[ORAL ARGUMENT NOT YET SCHEDULED]

CASE NO. 09-5051

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

GHALEB NASSAR AL-BIHANI,

APPELLANT,

v.

BARACK OBAMA, PRESIDENT OF THE UNITED STATES, ET AL.,

APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR NON-GOVERNMENTAL ORGANIZATIONS AND SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF REHEARING OR REHEARING *EN BANC*

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RULE 26.1 DISCLOSURE STATEMENTS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* make the following disclosures:

The Brennan Center for Justice at NYU School of Law certifies that it has not issued shares to the public, and has no parent company, subsidiary, or affiliate that has issued shares to the public.

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1)(A), the undersigned certifies as follows:

(A) **Parties and Amici.** To *amici's* knowledge, all parties, intervenors, and *amici* appearing in this court are listed in the Petition for Rehearing and the Petitioner-Appellant's original brief in this case, No. 09-5051, other than Non-Governmental Organizations and Scholars (listed in Appendix A) filing this brief as *amici curiae* in support of the Petition for Rehearing or Rehearing *En Banc*.

(B) **Ruling Under Review.** To *amici's* knowledge, references to the ruling at issue appear in the Petition for Rehearing and the Petitioner-Appellant's original brief in this case, No. 09-5051.

(C) **Related Cases.** To *amici's* knowledge, references to any related cases appear in the Petition for Rehearing and Petitioner-Appellant's original brief in this case, No. 09-5051.

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INTERESTS OF *AMICI CURIAE* AND SUMMARY OF ARGUMENT

Amici listed in Appendix A are non-governmental organizations and legal scholars who are experts on international law. *Amici* urge rehearing because the panel opinion includes a number of overly broad, incorrect, and prejudicial statements of law.

First, the panel erred when it determined that the laws of war do not affect the President's detention authority. As Judge Williams explained, this holding is contrary to direct Supreme Court precedent. It exceeds even the detention authority asserted by the government, which recognizes that the Authorization for Use of Military Force ("AUMF") "empowers the President to use all necessary and appropriate force to prosecute the war, in light of law of war principles." Because the parties were in agreement on the applicability and relevance of the laws of war, there was no reason for the panel opinion to reevaluate this settled point in order to decide the relevant standard for detention.

Second, the panel opinion outlines an incorrect approach to assessing District Court procedural decisions. Contrary to the Supreme Court's direction in *Boumediene*, the panel opinion adopts a presumption that any challenge to procedural rulings in habeas cases is automatically "on shaky ground" and "highly suspect." *Al-Bihani v. Obama*, 590 F.3d 866, 876 (D.C. Cir. 2010). The panel opinion need not have adopted this framework in order to consider the specific

procedural challenges before it. *Id.* at 882-86 (Williams, J., concurring).

Because the panel opinion's sweeping and prejudicial conclusions directly conflict with Supreme Court precedent, rehearing is warranted.

ARGUMENT

A. The Panel Opinion's Statements Regarding the Laws of War Are Wrong On the Merits and Prejudice Future Cases.

The panel opinion's conclusion that the laws of war do not limit the President's detention authority, *Al-Bihani*, 590 F.3d at 871, conflicts with Supreme Court precedent. Not only was the panel's analysis incorrect, but its errors have produced (and will continue to produce) detrimental effects in future cases.

1. The panel opinion's holding with regard to the laws of war directly contradicts statements by both the plurality and two of the concurring Justices in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). The panel opinion states that "the premise that the war powers granted by the AUMF and other statutes are limited by the international laws of war … is mistaken." *Al-Bihani*, 590 F.3d at 871. This statement is untenable in light of *Hamdi*, where six Justices held that the President's authority under the AUMF must be interpreted in light of the laws of war. *See Hamdi*, 542 U.S. at 521 (plurality) (describing the President's detention authority under the AUMF as "based on longstanding law-of-war principles"); *id.* at 548 (opinion of Souter, J., joined by Ginsburg, J.) ("[T]he military and its

Commander in Chief are authorized to deal with enemy belligerents according to … the laws of war."). The plurality cited a number of treaties regulating the conduct of hostilities to deduce that "[i]t is a clearly established principle of the law of war that detention may last no longer than active hostilities." *Id.* at 520. Moreover, the Court made clear that the laws of war are applicable in the absence of explicit statutory language to the contrary. *See id.* at 521 (plurality); *see also Hamdan v. Rumsfeld*, 548 U.S. 557, 594 (2006) (interpreting the UCMJ, the AUMF, and the DTA in light of the laws of war).

The Government has accepted *Hamdi*'s holding that the AUMF should be interpreted in light of the laws of war: "Principles derived from law-of-war rules governing international armed conflicts … must inform the interpretation of the detention authority Congress has authorized for the current armed conflict." Resp.'s Mem. Regarding Gov't Detention Authority Relative to Detainees at Guantanamo Bay at *1, *In Re: Guantanamo Bay Litigation*, No. 08-442 (D.D.C. Mar. 13, 2009). "This [detention] authority is derived from the AUMF, which empowers the President to use all necessary and appropriate force to prosecute the war, in light of law-of-war principles that inform the understanding of what is 'necessary and appropriate.'" *Id.* at *3 (quoting *Hamdi*, 542 U.S. at 518).

2. The panel opinion's categorical repudiation of the laws of war ignores and contradicts two centuries of Supreme Court precedent. In conflict after

conflict, the Supreme Court has relied upon the laws of war as default rules governing the conduct of hostilities, applicable absent explicit statutory language to the contrary. *See, e.g.*, *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815) ("Till such an act [of Congress] be passed, the Court is bound by the law of nations ….").

During the Quasi-War with France and the War of 1812, Chief Justice Marshall, writing for the Court, repeatedly invoked the law of nations. In *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801), the Court stated that "[C]ongress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed." In *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), the Court observed in a law of war context that "an act of Congress ought never to be construed to violate the law of nations." In *Thirty Hogsheads of Sugar v. Boyle*, 13 U.S. (9 Cranch) 191, 198 (1815), the Court noted that "[t]he law of nations is the great source from which we derive those rules, respecting belligerent and neutral rights."

The Court again relied upon the laws of war in decisions regarding nineteenth-century conflicts. In *United States v. Pacific R.R.*, 120 U.S. 227, 233 (1887), the Court recognized that the "rules of war" were "applicable to the contending forces" in the Civil War. *See also Ford v. Surget*, 97 U.S. 594, 606 (1878). And during the Spanish-American War, the Court held in *The Paquete*

Habana, 175 U.S. 677, 700 (1900), that the law of war limited the conduct of the United States against enemy nationals, famously observing that "[i]nternational law is part of our law."

The Court has continued to apply the laws of war as default rules during the conflicts of the 20th and 21st centuries. During World War I, the Court relied on the laws of war to determine the rights and responsibilities of a then-neutral United States in *The S.S. Appam*, 243 U.S. 124, 149, 153 (1917). During World War II, the Court observed in *Ex parte Quirin*, 317 U.S. 1, 27-28 (1942), that "[f]rom the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights, and duties of enemy nations as well as of enemy individuals." This approach has continued in recent years. *See supra* pp. 2-3.

3. The panel's broad and inaccurate pronouncements on the applicability of the laws of war are already influencing lower court holdings. *See, e.g.*, *Anam v. Obama*, No. 04-1194, 2010 WL 58965, at *3 n.1, 4 (D.D.C. Jan. 6, 2010) (describing, albeit incorrectly, the panel's conclusion regarding the President's detention authority). Indeed, District Judges have requested further briefing on the ramifications of the panel opinion. *See, e.g.*, Order, *Al-Adahi v. Obama*, No. 05-280 (D.D.C. Jan. 6, 2010). The panel opinion's impact extends even beyond Guantanamo habeas cases. *See Al-Zahrani v. Rumsfeld*, No. 09-0028, 2010 WL

535136, at *10 n.8 (D.D.C. Feb. 16, 2010) (relying on the panel opinion's law-of-war statements in an Alien Tort Statute case, notwithstanding that statute's explicit reference to international law). Left uncorrected, the damage caused by the panel opinion is likely to be widespread.

B. The Panel Opinion's Approach to Procedural Issues Is Wrong And Unwarranted.

1. The panel opinion's sweeping pronouncements regarding habeas litigation in the D.C. District Court since *Boumediene* merit rehearing because they are inconsistent with the Supreme Court's decision. In *Boumediene v. Bush*, the Court explicitly refused to shape the procedural contours of habeas hearings without grounding in the particular circumstances of discrete cases. *See* 128 S. Ct. 2229, 2276 (2008). Instead, the Court directed that the numerous remaining questions be addressed by the District Court, which would rely on its considerable "expertise and competence" to shape this new area of law case by case. *Id.* The Court understood that the Suspension Clause's requirements in this novel context would be highly fact-specific, and should be determined by the District Court.[1]

But the panel opinion takes exactly the opposite approach. Rather than consider each of the specific claims raised by petitioner, it grossly misreads *Boumediene* to hold that there are virtually no procedural requirements in these

[1] The Court similarly expressed its faith in a District Court's ability to weigh competing interests in detention cases in *Hamdi*, 542 U.S. at 538-39 (plurality).

cases and that habeas petitioners must overcome steep obstacles to prevail on any procedural matters. *See Al-Bihani*, 590 F.3d at 876 (describing any such claims as resting "on shaky ground" and "highly suspect"). The panel opinion justifies its procedural blank check by invoking the Court's observation that Guantanamo habeas proceedings "need not resemble a criminal *trial*." *Boumediene*, 128 S. Ct. at 2269 (emphasis added). But it does not follow that Guantanamo habeas proceedings in federal court need not resemble an ordinary *habeas* proceeding in federal court. Indeed, in order to "be effective" and "meaningful," *id.*, habeas procedures in cases challenging executive detentions may need to be more robust because the petitioners have never had the benefit of a full criminal trial. *See id.* ("[T]he need for collateral review is most pressing" with executive detention because the impartiality and procedural protections of criminal trials are "not inherent in executive detention orders or executive review procedures"); *Hamdi*, 542 U.S. at 536 (plurality) (the protections of habeas review are "strongest" in the context of executive detention).

The panel opinion's holding that hearsay evidence is "always admissible," *Al-Bihani*, 590 F.3d at 879—with the consequence that *any* modicum of reliability in a hearsay document, however slight, would add strength to the government's case—is indicative of the flaws in its blanket approach to procedural matters. The opinion reaches this conclusion by misreading the *Hamdi* plurality's recognition

that hearsay "*may* need to be accepted" if it is the most reliable evidence available. 542 U.S. at 533-34 (emphasis added). Yet it ignores *Boumediene*'s express disapproval of procedures in which "there are in effect no limits on the *admission* of hearsay evidence." 128 S. Ct. at 2269 (emphasis added). And it clashes with this Court's recognition in *Parhat v. Gates*, 532 F.3d 834, 850 (D.C. Cir. 2008), that unreliable hearsay evidence should be given *no* weight. Under the panel opinion's approach, the Government could successfully defend a detention by flooding the court with unreliable documents. *But see id.* at 848-49.

More generally, the panel opinion's approach to due process is troubling because it instructs the District Court to presume that no procedural protections are necessary to maintain fair proceedings. As a result, a vast number of open questions in pending habeas cases have now been prematurely prejudiced in the abstract, untethered to particular facts or circumstances. That is particularly significant because the Supreme Court has vacated this Court's prior holding, in *Kiyemba v. Obama*, 555 F.3d 1022, 1026-27 (D.C. Cir. 2009), that Guantanamo detainees are not protected by the Due Process Clause. *See Kiyemba v. Obama*, 130 S. Ct. 1235 (2010) (per curiam).

2. *Amici* recognize that "[t]hese cases present hard questions and hard choices." *Al-Bihani*, 590 F.3d at 882 (Brown, J., concurring). But, consistent with *Boumediene*'s mandate, the District Court has been responsibly handling the

myriad case-management and evidentiary issues presented in these cases. The District Court has accommodated the Government's secrecy and security concerns at every turn. For example, contrary to the panel opinion's stated concern that observing certain procedures "would have systemic effects on the military's entire approach to war," *id.* at 877, the District Court has minimized the need to divert resources from the war effort, *see, e.g.*, *Khan v. Obama*, 664 F. Supp. 2d 6, 11 (D.D.C. 2009). It has vigorously protected classified information through limited discovery and access to information. *See, e.g.*, *In re Guantanamo Bay Detainee Litig.*, 577 F. Supp. 2d 143, 148 (D.D.C. 2008); *In re Guantanamo Bay Detainee Litig.*, 2008 WL 4858241, at *2 (D.D.C. Nov. 6, 2008). And it has tightly controlled detainees' access to counsel at the Government's behest. *See, e.g.*, *In re Guantanamo Bay Detainee Litig.*, 577 F. Supp. 2d at 157-58.[2]

Experience has proven that the Supreme Court was right to place its faith in the District Court's ability to wade through these issues. Without incident, complaint, or substantial delay, the District Court has gone out of its way to reduce the intrusiveness of the fact-finding process in these habeas cases. This Court should grant rehearing to respect that ongoing, gradual process, and refrain from prejudicing procedural issues that are not squarely presented.

[2] *Amici* take no position on whether these procedural rules are appropriate. At this stage, *amici* merely wish to point out that the panel opinion improperly prejudices the ongoing development of the law in this area in the District Court.

C. The Panel Opinion's Reasoning Cannot Be Ignored.

The panel opinion went beyond the claims raised by the parties and in the process contradicted well-settled legal principles. Moreover, it did so notwithstanding the absence of briefing from the parties and *amici* on the relevant law. Such overreaching was improper and is grounds alone for the withdrawal of the panel opinion. *See, e.g.*, *Nat'l Juvenile Law Center, Inc. v. Regnery*, 738 F.2d 455, 466-67 (D.C. Cir. 1984) (withdrawing an opinion because certain "lurking issues were not fully briefed by the parties," making the court "reluctant to render a decision" on those issues "without the benefit of briefing and oral argument"). Rehearing is particularly warranted because the panel opinion's sweeping and unnecessary conclusions directly conflict with Supreme Court precedent.

The panel opinion propounds these incorrect statements of law as antecedent to its specific holdings, so they cannot easily be ignored or discarded as dicta. Indeed, the panel opinion is already having a prejudicial effect even beyond the unique context of Guantanamo habeas cases. *See supra* pp. 5-6, 8. These issues are of the utmost importance to this Circuit, and to the nation as a whole. Because all of the Guantanamo detainee cases are litigated in this Circuit, there is no opportunity for a conflict to arise. *See Al-Bihani*, 590 F.3d at 881-82. As such, it is incumbent upon this Court to remove these errors by granting the petition for rehearing and giving full and fair consideration to these matters.

CONCLUSION

For the foregoing reasons this Court should grant the petition for rehearing.

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Respectfully submitted,

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APPENDIX A: LIST AND DESCRIPTION OF *AMICI CURIAE*

Non-Governmental Organizations

The Brennan Center for Justice at the New York University School of Law is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. It advocates for national security policies that respect the rule of law, constitutional and human rights, and fundamental freedoms. It has served as counsel in several cases involving Executive detention.

Human Rights First (HRF) is a non-profit, non-partisan organization that has worked since 1978 to create a secure and humane world by advancing justice, human dignity, and respect for the rule of law. HRF supports human rights activists around the world, protects refugees in flight from persecution and repression, and helps build an international system of justice and accountability for human rights crimes. HRF works to advance effective counterterrorism laws and policies that are consistent with U.S. and international law through advocacy in the courts and with policymakers, research and reporting, and trial monitoring.

Human Rights Watch (HRW) is one of the world's leading independent organizations dedicated to defending and protecting human rights. HRW stands with victims and activists to prevent discrimination, to uphold political freedom, to protect people from inhumane conduct in wartime, and to bring offenders to justice. HRW investigates and exposes human rights violations and holds abusers

accountable. HRW challenges governments and non-state actors to end abusive practices and respect international human rights law. HRW currently monitors human rights abuses in over 80 countries.

The National Institute of Military Justice (NIMJ) is a District of Columbia non-profit corporation organized in 1991 to advance the fair administration of military justice and improve public understanding of the military law system. NIMJ has worked and written extensively in the relevant fields. NIMJ's officers and advisory board include law professors, private practitioners, and other experts in the field, none of whom are on active duty in the military, but nearly all of whom have served as military lawyers, including as flag and general officers. NIMJ appears regularly as an *amicus curiae* before the United States Court of Appeals for the Armed Forces, and has appeared in the United States Supreme Court as an *amicus* in support of the government in *Clinton v. Goldsmith*, 526 U.S. 529 (1999), and in support of the petitioners in cases such as *Rasul v. Bush*, 542 U.S. 466 (2004). NIMJ joins only Part A of this brief.

People For the American Way Foundation (People For) is a non-partisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1981 by civic, religious, and education leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, People For now has hundreds of thousands of members and supporters nationwide. One of People For's primary

missions is to educate the public on our tradition of liberty and freedom, and it defends that tradition, including the fundamental right to challenge the legality of one's detention, through litigation and other means. Accordingly, People for has filed *amicus* briefs before the Supreme Court in other cases involving these issues, including *Boumediene v. Bush*, *Rasul v. Bush*, and *Hamdan v. Rumsfeld*.

Reprieve is a London-based legal services charity founded in 1999 by its current director, Clive Stafford Smith, who practiced capital defense litigation in the United States for 20 years. The chairman is Thomas Bingham, Baron Bingham of Cornhill, the recently retired senior law lord in the United Kingdom. Reprieve provides pro bono legal assistance to prisoners facing the death penalty (in the U.S. and around the world) and also litigates to reunite prisoners held beyond the rule of law with their legal rights. Lawyers from Reprieve have been involved in Guantanamo Bay litigation from the very start, filing the initial case that led to the Supreme Court's decision in Rasul v. Bush, and have to date worked on the cases of at least 80 detainees held there. Reprieve has also been at the forefront of efforts to bring the rule of law to other secret U.S. detention facilities.

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CERTIFICATE OF COMPLIANCE WITH RULE 29(d)

In accordance with D.C. Circuit Rule 29(d), the undersigned certifies that the accompanying brief is necessary. *Amici* are non-governmental organizations that have advocated in this Court and others for habeas rights for detainees at Guantanamo Bay, and legal scholars that are experts in international law. *Amici* are not aware of any other brief in this case that describes the legal errors and prejudicial effects of the panel opinion that are discussed in *amici*'s brief.

Dated: March 22, 2010

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CERTIFICATE OF COMPLIANCE

In accordance with Rules 32(a)(5)(A) of the Federal Rules of Appellate Procedure and Circuit Rule 32(a), the undersigned certifies that the accompanying brief has been prepared using 14-point typeface, proportionally spaced, with serifs. According to the word processing system used to prepare the brief, Microsoft Office Word 2003, the brief contains 2,372 words, exclusive of the table of contents, table of authorities, attorney identification and certificates of service and compliance.

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I hereby certify that on March 22, 2010, I caused a true and accurate copy of the Brief for Non-Governmental Organizations and Scholars as *Amici Curiae* in Support of Rehearing or Rehearing *En Banc* to be served upon the following counsel for the parties via electronic mail, by operation of the Court's ECF system:

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