Nos. 06-1195, 06-1196

In the Supreme Court of the United States

LAKHDAR BOUMEDIENE, ET AL., *Petitioners,*
v.
GEORGE W. BUSH, ET AL., *Respondents.*

KHALED A.F. AL ODAH, ET AL., *Petitioners,*
v.
UNITED STATES, ET AL., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF RETIRED MILITARY OFFICERS IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI CURIAE[1]

Amici curiae are retired military officers. Each has extensive experience with U.S. military regulations and the Laws of War. Each believes that the mission of the Nation's Armed Forces must be consistent with the rule of law.

The purpose of this brief is to explain the profound ramifications, from a military point of view, of the government's position that foreign prisoners at the United States Naval Base at Guantanamo Bay, Cuba may be held indefinitely without any meaningful judicial review of their imprisonment. Amici are concerned that foreigners capturing American forces in current or future conflicts will use the example of Guantanamo as justification for indefinite detention of American captives.

Brigadier General David M. Brahms served in the Marine Corps from 1963 through 1988, with a tour of duty in Vietnam. During the 1970s, he served as the principal legal advisor for POW matters at Headquarters Marine Corps, and in that capacity, he was directly involved in issues relating to the return of American POWs from Vietnam. General Brahms was the senior legal advisor for the Marine Corps from 1985 through 1988, when he retired. He is currently in private practice in California and was formerly a member of the Board of Directors of the Judge Advocates Association. He also served as the Technical Advisor for the film *A Few Good Men*.

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been lodged with the Clerk.

Rear Admiral Donald J. Guter was a line officer in the United States Navy from 1970 through 1974. After a break for attending law school, he returned to the Navy in 1977 and remained in the Navy until 2002, when he retired from the military. He served as the Navy's Judge Advocate General from June 2000 through June 2002. Admiral Guter was in the Pentagon when it was attacked by terrorists on September 11, 2001. He is currently the Dean of Duquesne University School of Law.

Rear Admiral John D. Hutson served in the United States Navy from 1973 to 2000. He was the Navy's Judge Advocate General from 1997 to 2000. He is the Dean and President of the Franklin Pierce Law Center in Concord, New Hampshire.

SUMMARY OF ARGUMENT

For more than 200 years, the United States has been at the forefront of international efforts to safeguard the rights of prisoners captured in wartime. Those efforts resulted, after World War II, in the Geneva Conventions of 1949, which the Senate ratified in 1955. Key provisions of those Conventions have been incorporated in Army Regulation 190-8, including the requirement that the status of captured persons be determined by a competent tribunal shortly after capture if there is any doubt about whether the captives are prisoners of war. Persons found to be innocent civilians are released.

The Combatant Status Review Tribunals ("CSRTs") created in the wake of *Rasul* v. *Bush*, 542 U.S. 466 (2004), and *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004), occurred years after the detainees were captured and do not even measure up to the streamlined battlefield procedures established by Regulation 190-8, let alone the protections provided by the writ of habeas corpus. Unlike hearings under Regulation 190-8, command influence and the permissible use of evidence obtained by torture tainted the CSRTs at issue here. The result is a "procedure" that lacks the integrity of Regulation 190-8 hearings and permits individuals to be detained for the

rest of their lives as "enemy combatants" based on the flimsiest of evidence. There is no legitimate justification for providing such a grossly deficient process years after the detainees' capture and thousands of miles away from any battlefield. The severely constricted review of CSRT findings permitted by the Detainee Treatment Act of 2005 ("DTA") provide no meaningful opportunity for detainees to challenge their potentially lifelong imprisonment.[2]

Providing Guantanamo prisoners with meaningful judicial review of their imprisonment is especially important to the members of the United States Armed Forces. If the United States detains "enemy combatants" without providing a fair and meaningful hearing, it increases the likelihood that foreign forces capturing American troops in the future will ignore the Geneva Conventions entirely—thereby putting the lives of American prisoners at risk. And even if our enemies do not comply with the Geneva Conventions, it is important for our military to do so. Adhering to U.S. law and upholding traditional American values are well-established hallmarks of the American military tradition; they also provide moral authority that is critically important to the ability of our soldiers to wage and win war with a minimum of resistance.

The government contends that it is not required to provide detainees with meaningful judicial review because the Guantanamo base is not under United States sovereignty. This Court rejected that position in *Rasul*, recognizing that the governing agreements with Cuba provide the United

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[2] The petitioners' briefs and other amicus briefs address whether or not some detainees are subject to military jurisdiction at all. This brief does not discuss that issue, but compares the CSRTs to the military procedures provided at the time of capture for persons properly subject to military jurisdiction.

States with "complete jurisdiction and control" over the base in perpetuity. Military officials have long regarded the lease, executed in 1903, as interrupting Cuban sovereignty; Cuba's sovereignty will resume if the United States ever decides to return the base to Cuba. In the meantime, the United States acts as the "pro tanto sovereign" of the base, as the State Department's Office of the Solicitor concluded in 1912.

ARGUMENT

I. The United States Has Played A Leading Role In Developing International Standards To Safeguard The Rights Of Captured Prisoners.

For more than 200 years, the United States has "been a leader in * * * bettering the humanitarian principles invoked in the treatment of prisoners of war." Gen. J.V. Dillon, *The Genesis of the 1949 Convention Relative to the Treatment of Prisoners of War*, 5 MIAMI L.Q. 40, 41 (1950). A 1785 treaty between the United States and Prussia "probably constituted the first international attempt to provide in time of peace for the protection of prisoners of war." Howard S. Levie, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT 5-6 (1977). In 1863, Abraham Lincoln commissioned Dr. Francis Lieber to draft a code of conduct for the Union Army in treating prisoners of war. *Id.* at 7. The Lieber Code "was perhaps the first formal codification of rules governing the treatment to be accorded prisoners of war." Dillon, 5 MIAMI L.Q. at 42.

Among other things, the Lieber Code provided that "[a] prisoner of war is subject to no punishment for being a public enemy." Art. 56, *U.S. Army General Order No. 100* (1863). The Lieber Code became the "quarry from which all subsequent codes were cut" and the "basis of every convention and revision on the subject" of conduct toward prisoners of war. Geoffrey Best, HUMANITY IN WARFARE 129 (1980). It had a "significant influence" on other nations and on the Hague Conventions of 1899 and 1907, Dillon, 5

MIAMI L.Q. at 42, which were "the first effective multilateral codification[s] of the law of war." Levie, PRISONERS OF WAR, at 8. After World War I, the United States and Germany entered into an agreement concerning the treatment of prisoners of war. Dillon, 5 MIAMI L.Q. at 42. The subsequent 1929 Geneva Convention Relative to the Treatment of Prisoners of War, signed by the United States and more than 40 other nations, bore "a striking resemblance to the United States-German agreement." *Id.* at 43.

The Geneva Convention of 1929 played a significant role during World War II. The fact "that millions of prisoners of war from all camps, notwithstanding the holocaust, did return, is due exclusively to the observance of the Geneva Prisoners of War Convention." Josef L. Kunz, *The Chaotic Status of the Laws of War and the Urgent Necessity For Their Revision*, 45 AM. J. INT'L L. 37, 45 (1951). "The American Red Cross attributed the fact of the survival of 99 percent of the American prisoners of war held by Germany during World War II to compliance with the 1929 Convention." Levie, PRISONERS OF WAR, at 10 n.44.

The treatment of POWs during World War II also indicated that the Geneva Convention of 1929 required substantial revision to broaden and clarify the circumstances under which its protections would apply. Levie, PRISONERS OF WAR, at 10-11. Some countries had argued that the 1929 Convention did not apply when the invading country had not formally declared war. Germany had claimed that the Convention did not apply to Polish prisoners because the Polish government had ceased to exist and that the Convention did not apply to French prisoners because France ceased to be a belligerent after signing an armistice with Germany. *Id.* at 11-12. Moreover, the 1929 Convention did not establish a procedure for determining whether a captive is a prisoner of war: "[d]uring World War II the decision that an individual was not entitled to prisoner-of-war status had

frequently been made summarily and by persons of very low rank." Levie, PRISONERS OF WAR, at 55.

Following World War II, at the suggestion of an American general, the International Committee of the Red Cross convened "a meeting of experts on prisoner of war affairs of the various belligerent nations." Dillon, 5 MIAMI L.Q. at 43. The United States went on to play "a major role both in the prepatory steps and in the conference proceedings." *Geneva Conventions for the Protection of War Victims: Hearing Before the Senate Committee on Foreign Relations*, 84th Cong., 1st Sess., at 3-4 (1955) ("Senate Hearing") (statement of Robert Murphy, Deputy Under Secretary of State). Meetings involving the United States and other nations resulted in the four Geneva Conventions of 1949, including the Geneva Convention Relative to the Treatment of Prisoners of War. Dillon, 5 MIAMI L.Q. at 43.

The debate on the 1949 Conventions shows that two basic principles animated the Senate's decision to ratify. First, the United States had to lend its moral authority to the Conventions and provide a model for other nations to follow in treating prisoners of war. In urging Senate approval, Secretary of State John Foster Dulles stated that American "participation is needed to enlist the authority of the United States in the[] interpretation and enforcement" of the Conventions. Senate Hearing at 61. Secretary Dulles went on to express the view that "United States ratification of the Geneva Conventions, by lending further support to their standards, should influence favorably future behavior toward prisoners of war." *Id.* at 68.

Second, by treating prisoners of war in accordance with the 1949 Conventions, the United States believed that it would encourage its enemies to reciprocate in their treatment of American prisoners of war. Deputy Under Secretary of State Murphy informed the Senate Committee on Foreign Relations that although neither North Korea nor the United

States had ratified the 1949 Conventions at the time of the Korean War, "the moral acceptance of the conventions as a general norm did have some effect on" North Korea's treatment of American prisoners during the war. *Id.* at 5. Looking to future conflicts, Secretary Dulles explained that American "participation is needed to * * * enable us to invoke them for the protection of our nationals." *Id.* at 61. Similarly, Senator Mike Mansfield stated that "it is to the interest of the United States that the principles of these conventions be accepted universally by all nations." 101 Cong. Rec. 9960 (July 6, 1955). Senator Mansfield explained that American "standards are already high. The conventions point the way to other governments. Without any real cost to us, acceptance of the standards provided for prisoners of war, civilians, and wounded and sick will insure improvement of the condition of our own people as compared with what had been their previous treatment." *Ibid.* Senator Alexander Smith concurred: "I cannot emphasize too strongly that the one nation which stands to benefit the most from these four conventions is our own United States. * * * To the extent that we can obtain a worldwide acceptance of the high standards in the conventions, to that extent will we have assured our own people of greater protection and more civilized treatment." *Id.* at 9962.

One important protection is Article 5 of the Third Geneva Convention Relative to the Treatment of Prisoners of War ("GPW") (Aug. 12, 1949, 6 U.S.T. 3316), which provides:

> Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4 [defining POWs], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

The same requirement has been part of American military regulations for decades:

> All persons taken into custody by U.S. forces will be provided with the protections of the GPW until some other legal status is determined by competent authority.

United States Dep't of Army, Regulation 190-8, §1-5(a)(2) (Oct. 1, 1997).[3] The regulation further provides (*id*. §1-6):

> (a) In accordance with Article 5, GPW, if any doubt arises as to whether a person, having committed a belligerent act and been taken into custody by the US Armed Forces, belongs to any of the categories enumerated under Article 4, GPW, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.
>
> (b) A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces, and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists.

Hearings under Regulation 190-8 are designed to occur shortly after a prisoner's capture. Anyone determined to be an innocent civilian is "immediately returned to his home or

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[3] Regulations for the other branches of the military contain the same provisions discussed in the text. See OPNAVINST 3461.6 (Navy); AFJI 31-304 (Air Force); MCO 3461.1 (Marine Corps). Predecessor versions of Regulation 190-8 also included these provisions.

released." Reg. 190-8, §1.6(e)(10)(c). Prisoners of war are released when the active military conflict ends. Geneva Convention, Art. 118 ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities").

It has been Defense Department policy to comply with the Laws of War, including the Geneva Conventions, in conducting "military operations and related activities in armed conflict, *however such conflicts are characterized*." Judge Advocate General's School, OPERATIONAL LAW HANDBOOK 10 (O'Brien, ed. 2003) (emphasis added); see also Department of Defense Directive No. 5100.77, ¶5.3.1 (Dec. 9, 1998). Thus, the military instructs its Judge Advocates that they "should advise commanders that, regardless of the nature of the conflict, all enemy personnel should initially be accorded the protections of the GPW Convention (GPW), at least until their status may be determined." OPERATIONAL LAW HANDBOOK at 22. See also U.S. Marine Corps, The Basic School Training Command, LAW OF WAR/CODE OF CONDUCT 10 (Dec. 2002) (instructing new Marine Corps officers that "[e]veryone who is captured or detained during a conflict should therefore be treated as the Geneva POW Convention requires until the proper tribunal can judge his or her case").

II. CSRTs Do Not Comport With Military Law Principles.

Although the model of Regulation 190-8 was invoked by some members of Congress to justify ousting the courts of habeas jurisdiction and replacing habeas with limited judicial review of the CSRTs, there are fundamental differences between CSRTs and hearings under Regulation 190-8—differences that cannot be corrected under the severely

circumscribed review provided by the DTA, Pub. L. No. 109-148, Tit. X, 119 Stat. 2739.[4] The CSRTs depart significantly from standards followed by the military for decades.

First, the CSRTs conducted after *Rasul* were irretrievably infected with the pernicious effects of command influence—the pressure that superiors exert over military subordinates. Command influence eliminates "a forum where impartiality is not impaired"; it is the "mortal enemy of military justice." *United States* v. *Thomas*, 22 M.J. 388 (CMA 1986). Its effect is so harmful to the objectivity and the validity of any military tribunal that it is prohibited by the Code of Military Justice and the rules governing courts-martial. 10 U.S.C. § 837(a) (barring any attempt "to coerce" or "influence the action of a court-martial or any other military tribunal"); Manual of Courts-Martial, Rule 2-104 (2005) ("No person" may "coerce" or "influence" the actions of any military tribunal "with respect to such authority's judicial acts").

Command influence is inextricably intertwined with the CSRT process in both form and practice. The CSRT Order itself proclaimed that "[e]ach detainee" receiving a CSRT already "*has been determined to be an enemy combatant* through multiple levels of review." CSRT Order §a (July 7, 2004) (emphasis added). Even before the CSRT Order, the President labeled the detainees as "killers" and "terrorists." Bronwen Maddox, *Truth is casualty in fog of the Afghan*

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[4] The DTA also directed the Department of Defense to establish new rules, *inter alia*, to "ensure" that "to the extent practicable" future CSRTs assess whether any statement "derived from or relating to [the] detainee" was obtained by torture or coercion and "the probative value (if any) of any such statement." *Id*. §1005(b)(1). But the DTA provided that such new rules would apply only "with respect to any proceeding beginning on or after the date of the enactment of this Act," *i.e.*, December 30, 2005. All of the petitioners' CSRTs were held before then.

war, THE TIMES (London), May 8, 2002. More recently, the President reiterated that "a lot" of Guantanamo detainees "are killers." Maura Reynolds, *No Tax Hike For Bridges*, L.A. TIMES, Aug. 10, 2007, at A12. On a visit to the Guantanamo base in January 2002, former Secretary of Defense Donald Rumsfeld described the detainees as "among the most dangerous, best trained, vicious killers on the face of the earth." Christine Lowe, *Guarding Gitmo*, MARINE TIMES, Feb. 11, 2002, at 211. Statements like these made it exceedingly unlikely that a CSRT would reach a contrary conclusion. Indeed, in a naked assertion of command influence, in some of the rare cases where a detainee was found by his CSRT panel not to be an enemy combatant, higher ranking officials in the chain of command insisted on another bite at the apple—a "do-over" by the same panel or a new panel—until the CSRT reached the "correct" result: an enemy combatant finding. *Al-Odah* v. *Bush*, No. 06-1196, Reply to Opp. to Pet. for Rehearing, Decl. of Lt. Col. Stephen Abraham ¶23.

Second, CSRTs were allowed to consider evidence against a detainee procured by torture. The CSRT Order permitted CSRT decisions to be based on "any information [the panel] deems relevant and helpful to a resolution of the issue before it," including hearsay evidence obtained through interrogation procedures prohibited by the Geneva Conventions. CSRT Order §g(9). Regulation 190-8 hearings, by contrast, bar evidence obtained by torture. Army Reg. 190-8, Ch. 2-1a(1)(d) ("The use of physical or mental torture or any coercion to compel prisoners to provide information is prohibited"). The government's ability in the CSRTs to use evidence procured by torture stacked the deck even more heavily in its favor: an out-of-tribunal statement uttered by an unknown individual under coercion—the content of which was kept secret from the detainee—could result in a detainee's indefinite imprisonment.

Third, Regulation 190-8's stripped-down procedures are necessary for the battlefields on which they were intended to operate, where captured people must be sorted quickly. See Regulation 190-8, Chs. 2-3. That justification does not apply to CSRTs for individuals held thousands of miles from an active theatre of war, years after their capture. See *Hamdi*, 542 U.S. at 534 (plurality opinion) (distinguishing the process due when "continu[ing] to hold those who have been seized" compared to "initial captures on the battlefield"); *Rasul*, 542 U.S. at 488 (Kennedy, J., concurring) ("Perhaps, where detainees are taken from a zone of hostilities, detention without proceedings or trial would be justified by military necessity for a matter of weeks; but as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker").

Fourth, an erroneous determination under the CSRT process has repercussions far more severe than an error in a Regulation 190-8 hearing. A prisoner-of-war finding means that the person is held until the end of hostilities. But given the nature of the "war on terror"—which may last indefinitely—an "enemy combatant" label imposed by a CSRT may result in imprisonment for the rest of a detainee's life. Our Nation's military tradition does not permit imposing a life sentence on a suspected enemy without substantially greater procedural protections than the CSRTs provide.

Taken together, these differences show that CSRT proceedings are little more than a façade, without even the substantive protections that ensure compliance with Article 5 of the Geneva Conventions and that invest 190-8 tribunals with legitimacy in the eyes of the world. Hearings conducted by the U.S. military under Article 5 have long been models of fairness, as evidenced by the large numbers of detainees released as non-combatants during past conflicts following such hearings conducted in the field. For example, in the 1991 Gulf War, nearly 1,200 hearings resulted in the release

of about 75% of those initially detained. Dep't of Defense, *Final Report to Congress: Conduct of the Persian Gulf War* L-3 (1992). In contrast, the CSRT regime is heavily tilted in favor of an enemy combatant finding, which undermines the legitimacy of the military justice system.

These serious defects are compounded by the sharply limited judicial review the DTA provides for CSRT findings. The DTA limits the D.C. Circuit to deciding whether the findings were "consistent with the standards and procedures" for CSRTs. DTA §1005(e)(2)(C)(i). This tautology does not remedy the defects in the "standards and procedures" of the CSRT program. While the statute provides that the D.C. Circuit may consider the Constitution "to the extent * * * applicable," §1005(e)(2)(C)(ii), the government's view is that *no* Constitutional provisions apply to the detainees held at Guantanamo. Br. Opp. 19-25. If the Court rejects that position, as it should, then it should reject the Government's reliance on the CSRT results. In light of the possibility of what amounts to a life sentence, the CSRT procedures and limited DTA review do not measure up to Constitutional standards, as a number of other briefs explain.

III. Holding Guantanamo Detainees Indefinitely Without Any Meaningful Judicial Review Increases The Risk To American Armed Forces.

The significant deficiencies of the CSRTs may well have an adverse effect on the members of America's armed forces. If the United States holds prisoners indefinitely—potentially lifetime imprisonment—based on sham CSRT proceedings and without providing meaningful judicial review of their imprisonment, enemies in current or future conflicts may use that as an excuse to mete out similar treatment to captured American military forces.

This risk is greater today than it was in 2004, when the Court decided *Rasul*. Since then, American standing in the world has plummeted. Guantanamo and the government's

treatment of the prisoners there have become lightning rods for anti-American sentiment, fostering the perception that the United States no longer stands for the rule of law. Upholding potentially lifelong imprisonment of Guantanamo detainees based on CSRTs that are widely viewed as preordained proceedings could make the world a great deal more perilous for American servicemen and women captured abroad.

This Court has observed that "[t]he United States frequently employs Armed Forces outside this country—over 200 times in our history—for the protection of American citizens or national security." *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 273 (1990). In recent decades, American armed forces have been engaged somewhere abroad nearly every year. It is inevitable that some American military personnel operating abroad will be captured or taken prisoner. When that happens, the United States government and the families and friends of detained servicemen and women will share a strong interest: ensuring that American personnel are treated fairly and returned promptly when the conflict is over.

In past and present conflicts, the United States has insisted that American soldiers held by the enemy be accorded the basic protections of the Geneva Conventions. Ironically, Deputy Secretary of Defense Paul Wolfowitz invoked the Conventions when objecting to Iraqi treatment of American POWs: "We've seen those scenes on Al Jazeera that others have seen. We have reminded the Iraqis * * * that there are very clear obligations under the Geneva Convention to treat prisoners humanely." Dep't of Defense News Transcript, *Deputy Secretary Wolfowitz Interview with New England Cable News* (Mar. 23, 2003). Similarly, when American troops captured during NATO military action against Serbia in 1999 were shown on Serbian television, beaten and humiliated, the United States immediately demanded their treatment as prisoners of war under the Geneva Conventions. Steven Lee Myers, *Serb Officer, Captured by Rebels, Held by*

U.S., N.Y. TIMES, Apr. 17, 1999, at A9. The United States had the same reaction during Vietnam. See 64 Dep't of State Bull. 10 (Jan. 4, 1971) (announcing President Nixon's call for applying the 1949 Geneva Conventions to ease "the plight of American prisoners of war in North Viet-Nam and elsewhere in Southeast Asia").

The United States has demanded that captured U.S. service personnel be treated in accord with the Geneva Conventions even in situations where the Conventions technically did not apply. After the 1993 capture of U.S. Warrant Officer Michael Durant by forces under the control of Somali warlord Mohamed Farah Aideed, the United States demanded assurances that Durant's treatment would be consistent with the protections afforded by the Conventions, even though "[u]nder a strict interpretation of the Third Geneva Convention's applicability, Durant's captors would not be bound to follow the convention because they were not a 'state.'" Neil McDonald & Scott Sullivan, *Rational Interpretation in Irrational Times: The Third Geneva Convention and the "War On Terror*," 44 HARV. INT'L L.J. 301, 310 (Winter 2003).[5]

Invoking international human rights standards, the United States has condemned foreign governments that have held detainees incommunicado or deprived them of the ability to seek judicial review of their confinements. For example, the United States objected when Liberia arrested journalist Hassan Bility and held him incommunicado on the purported

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[5] American invocation of the Geneva Conventions evidently had its desired effect. "Following these declarations by the United States, heavy-handed interrogations of Durant appeared to cease, * * * and he was subsequently released by Aideed as a 'gesture of goodwill.'" 44 HARV. INT'L L.J. at 310.

ground that he was an "illegal combatant" involved in terrorist activity. *Liberia; Journalist Tortured, Envoy Blaney Discloses, Wants Gov't to Honor Terms of Agreement*, AFRICA NEWS, Jan. 3, 2003 (available on Nexis). The United States Ambassador in Monrovia explained that "[a]n honest and competent civil court" should have judged whether Bility was guilty of a crime, "not any individual or official." John W. Blaney, Jan. 2, 2003 Statement (http://usembassy.state.gov/monrovia/wwwhsp010203.html). Similarly, the State Department expressed "deep concern" over the trial of a Chinese democracy activist who was held incommunicado for six months and whose "trial was conducted in secret, raising questions about the nature of the evidence against him and the lack of due process." State Department, Daily Press Briefing, February 10, 2003 (http://www.state.gov/r/pa/prs/dpb/2003/17590.htm). See also Jeffrey K. Cassin, *United States' Moral Authority Undermined: The Foreign Affairs Costs of Abusive Detentions*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 421, 440-445 (2006) (noting that in recent years, the United States has censured Cuba, Turkmenistan, Uzbekistan, and Burma for holding dissidents or suspected terrorists incommunicado and/or without due process of law).

Yet even as American officials condemn other nations for detaining people indefinitely, authoritarian regimes have pointed to U.S. treatment of the Guantanamo prisoners as justification for such actions. Liberia's former President Taylor defended Bility's treatment by maintaining that Bility was being treated in the same manner as the U.S. treats its own "terrorists." Bill K. Jarkloh, *U.S. Against Government Failure to Produce Bility, Others*, THE NEWS (NIGERIA), July 10, 2002 (available on Nexis). Eritrea's Ambassador to the United States defended his government's roundup of journalists by claiming that their detention without charge was consistent with the United States' detention of material witnesses and aliens suspected by the United States of terrorist activities. Fred Hiatt, *Truth-Tellers in a Time of*

Terror, WASH. POST, Nov. 25, 2002, at A15. See also Shehu Sani, *U.S. Actions Send a Bad Signal to Africa: Inspiring Intolerance*, INT'L HERALD TRIB., Sept. 15, 2003, at 6 ("indefinite detention in Guantanamo Bay * * * helps justify Egypt's move to detain human rights campaigners as threats to national security, and does the same for similar measures by the governments of Ivory Coast, Cameroon and Burkina Faso").

If indefinite detention of the Guantanamo prisoners—based on sham CSRT proceedings and without any meaningful judicial review of the factual and legal basis of their imprisonment—is regarded as precedent for similar actions by countries with which we are at peace, it obviously may be similarly regarded by enemies who capture American soldiers in an existing or future conflict. *E.g.*, *Iran Denies British Sailors Mistreated, Claims "Pressure,"* AGENCE FRANCE PRESSE, Apr. 7, 2007 (available on Nexis) (quoting a spokesperson for Iranian President Ahmadinejad, defending Iran's March 2007 seizure of 15 British sailors captured in Iraqi waters, by noting that the Guantanamo detentions have made "the United States * * * the biggest hostage taker"). As a result, the lives of captured American military forces may well be endangered by our Nation's failure to permit Guantanamo detainees to pursue the habeas corpus petitions filed after this Court decided *Rasul*.

The importance of reciprocal treatment of a country's own citizens or soldiers and those of an enemy has an ancient pedigree. Nearly 800 years ago, the Magna Carta provided that foreign merchants from countries at war with England

> "shall be attached without harm of body or goods, until it be known unto us, or our chief justice, how our merchants be entreated who are then found in the land making war against us; and if our merchants be well intreated there, theirs shall be likewise with us."

Johnson v. *Eisentrager*, 339 U.S. 763, 783 n.11 (1950) (quoting Magna Carta, chapter 30, in 3 THE COMPLETE STATUTES OF ENGLAND 27 (Halsbury's Laws of England 1929)).

Shortly after World War II ended, General Eisenhower explained to Soviet Marshal Zhukov why German POWs received the same rations as American soldiers:

> Well, in the first place my country was required to do so by the terms of the Geneva Convention. In the second place the Germans had some thousands of American and British prisoners and I did not want to give Hitler the excuse or justification for treating our prisoners more harshly than he was already doing.

Dwight D. Eisenhower, CRUSADE IN EUROPE 469 (1949).[6]

In Vietnam, the American decision to apply the Geneva Conventions' principles to captured enemy soldiers was driven in part by the desire to obtain "reciprocal benefits for American captives." Maj. Gen. George S. Prugh, VIETNAM STUDIES, LAW AT WAR: VIETNAM 1964-1973, at 62-63 (Dep't of the Army 1975). Our insistence that the enemy apply the Geneva Conventions to American POWs in Vietnam saved American lives:

> [A]pplying the benefits of the Convention to those combat captives held in South Vietnam did enhance the opportunity for survival of U.S. service members held by the Viet Cong and North Vietnamese. While

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[6] On the Russian front, in contrast, the belligerents did not follow the Geneva Conventions, with horrific results. The consensus is that at least 55% of Soviet POWs died in German captivity, while some 38% of German POWs held by the Soviets perished. Evan Mawdsley, THUNDER IN THE EAST: THE NAZI-SOVIET WAR 1941-1945 103, 238 (2005).

> the enemy never officially acknowledged the applicability of the Geneva Convention, and treatment of American POWs continued to be brutal, more U.S. troops were surviving capture. Gone were the days when an American advisor was beheaded, and his head displayed on a pole by the Viet Cong. On the contrary, the humane treatment afforded Viet Cong and North Vietnamese Army prisoners exerted constant pressure on the enemy to reciprocate, and the American POWs who came home in 1973 survived, at least in part, because of [that].

Col. Fred L. Borch, *Review of Honor Bound*, 163 MIL. L. REV. 150, 152 (2000).

In current debates about the Guantanamo detainees and prisoners from the conflicts in Afghanistan and Iraq, military officers, government officials, and commentators have pointed out that "[t]he Geneva Conventions operate on the principle of reciprocity," Joan Fitzpatrick, *Sovereignty, Territoriality, and the Rule of Law*, 25 HASTINGS INT'L & COMP. L. REV. 303, 317 (2002), and that if the United States does not apply the Geneva Conventions, it heightens the risk that captured Americans will be denied the protection of the Conventions by foreigners. In recent Senate hearings, Defense Secretary Gates, General Petraeus, and Commander Fallon all testified that standards for detainee treatment must be based on the principle of reciprocity, and all agreed that the manner in which we treat our own detainees may directly affect the treatment of captured U.S. soldiers. Statement of Gen. David H. Petraeus, Senate Committee on Armed Services (Dec. 5, 2006); Statement of Dr. Robert M. Gates, Senate Committee on Armed Services (Jan. 23, 2007); Statement of Adm. William J. Fallon, Senate Committee on Armed Services (Jan. 30, 2007) (all available at http://armed-services.senate.gov/ hearings.cfm).

Similarly, William H. Taft IV, the State Department's Legal Adviser, wrote the President in 2002 that "[a]ny small benefit from reducing further [the application of the Geneva Conventions] will be purchased at the expense of the men and women in our armed forces that we send into combat." Mem. to Counsel to the President (Feb. 2, 2002) (www.fas.org/sgp/othergov/taft.pdf). See also, *e.g.*, Wesley K. Clark, *The Next Iraq Offensive*, N.Y. TIMES, Dec. 6, 2005, at A27 ("among retired officers, there is deep concern that the Bush administration's attitude on the treatment of detainees has jeopardized not only the safety of our troops but the moral purpose of our effort"); P.X. Kelly & Robert F. Turner, *War Crimes and the White House: The Dishonor in a Tortured New 'Interpretation' of the Geneva Conventions*, WASH. POST, July 26, 2007, at A21 ("The Geneva Conventions provide important protections to our own military forces when we send them into harm's way. Our troops deserve those protections, and we betray their interests when we gratuitously 'interpret' key provisions of the Conventions in a manner likely to undermine their effectiveness"). The danger that captured Americans might be mistreated is increased for those American forces overseas, some in Afghanistan for example, who do not always wear military uniforms.

In addition to the interest in obtaining reciprocal benefits for our own captured soldiers, adherence to traditional legal principles furthers the United States' moral authority, which decreases the ability of our enemies to turn civilian populations against us and in turn increases the ability of our troops to wage and win war with a minimum of casualties. See Letter from Gen. David H. Petraeus to Multi-National Force–Iraq (May 10, 2007) (http://tinyurl.com/35wpe7) ("Adherence to our values distinguishes us from our enemy. This fight depends on securing the population, which must understand that we—not our enemies—occupy the moral

high ground"). As General John Vessey wrote in comments echoed by Secretary of State Colin Powell:

> I continue to read and hear that we are facing a "different enemy" in the war on terror; no matter how true that may be, inhumanity and cruelty are not new to warfare nor to enemies we have faced in the past. In my short 46 years in the Armed Forces, Americans confronted the horrors of the prison camps of the Japanese in World War II, the North Koreans in 1950-53, and the North Vietnamese in the long years of the Vietnam War, as well as knowledge of the Nazi's holocaust depredations in World War II. Through those years, we held to our own values. We should continue to do so.

Letter from Gen. John W. Vessey (Ret.) to Sen. John McCain (Sept. 12, 2006), quoted in 152 Cong. Rec. S10412 (daily ed. Sept. 28, 2006); Letter from Colin Powell to Sen. John McCain (Sept. 13, 2006), quoted *ibid*.; see also U.S. Senate Judiciary Committee Hearing on Detainee Trials (Aug. 2, 2006) ("Even in a conflict like this where you don't expect particularly good treatment, * * * we have to set the standard; I think that's our obligation as a country * * *") (statement of General Richard Myers, former Chairman of the Joint Chiefs of Staff).

Nearly 80 years ago, Justice Brandeis warned:

> Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. * * * If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that * * * the end justifies the means * * * would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

Olmstead v. *United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting). The United States still serves as an example to the world. Our concern is that, in this instance, the government is setting an example that is not only fundamentally at odds with the rule of law, but that puts our own troops in greater peril.

IV. Constitutional Protections Apply To Detainees Held At The Guantanamo Base.

The government attempts to justify the wholly inadequate procedures offered to Guantanamo detainees by asserting that ordinary principles of habeas corpus and due process do not apply because the government is holding the detainees outside the sovereign territory of the United States. Br. Opp. 19-24. This argument rests on the February 1903 lease agreement between the United States and Cuba, which provides in pertinent part:

> While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas.

T.S. No. 418, Art. III, 6 Charles I. Bevans, TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949, at 1113, 1114 (State Dep't 1971) .

In *Rasul*, this Court rejected the contention that the rights of Guantanamo detainees depended on the technicalities of sovereignty. The Court held that "the reach of the writ" of habeas corpus has always "depended not on formal notions of territorial sovereignty, but rather on the practical question of 'the exact extent and nature of the jurisdiction or dominion exercised in fact by the [government].'" 542 U.S. at 482. As

Justice Kennedy concluded in his concurring opinion: "What matters is the unchallenged and indefinite control that the United States has long exercised over Guantanamo Bay. From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States." *Id*. at 487. In short, "Guantanamo Bay is in every practical respect a United States territory." *Ibid*.

The *Rasul* Court was correct. But even if "formal notions of territorial sovereignty" (*Rasul*, 542 U.S. at 482) were relevant, government officials and legal scholars have long rejected the contention that the United States "is not sovereign over Guantanamo Bay." Br. Opp. 24.

1. The Guantanamo lease "is no ordinary lease. Its term is indefinite and at the discretion of the United States." *Rasul*, 542 U.S. at 487 (Kennedy, J., concurring). To our knowledge, Guantanamo is the only military base located in another country that the United States is legally entitled to keep in perpetuity. Every other American base overseas is leased for a specific term, and when that term expires, either the base must be closed or the agreement renegotiated—a process in which the host countries may seek a variety of diplomatic, political, and economic concessions in exchange for continued American use of the base. See Robert E. Harkavy, GREAT POWER COMPETITION FOR OVERSEAS BASES 3, 5, 206-209 (1982). That type of "bargained diplomatic exchange" (*id.* at 5) is entirely absent with Guantanamo—the United States may stay at Guantanamo as long as it desires. Cuba has no say in the matter whatsoever. The Castro government has repeatedly objected to the base, but the United States has remained for more than a century.

2. The government's current interpretation of Article III of the 1903 lease—and of the "ultimate sovereignty" provision in particular—is fundamentally at odds with the interpretation that has long held sway among those in the

U.S. military charged with responsibility for Guantanamo and for negotiating and administering other base leases.

The most striking evidence of this is found in a history of the Guantanamo Naval Station written in 1953—long before this dispute arose—by Rear Admiral Marion E. Murphy, the Commander at Guantanamo at the time. Marion E. Murphy, THE HISTORY OF GUANTANAMO BAY (1953). Rear Admiral Murphy's history was published by the Navy and is posted to this day on the official U.S. Navy web site (http://www.cnic.navy.mil/Guantanamo/AboutGTMO/gtmohistgeneral/gtmohistmurphy/gtmohistmurphyintro), which describes the history as a "monumental work," although it adds that the history is not "presented as 'official documentation' * * * by the United States Government or its agencies."

Rear Admiral Murphy's understanding of the lease's "ultimate sovereignty" provision could not have been clearer:

> "Ultimate," meaning final or eventual, is a key word here. *It is interpreted that Cuban sovereignty is interrupted during the period of our occupancy, since we exercise complete jurisdiction and control*, but in case occupation were terminated, the area would revert to the ultimate sovereignty of Cuba.

HISTORY OF GUANTANAMO BAY at 6 (emphasis added). Thus, Rear Admiral Murphy explained,

> it is clear that at Guantanamo Bay we have a Naval reservation which, *for all practical purposes, is American territory*. Under the foregoing agreements, *the United States has for approximately fifty years exercised the essential elements of sovereignty over this territory*, without actually owning it.

Id. at 7 (emphasis added). "Unless we abandon the area or agree to a modification of the terms of our occupancy, we can continue in the present status as long as we like." *Id.* at 7-8.

The same practical understanding of the lease is reflected in an analysis published in 1961 by Rear Admiral Robert D. Powers, Jr., then Deputy and Assistant Judge Advocate General of the Navy. *Caribbean Leased Bases Jurisdiction*, 15 JAG J. 161 (Oct.-Nov. 1961).[7] Rear Admiral Powers began by observing that in marked contrast to other American military bases, which "have been leased for a finite term with fixed provisions as to use and jurisdiction," the "bases at Guantanamo Bay in Cuba and the Canal Zone in Panama are unique in their grants of jurisdiction and their indefinite terms of occupancy." *Id.* at 161. Rear Admiral Powers went on to explain:

> IT MAY BE said that the words used regarding sovereignty in the [Guantanamo and the Panama Canal Zone] treaties grant to the United States the complete right in each case to act as the sovereign, with titular or residual sovereignty in the grantor nation. * * * *If merely ultimate sovereignty is recognized by both parties as remaining in Cuba, then the exercise of present or actual sovereignty must be vested in the United States*.

Id. at 163 (emphasis added). While acknowledging "that *all* the rights of sovereignty" might "not pass" to the United States given the lease's recognition of Cuba's "*ultimate* sovereignty," *ibid.*, Rear Admiral Powers recognized that Cuba retained "at most a 'titular' sovereignty," *id.* at 166, a concept that William Howard Taft, as Secretary of War, characterized as "'a barren ideality,'" *id.* at 164. Like the

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[7] As a Navy lawyer, Rear Admiral Powers was directly involved in negotiating and administering base leases, serving, for example, as the legal adviser to the U.S. Negotiating Group in connection with obtaining base rights through agreements with other countries. 15 JAG J. at 161 n.*.

original Panama Canal treaty, the Guantanamo lease provided the United States with a "complete grant of jurisdiction and control, with only a possibility of reversionary or residual jurisdiction in the grantor." *Id.* at 163. The United States thus is "entitled to treat the territory as subject to such laws and administration as it may make applicable." *Id.* at 166.

3. The conclusion that the United States exercises at least some sovereign powers at Guantanamo is found as well in a 54-page Memorandum prepared in 1912 by the State Department's Office of the Solicitor in connection with negotiations then ongoing between the United States and Cuba to extend the boundaries of the Guantanamo base. After reviewing the negotiating history leading up to the 1903 lease, as well as the provision in the lease affording the United States the power of eminent domain, the Solicitor concluded: "[i]t would thus appear that this Government, upon the approval of this Agreement [the 1903 lease] by Cuba, might well have gone into possession immediately and, as *pro tanto sovereign*, have appropriated under the right of eminent domain the private land found within the leased areas." May 7, 1912 Memorandum at 4 (emphasis added), National Archives, Record Group 59, document no. 811.34537/95. In short, "the Cuban Government is furnishing to this Government the naval reservation and is giving to this Government the *quasi-sovereign rights* granted without any compensation other than the payment of this nominal rent." *Id.* at 10 (emphasis added).

4. Scholars likewise have concluded that the terms of the 1903 lease provide the United States with some type of sovereignty over Guantanamo. Some have concluded that the United States has "territorial sovereignty" over Guantanamo as a result of the lease. See William W. Bishop, Jr., INTERNATIONAL LAW: CASES AND MATERIALS 300 (1953) (noting that "[a]t times one state has acquired by lease rights corresponding more or less closely to territorial sovereignty

over parts of the territory of another state," and citing the Guantanamo lease as an example); Robert L. Montague, III, *A Brief Study of Some of the International Legal and Political Aspects of the Guantanamo Bay Problem*, 50 KY. L.J. 459, 488 (1962) ("the rights conferred upon the United States under this lease amount to 'territorial sovereignty'").

Other scholars agree with Rear Admiral Murphy's view that Cuba's "ultimate" sovereignty over the base means "eventual" sovereignty, *i.e.*, reversionary sovereignty that will become effective only if the United States decides to relinquish the base. See Martin J. Scheina, *The U.S. Presence in Guantanamo*, 4 STRATEGIC REVIEW 81, 82 (Spring 1976) (the lease "recognized Cuba's continuance of ultimate (final or eventual) sovereignty"); Joseph Lazar, *International Legal Status of Guantanamo Bay*, 62 AM. J. INT'L L. 730, 735, 740 (1968) (Article III of the 1903 lease "is an express recognition by the parties that Cuban sovereignty over the leased areas rests suspended"; "Cuba has not yet been given the 'ultimate sovereignty' over Guantanamo"); Mary Ellene Chenevey McCoy, *Guantanamo Bay: The United States Naval Base and its Relationship with Cuba* 51 (unpublished Ph.D. dissertation, University of Akron, 1995) (on file at the University of Michigan) ("[t]he word 'ultimate' was interpreted to mean that Cuban sovereignty was interrupted during the U.S. occupancy").

5. Cuban authorities, too, have recognized implicitly that Cuba does not exercise complete sovereignty over the base as a result of the lease. The Cuban Supreme Court held more than 70 years ago that "the territory of that Naval Station is *for all legal effects regarded as foreign*." *In re Guzman and Latamble*, Annual Digest & Reports of Pub. Int'l Law Cases, 1933-34, Case No. 43, at 112, 113 (emphasis added). Just six weeks after signing the lease, Cuban President Tomas Estrada Palma told the Cuban Senate that the base had been "cede[d]" to the United States. PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES ("Foreign

Relations"), 1903, at 357. In 1912, the United States and Cuba signed an agreement to expand the base that characterized the 1903 lease as a "cession in lease" by which the base was "ceded in lease" to the United States. Foreign Relations, 1912, at 295, 297. (The 1912 agreement never went into effect because the Cuban Senate failed to ratify it. Scheina, 4 STRATEGIC REVIEW at 82.) And a book published "under the auspices" of the Cuban government stated that the base had been "formally ceded" to the United States. 5 Willis Fletcher Johnson, THE HISTORY OF CUBA, page following cover page, 89 (1920).[8]

6. As the long history of Guantanamo demonstrates, Cuba does not presently have—and has not had for more than 100 years—sovereignty in any meaningful sense over the American base at Guantanamo. "'Sovereignty' is a term used in many senses and is much abused," but in general "it implies a state's lawful control over its territory generally to the exclusion of other states, authority to govern in that territory, and authority to apply law there." RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES §206 cmt b (1987). Or as this Court has recognized, "[a] basic attribute of full territorial sovereignty is the power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens." *Duro* v. *Reina*, 495 U.S. 676, 685 (1990). Cuba has no such power—indeed, it has no power whatever—over Guantanamo. See also *United States* v. *Rice*, 17 U.S. 246, 254 (1819) (Story, J.) (during the British occupation of Castine, Maine in 1814 and 1815, "[t]he

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[8] A "cession" is the "act of relinquishing property rights"—the "relinquishment or transfer of land from one state to another, esp. when a state defeated in war gives up the land as part of the price of peace." BLACK'S LAW DICTIONARY 221 (7th ed. 1999).

sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there").

It is the United States that acts as sovereign at Guantanamo, for it is United States law that applies there. And it is the United States—and the United States alone—that has the power to enforce its law at Guantanamo over all who set foot within the naval station, including citizens of Cuba. When the United States and Cuba negotiated detailed terms to implement the February 1903 lease, Cuba proposed excluding Cuban citizens from the application of U.S. law: "Cuban citizens who may have committed any crime or misdemeanor within the boundaries of said statio[n] shall be delivered to the Cuban authorities, for trial under the laws and by the tribunals of Cuba." Art. V, draft of proposed Cuban lease terms transmitted by Herbert Squiers, U.S. minister in Havana, to Secretary of State John Hay, Despatch No. 549, June 6, 1903, 7 Despatches from the United States Ministers to Cuba, 1902-1906, National Archives. But the United States rejected that proposal, June 20, 1903 telegram, Minister Squiers to Secretary Hay, *id.*, Despatch No. 572, and the proposed exclusion was dropped from the final agreement of specific lease terms signed by the United States and Cuba in July 1903. Instead, that document provided that *all* "fugitives from justice charged with crimes or misdemeanors amenable to United States law, committed within [the naval station], taking refuge in Cuban territory, shall on demand, be delivered up to duly authorized United States authorities." T.S. No. 426, Art. IV, 6 Bevans at 1121.

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Less than three months after the United States and Cuba signed the Guantanamo lease, President Theodore Roosevelt wrote Secretary of State Hay that "we regard the [Cuban] coaling stations as ours." Theodore Roosevelt to John Hay, May 12, 1903, Theodore Roosevelt Papers, Library of

Congress, Manuscript Division, microfilm reel 416. The United States has treated Guantanamo "as ours" ever since—and it is perfectly entitled to continue to "exercise complete jurisdiction and control" (T.S. No. 418, Art. III, 6 Bevans at 1114) over the base as long as it likes. Under these unique circumstances, the Court should reject the government's argument that the petitioners have no rights under the U.S. Constitution because Cuba is "sovereign" at Guantanamo.

CONCLUSION

It is a sad fact that the United States is no longer recognized as a leader in the development of international standards for the treatment of captured prisoners. Instead, it is regarded by many around the world as an outlaw nation, using a rigged process to reach a predetermined result that is effectively immune from independent judicial review. That perception increases the risk to American military forces unfortunate enough to be captured by enemies abroad. Only by rejecting the government's position and upholding the Guantanamo detainees' right to pursue the habeas petitions filed after *Rasul* will the Court demonstrate that our Nation's adherence to the rule of law remains alive and well.

The judgment of the court of appeals should be reversed and the cases remanded for consideration of the detainees' habeas corpus petitions on the merits.

Respectfully submitted.

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