noted above, how-

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[38] "Agency 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.

[39] *See* Gov't Mem. 63, citing *Bowen v. Massachusetts*, 487 U.S. 879 (1988) (special statutory review procedure inadequate because Claims Court did not have same equitable powers)); *Correctional Servs. v. Malesko*, 534 U.S. 61 (2001) (concluding there is no implied cause of action for damages against private entity operating halfway house for violation of constitutional rights where Bureau of Prisons statute provided for other specific remedial mechanisms); *Mitchell v. United States*, 930 F.2d 893 (Fed. Cir. 1991) (holding that there is no jurisdiction to hear military pay claims where Tucker Act specifically conferred jurisdiction over such claims to Claims Court and this remedy was adequate); *Council of & for the Blind of Del. County Valley, Inc. v. Regan*, 709 F.2d 1521 (D.C. Cir. 1983) (declining to hear claims seeking grand-scale, long-term court monitoring of federal agency enforcement activities where the civil rights statute at issue specifically provided for individual suits against discriminating entities and this was an adequate remedy); *Women's Equity Action League v. Cavazos*, 906 F.2d 742 (D.C. Cir. 1990) (same); *McGregor v. Greer*, 748 F. Supp. 881 (D.D.C. 1990) (dismissing claims seeking judicial (continued…)

ever, there are no applicable special statutory procedures in this case. Thus, Petitioners are entitled to judicial review of their claims under the APA.

(b) Habeas Relief Is Not the Sole Remedy Available Here

The government's assertion that habeas corpus is the exclusive vehicle to litigate Petitioners' claims, *see* Gov't Mem. 60, is similarly unconvincing. The analysis under the APA differs from that under habeas, and the two remedies are not mutually exclusive. *See*, *e.g.*, *Shaughnessey v. Pedreiro*, 349 U.S. 48 (1955) (holding that habeas was not exclusive remedy for review of deportation orders and that review under the APA was appropriate because not expressly precluded by the immigration statute at issue).

Petitioners' APA claims seek relief relating only to the conditions of their confinement. It is well established that claims challenging *conditions of confinement* do not fall within the category of claims for which habeas is the exclusive remedy.[40] In *Wilwording v. Swenson*, 404 U.S. 249, 251 (1971), prisoners filed a complaint alleging that the prison living conditions and disciplinary measures while confined in maximum security were unconstitutional. The Supreme Court permitted petitioners' challenge to proceed as a civil rights action "although [the claims were also] cognizable in federal habeas corpus." In *Haines v. Kerner*, 404 U.S. 519 (1972), a prisoner filed a complaint alleging that placing him in solitary confinement as a disciplinary matter was unconstitutional. In this case too the Supreme Court held that the prisoner's

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review and declaratory judgment under APA where Civil Service Reform Act provided a "comprehensive" and "intricate" scheme of remedies for federal employees and explicitly excluded suits by employees in plaintiff's job category).

[40] The Supreme Court highlighted this distinction between validity and conditions of detention in *Rasul v. Bush*, 124 S. Ct. 2686, 2698 (2004) (overturning dismissal of claims that were based on § 1331 and § 1350 jurisdiction, noting they had been dismissed "even to the extent that these claims 'deal only with conditions of confinement and do not sound in habeas.'")

challenge to the conditions of confinement could be brought as either a habeas petition or a Section 1983 claim. *See also Brown v. Plaut*, 131 F.3d 163 (D.C. Cir. 1997) (no requirement to invoke habeas corpus where prisoner's claim that he was placed in administrative segregation without due process challenged the conditions, rather than the fact or legality, of confinement); *Carter v. Doe*, 203 F.3d 51 (D.C. Cir. 1999) (claim challenging placement in administrative segregation may be brought under Section 1983).

Because Petitioners' claims under the ATS seek relief relating only to the conditions of their confinement, these claims should not be dismissed. Neither a declaration that Petitioners have been subjected to torture, cruel, inhuman or degrading treatment or prolonged, arbitrary detention, nor an injunction prohibiting such treatment, would operate to test the validity of their capture or the legality of their detention. Neither relief would necessarily require release. The requested relief merely seeks the proper process through which Petitioners could subsequently seek release, as well as to ensure that Petitioners are detained in humane conditions in compliance with U.S. obligations under international law.[41]

2. None Of The APA Exceptions Apply To Preclude Judicial Review Of Petitioners' Claims.

The government argues that its actions are insulated from judicial review under a number of exceptions to the APA's waiver of sovereign immunity. None of these exceptions

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[41] The Government cites *Valenti v. Clark*, 83 F. Supp. 167 (D.D.C. 1949), in support of its view that the availability of habeas precludes resort to the judicial review provisions of the APA. However, plaintiff's sole request in that case was for a declaration that he was not subject to deportation – a claim which sounded in habeas and for which habeas was an adequate remedy. *Cf. Shaughnessy v. Pedreiro*, 349 U.S. 48 (1955) (holding that "there is a right of judicial review of deportation orders other than by habeas corpus and the remedy sought here [under the APA] is an appropriate one" because not expressly precluded by the immigration statute at issue).

applies. First, the government claims that the challenged actions fit within either the exemption for "courts martial and military commissions," 5 U.S.C. § 701(b)(1)(F), or that for "military authority exercised in the field in time of war or in occupied territory, *Id.* § 701(b)(1)(G). However, the government makes no effort to explain how the exception for courts martial and military commissions would apply in this case. Petitioners have not been charged with any wrongdoing, nor have they been tried by any court martial or military commission. In fact, the government has expressly declined to apply the Uniform Code of Military Justice to them.

Similarly, the APA's exception for "military authority exercised in the field in time of war or in occupied territory" does not apply to Petitioners' ATS claims. The District of Columbia Circuit has explained that the "military authority" exception is intended to prohibit "judicial interference with the relationship between soldiers and their military superiors" and with "military commands made in combat zones or in preparation for, or in the aftermath of, battle." *Doe v. Sullivan*, 938 F.2d 1370, 1380 (D.C. Cir. 1991); *see also Jaffee v. United States*, 592 F.2d 712 (3d Cir. 1979). Here, Petitioners do not contest the power of the President, as Commander-in-Chief, to commit troops or to undertake battlefield strategy, nor do they seek to disrupt the relationship between soldiers and their military superiors. Instead, Petitioners are looking to secure conditions of confinement that do not interfere with military functions, and are being held on land that is neither "occupied territory" nor "in the field." In this regard, the government blatantly ignores the plain language of the statute. Guantanamo Bay plainly is not "occupied territory," and the conditions under which Petitioners are confined there – thousands of miles from any battlefield and years after their capture – cannot, by any stretch of the imagination, be considered military actions taken "in the field" or "in time of war." The Court made clear in *Rasul* that it was not only rejecting the government's argument that Guantanamo was

beyond the reach of U.S. law, it was also explicitly ruling that the naval facility is "within the 'territorial jurisdiction' of the United States." *Rasul v. Bush*, 124 S. Ct. 2686, 2696 (2004). Furthermore, the Court's conclusion was based on the evidence accepted by the Court regarding the lease agreement entered into by the United States and Cuba in 1903 at the end of the Spanish-American War. *See* Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations, Feb. 16–23, 1903, U.S.-Cuba, art. III, T.S. 418.

Finally, the exception claimed by the government under 5 U.S.C. § 701(b)(1)(G) only exempts the exercise of military authority that is *both* "in the field" *and* "in time of war." Decisions made about the treatment of the Petitioners – years after they were deliberately transported away from the field to a remote detention facility – are far removed in time and space from any strategic military decisions made in a zone of combat.[42]

In addition to the military exceptions claimed under Section § 701(b)(1)(F) and (G), the government maintains that the actions challenged by Petitioners are exempt from judicial review because they are allegedly "committed to agency discretion by law."[43] However, agency decisions fall under this category only "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Webster v. Doe,* 486 U.S.

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[42] The government cites *Ex Parte Quirin*, 317 U.S. 1, 21 (1942) as support for its argument that "'in the field' is not restricted to the field of battle." Gov't Mem. at 56. However, petitioners in that case were German soldiers who were captured on U.S. soil, and were tried by a military tribunal for war crimes for having crossed "behind enemy lines" in civilian dress for the purpose of sabotaging U.S. military installations and supplies. It also cites *Koohi v. United States*, 976 F.2d 1328, 1333–35 (9th Cir. 1992) for the proposition that "time of war" does not require a formal declaration of war. The U.S. actions at issue in that case were taken in battle when the U.S. Navy shot down an Iranian civilian aircraft, mistaking it for one of the military aircraft that had been attacking Kuwaiti ally's ships in the vicinity. In contrast, Petitioners here challenge the conditions of their confinement far from the field of battle.

[43] 5 U.S.C. § 701(a)(2).

592, 599 (1988) (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971)); *see also Heckler v. Chaney*, 470 U.S. 821, 830 (1985) ("[R]eview is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion."). That is certainly not the case here.

In the present case, there is an entire body of international law governing the rights that are due individuals under detention. This body of law furnishes the Court with meaningful standards against which to judge Petitioners' claims under the ATS that their prolonged arbitrary detention by the defendants violates international human rights and humanitarian law. There is also no statute committing to defendants' discretion the denial of those rights. Consequently, even if the President, as Commander-in-Chief, has unreviewable discretion to engage in combat operations and to capture enemies in the field, Petitioners' ATS claims are not excepted from the APA's waiver of sovereign immunity under 5 U.S.C. § 701(a)(2).

National security and foreign policy concerns, the government claims, are matters "traditionally left to agency discretion."[44] However, this pronouncement simply does not end the inquiry. Courts have repeatedly rejected the government's argument that actions taken pursuant to its war powers are per se beyond judicial review, particularly when significant liberty interests are at stake.[45] Indeed, even in cases where an agency's decisions are held unreviewable, this fact

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[44] Gov't Mem. at 64, citing *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993).

[45] *See e.g., Bldg. & Loan Ass'n. v. Blaisdell*, 290 U.S. 398, 426 (1934) ("even the war power does not remove constitutional limitations safeguarding essential liberties."); *Sterling v. Constantin*, 287 U.S. 378, 401 (1932) ("the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions"); *Youngstown v. Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (review of President's wartime seizure of steel industry); *The Paquete Habana*, 175 U.S. 677, 710-11, 20 S. Ct. 290 (1900) (wartime capture of foreign fishing vessels off the coast of Cuba by U.S. officials was unlawful); *Reid v. Covert*, 354 (continued…)

"does not preclude review of questions pertaining to an agency's jurisdiction or compliance with constitutional and statutory demands." *Grace Towers Tenants Assoc. v. Grace Housing Dev. Fund Co.*, 538 F.2d 491, 496 (2d Cir. 1976) (rejecting claim that Department of Housing and Urban Development's approval of rent increase was based on insufficient evidence as not reviewable because committed to agency discretion by law, but claims alleged constitutional and statutory violations were reviewable).

In *Webster v. Doe*, the Supreme Court considered the reviewability of claims arising out of the termination of an employee of the Central Intelligence Agency, which the government justified on grounds of national security. *Webster*, 486 U.S. 592 (1988). The relevant statute granted the Director of Central Intelligence "discretion" to terminate employees whenever he "deem[ed]" it "necessary or advisable in the interests of the United States." *Id.* at 594. The Court found that this statute "exude[d] deference" and "foreclosed[d] the application of any meaningful standard of review." *Id.* at 600. However, this did not preclude review of the former employee's claims that his due process rights were violated. *Id.* at 603.

The government cites the AUMF and the President's powers as Commander-in-Chief as bestowing unfettered discretion on the President to use force against those responsible for the terrorist attacks on September 11, 2001. The AUMF nowhere authorized indefinite imprisonment without charges, however, and there is certainly no indication that the discretion accorded the government could be stretched to include the torture or cruel, inhuman and degrad-

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U.S. 1, 77 S. Ct. 1222 (1957) (court martial jurisdiction could not be asserted over military dependants); *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955) (discharged serviceman could not be tried by military courts); *Webster v. Doe*, 486 U.S. 592 (1988) (termination of employee on national security grounds was reviewable for violation of constitutional rights).

ing treatment of detainees in violation of U.S. obligations under constitutional law, international human rights law, and the laws of war. It is undoubtedly the province of the judiciary to review the conditions in which Petitioners are confined and to ensure that international due process norms are met. *See Rasul*, 124 S. Ct. at 2698.

Finally, the government's argument that the court's discretion to grant discretionary non-monetary relief in fact "compels" it to deny this relief[46] should be discarded. Again, the government's arguments boil down to what is now a familiar refrain – national security and foreign policy are the exclusive prerogative of the Executive. As discussed above, however, "the foreign affairs context of Executive action cannot shield unlawful conduct from judicial inquiry."[47] The judiciary is indisputably well equipped to entertain the individual claims asserted by Petitioners, who challenge the unlawful conditions in which they are being held.

B. Petitioners Have Stated A Claim Under ATS For Prolonged, Arbitrary Detention, Torture And Cruel, Inhuman or Degrading Treatment In Violation Of The Law Of Nations

In *Rasul*, the Court expressly referenced Section 1350 as an alternative basis of jurisdiction for the Guantánamo detainees' claims. *Rasul*, 124 S. Ct. at 2698.[48] The government simply ignores this statement and instead attempts to resurrect the very same arguments it re-

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[46] Gov't Mem. at 57. The government cites *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985) as support for this argument. However, that case is distinguishable on its facts. The relief requested would have required the court to pass directly on the Executive's alleged policy to support the "Contras" in opposition to the Nicaraguan government – a clear encroachment on the foreign policy prerogatives of the Executive.

[47] *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, (D.C. Cir. 1984), *vacated on other grounds*, 471 U.S. 1113 (1985).

[48] Given this ruling, and the arguments presented by the government, the government's arguments that there be "case-specific deference" in relation to petitioners' claims under the ATS (Gov't Mem. at 66) must be rejected.

cently advanced before the Supreme Court in *Sosa v. Alvarez-Machain* to argue that Petitioners have failed to state a violation of the ATS. In rejecting the government's position, the *Sosa* Court held that courts are permitted to create causes of action for claims for which the ATS affords jurisdiction, so long as the claims are based on violations of international norms with definite content and acceptance among civilized nations," or norms that rise to the level of "specific, universal and obligatory." 124 S. Ct. at 2766 (citing *Marcos*, 25 F.3d at 1475).

In *Sosa*, the Court expressly endorsed a long line of lower court rulings that recognized a private cause of action for foreign nationals to sue under the ATS for violations of international law,[49] citing as specific examples the Second Circuit's decision in *Filartiga v. Pena Irala*, 630 F.2d 876 (2d Cir. 1980) (recognizing ATS claim for torture); *In re Estate of Ferdinand Marcos, Human Rights Litig*., 25 F.3d 1467 (9th Cir. 1994) (same); *Tel Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (Edwards, *J*., concurring) (endorsing legal principles in *Filartiga*).

The Petitioners have made claims only for those violations which previous U.S. courts have recognized as universal, obligatory, and specific or definable. International legal

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[49] The government mistakenly argues that "there are no clear international legal norms, recognizing a cause of action for such equitable relief as requested by petitioners" and cite to the Court's analysis in *Sosa*, 124 S. Ct. at 2767 (finding no self-executing rule of international law prohibiting arbitrary arrest and detention)." Gov't Mem. at 66. This argument is irrelevant, even assuming *arguendo* that their unsupported statement is true. If the government is arguing that every legal principle in an ATS case must have universal adherence in international law, this position would make international law norms unenforceable because international law is silent about many issues. This contrasts with *Sosa's* central holding that, from its inception, the ATS was intended to afford redress for international violations, 124 S. Ct at 2761, 2764, and it is inconsistent with the use of the word "tort" in the statute, which indicates that the principles of tort law would be used to effectuate the jurisdiction granted by the ATS.

norms prohibiting torture,[50] cruel, inhuman or degrading treatment,[51] and prolonged, arbitrary detention[52] are well established and have been adjudged specific, universal, and obligatory in accordance with the standard approved by the Supreme Court in *Sosa*. Indeed, the Supreme Court specifically cited with approval *Marcos* and *Filartiga* which found violations of the same norms which are the subject of Petitioners' ATS claims here.

The government apparently acknowledges that petitioners have stated cognizable claims for torture and cruel, inhuman, or degrading treatment. It does not challenge these claims in its response. To the extent the government suggests that the Supreme Court's holding in *Sosa* ruled out a finding of an actionable claim for arbitrary arrest and detention, this interpretation is clearly untenable. The Supreme Court acknowledged that a state policy to "'practice[], encourage[], or condone[]'" "'prolonged arbitrary detention'" may violate customary international law. *Sosa*, 124 S. Ct. at 2768 (quoting Restatement (Third) of Foreign Relations Law of the United States (1987), § 702). The court found only that this standard was not met in the particular case before it and carefully limited its holding to the facts of that case – "a single illegal detention of

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[50] *See, e.g.*, *Filartiga v. Pena Irala*, 630 F.2d 876 (2d Cir. 1980) (torture); *In Re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994); *Xuncax v. Gramajo*, 886 F. Supp. 162, 184–85 (D. Mass. 1995); *see also Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714–17 (9th Cir. 1992) (prohibition against torture has attained status of *jus cogens* norm from which no derogation is permitted).

[51] *See, e.g.*, *Gramajo*, 886 F. Supp. at 186-189; *Wiwa v. Royal Dutch Petroleum*, 2002 WL 319887, at *7–*9 (S.D.N.Y. Feb. 28, 2002); *Tachiona v. Mugabe*, 216 F. Supp. 2d 262 (S.D.N.Y. 2002); *see also Jama v. INS*, 22 F. Supp. 2d 253 (D. N.J. 1998) ("entirety of the conduct" of detainees constitutes cruel, inhuman or degrading treatment; court included in its analysis that United States has recognized this norm (citing *United States v. Iran*, 1980 I.D.J. 3); *Najarro de Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385 (5th Cir. 1985).

[52] *See, e.g.*, *Wiwa v. Royal Dutch Petroleum*, 2002 WL 319887; *Gramajo*, 886 F. Supp. 162, at 184–85 (D. Mass. 1995); Restatement (Third) of the Foreign Relations Law of the United States § 702 cmt. n.

less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment." *Id.* at 2769.

In contrast to the facts in *Sosa*, Petitioners here, together with over five hundred other detainees, have been held virtually *incommunicado* at Guantánamo for nearly three years. They have been detained without charge, without being granted meaningful access to their families, to counsel, or to the courts. They have been subjected to constant, involuntary interrogations involving tactics amounting to torture or other cruel, inhuman or degrading treatment and torture.[53] There is no doubt that this mistreatment – which was authorized and orchestrated by the government[54] – constitutes a state policy to practice, encourage, or condone prolonged arbitrary detention in violation of the law of nations.

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[53] *See* Statement of Former Guantánamo Detainees, Shafiq Rasul, Asif Iqbal and Rhuhel Ahmed *available at* http://www.ccr-ny.org/v2/reports/docs/Gitmo-compositestatementFINAL23july04.pdf (last visited November 4, 2004).

[54] *See generally*, A Guide to the Memos on Torture *available at*, www.nytimes.com/ref/international/24MEMO-GUIDE.html (posted Jun. 26, 2004) (last visited November 4, 2004)

CONCLUSION

For the reasons discussed above, the government's motion to dismiss the instant habeas petitions, or in the alternative for judgment as a matter of law, should be denied.

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Respectfully submitted,

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