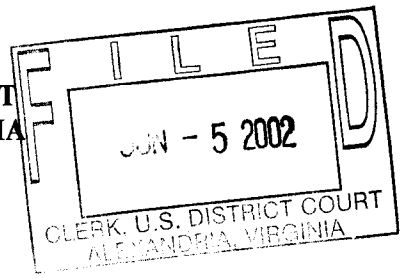
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION



UNITED STATES OF AMERICA,	
v.	CR No. 02-37-A
JOHN PHILLIP WALKER LINDH,	
Defendant	

MOTION FOR LEAVE OF LAW PROFESSORS AND PRACTITIONERS TO FILE MEMORANDUM AMICUS CURIAE OPPOSING RECOGNITION OF "COMBAT IMMUNITY" FOR DEFENDANT LINDH IN REGARD TO HIS ARMED SUPPORT OF TERRORISM

The undersigned proposed Amici Curiae hereby move the Court for leave to appear and file the accompanying proposed Memorandum Amicus Curiae Opposing Recognition of "Combat Immunity" for Defendant Lindh in Regard to His Armed Support of Terrorism.

Proposed amici seek to fulfil the "classic role of amicus curaie by assisting a case of public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." Miller-Wohl Co., Inc. v. Commissioner of Labor and Indus., 694 F.2d 203, 204 (9th Cir. 1982). The particular interest of each proposed amicus curiae is set out in the Statement of Interest attached to the proposed brief, but in summary, each is an experienced scholar or practitioner of public international law with a particular expertise in the laws of armed conflict and the Constitution. The views of jurists on matters of international law are often taken into account when such questions arise in court. See The Paquete Habana, 175 U.S. 677, 700 (1900) ("Such works are

resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is. Hilton v. Guyot, 159 U. S. 113, 163, 164, 214, 215, 40 L. ed. 95, 108, 125, 126, 16 Sup. Ct. Rep. 139.") The amici, through their writing and practice, have contributed to the development of international law on the same issues pending before this Court, and offer their professional views on what the state of law is in these areas, to assist the court in resolving these issues.

Conclusion

For the above-stated reasons, amici respectfully request that the Court grant this motion and accept the attached Memorandum Amicus Curiae Opposing Recognition of "Combat Immunity" for Defendant Lindh in Regard to His Armed Support of Terrorism.

Respectfully submitted,

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On Behalf of Amici Curiae

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STATEMENT OF INTEREST OF AMICI

Ruth Wedgwood is a Professor at Yale University Law School, and Edward B. Burling Professor of International Law and Diplomacy, Johns Hopkins University. She is Director of Studies, Hague Academy of International Law, and has participated on the Hart-Rudman Commission on National Security in the 21st Century (Dept. of Defense Nat'l Security Study Group); on the Secretary of State's Advisory Committee on International Law; and as an advisor to the Secretary of Defense on international law issues in the war on terrorism. Professor Wedgwood has also held the position of Charles H. Stockton Professor of International Law, U.S. Naval War College, Newport, Rhode Island (1998-99), and participated as an amicus curiae before the International Criminal Tribunal for the former Yugoslavia in 1997.

Messrs. Rivkin, Casey and Bartram are partners in the Washington office of Baker & Hostetler LLP and have extensive experience in constitutional and public international law matters. Mr. Rivkin served in the Departments of Justice and Energy and the White House Counsel's Office. Mr. Casey served in the Office of Legal Counsel, Department of Justice. Messrs. Rivkin, Casey and Bartram have practiced before the International Criminal Tribunal for

the Former Yugoslavia and the International Court of Justice on a broad range of public international law matters, including such issues as the definition of armed conflict, compliance with the laws of war, the scope of state responsibility and the extent of binding discovery obligations to which states and state officials can be subjected. They also have published extensively in legal and public policy journals on various constitutional and international law matters, including "Unlawful Belligerency and its Implications Under International Law," Legal Memorandum for the Federalist Society for Law and Public Policy, January 20, 2002.

John C. Eastman is an Associate Professor of Law, Chapman University School of Law and the Director of The Claremont Institute Center for Constitutional Jurisprudence. Prior to entering academia, Dr. Eastman practiced with the national law firm of Kirkland & Ellis, specializing in major civil and constitutional litigation at both the trial and appellate levels.

Samuel Estreicher is a Professor at New York University School of Law. He also holds positions as Director, The Institute of Judicial Administration and Director, The Center for Labor and Employment Law.

Malvina Halberstam is a Professor at the Benjamin N. Cardozo School of Law of Yeshiva University. She has previously served as a counselor on international law for the US Department of State, Office of the Legal Advisor, supervising the State Department's comments on what became the Restatement of US Foreign Relations Law. She has also lectured widely and published articles on international law, US foreign relations law, human rights, women's rights, the Arab-Israeli conflict, and criminal law and procedure

Douglas W. Kmiec is the Dean and St. Thomas More Professor at Columbus School of Law at The Catholic University of America. Professor Kmiec served in the Reagan and Bush administrations and headed the Office of Legal Counsel in the U.S. Department of Justice.

John Norton Moore is the Walter L. Brown Professor of Law, University of Virginia School of Law, and Director, Center for National Security Law. Professor Moore taught the first course in the country on national security law and conceived and co-authored the first casebook on the subject. From 1991-93, during the Gulf War and its aftermath, Professor Moore was the principal legal adviser to the Ambassador of Kuwait to the United States and to the Kuwait delegation to the United Nations Iraq-Kuwait Boundary Demarcation Commission. He has published National Security Law (editor with Frederick S. Tipson and Robert F. Turner) (Carolina Academic Press, 1990).

Ronald D. Rotunda is a Foundation Professor of Law, George Mason University School of Law. He is the author of the seminal, five-volume, Treatise on Constitutional Law: Substance and Procedure (3rd ed., West Group, St. Paul, Minn. 1999) (coauthored with Professor John E. Nowak); and Modern Constitutional Law: Cases and Notes (6th ed., West Group, St. Paul, Minn. 2000).

Professor Robert F. Turner is a Professor at University of Virginia and is the Cofounder and Associate Director, Center for National Security Law, University of Virginia School of Law. He is a former Charles H. Stockton Professor of International Law, U.S. Naval War College and former president, U.S. Institute of Peace. He has served as a three-term chairman of the ABA Standing Committee on Law and National Security, and served as a Co-editor with Professor Moore on National Security Law and National Security Law Documents, as well as the author or editor of more than a dozen other books and monographs.

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INTEREST OF AMICI

Amici are law professors and practitioners specializing in areas of international law, the law of armed conflict, international humanitarian law, and the law of the Constitution. Each has a personal and professional interest in the status and development of international law. Their individual qualifications are detailed in the attached Statement of Interest of Amici.

The question presented by Defendant's Motion to Dismiss Count One of the Indictment For Failure to State a Violation of the Charging Statute (Combat Immunity) (Motion #2) (May 12, 2002) [together with its supporting memorandum of points and authorities hereinafter referred to as "Defendant's Motion"], is of the highest importance both to the proper development of international law, and for the successful prosecution of the United States' war against international terror. Amici strongly believe that Lindh's

claim to so-called "combat immunity" is both legally and factually unfounded. The views expressed herein are those of the individual Amici, and do not necessarily represent the views of any group or organization with which any of them may be affiliated.

SUMMARY OF ARGUMENT

Defendant John Walker Lindh is charged with multiple felonies stemming from his assistance to the al Qaeda terrorist network and its allies. Lindh's counsel, supported by several amici curiae, has made the astonishing claim that Lindh is immune from prosecution because he was a common "foot soldier" entitled to "combat immunity." Lindh, however, was not a lawful combatant to whom "combat immunity" applies. Nor was he some unwitting country rube overtaken by events. He was a willing volunteer for "jihad," and a knowing participant in a mature conspiracy to commit terrorist acts against his fellow citizens.

In particular, according to the indictment, Lindh deliberately took part in efforts to shelter and sustain the al Qaeda terrorist network within the Taliban-controlled areas of Afghanistan. Lindh was part of bin Laden's non-Afghan, Arabic-speaking "Anser" brigade. There is no claim that he was ignorant of al Qaeda's character and purpose, or of its close association with the Taliban Militia. Lindh did not withdraw from this criminal conspiracy after the United States was directly attacked on September 11, after the United Nations Security Council determined, on September 28, 2001, that there is no privilege to "provid[e] any form of support, active or passive, to entities or persons involved in terrorist acts," or to provide "safe havens" to such persons, see S.C. Res. 1373, U.N.S.C., 4385st mtg. § 2 (28 Sept. 2001), or even after United States forces entered the military

campaign, as an ally of the Northern Alliance, against the Taliban and al Qaeda in October, 2001. Indeed, Lindh did not withdraw from the conspiracy even when confronted by an American agent at the Mazar-e-Sharif fortress, or when the captured al Qaeda and Taliban forces betrayed the terms of their surrender and revolted within that prison to overcome their American captors.

Insofar as there may be any pertinent question concerning Lindh's knowledge of, or intention to aid and assist, al Qaeda's activities in the course of these events, that is a matter for proof at trial. Such a factual challenge concerning a defendant's provable intent cannot be determined on the face of a motion to dismiss the indictment, including on the specious grounds of "foot soldier immunity." It should be noted, however, that participation in a conspiracy does not require an accused to carry out every step necessary to complete the substantive offense. It requires a criminal agreement, and an overt act. Whether as a member of al Qaeda – for non-Afghan fighters were generally deemed to belong to al Qaeda – or the Taliban, defendant Lindh was knowingly participating in the network that carried out attacks against Americans both in Afghanistan and throughout the world.

Although Lindh claims the rights of an honorable soldier, he is, in fact, a common criminal, and enjoys no immunity for his actions. Under the laws and customs of war, combat immunity – a doctrine akin to the idea of an "act of state" – applies only to lawful combatants. These are individuals who belong to military formations that (1) are legally authorized, by a sovereign state, to use armed force, *and* (2) that comply, as a matter of policy and practice, with the laws and customs of war. Neither al Qaeda, nor the Taliban Militia, met these requirements. Both groups are "unlawful combatants" who enjoy no

immunity under the laws of war, and their members can be tried for their actions. See Ex Parte Quirin, 317 U.S. 1, 31 (1942).[1]

In this regard, al Qaeda and the Taliban are nothing but groups of private individuals, entirely unprivileged to use armed force. Al Qaeda is a criminal gang. The Taliban is a tribal faction fighting for power in Afghanistan, and seeking to protect the al Qaeda terrorist network. Neither the United States nor the United Nations ever recognized the legality of the Taliban regime. Moreover, neither al Qaeda nor the Taliban qualified as lawful combatants because they consistently disregarded the law and customs of armed conflict. Deliberate and persistent attacks against civilians in terrorist operations, betrayal of the terms of surrender, and other violations of the humanitarian rules of warfare, serve to disqualify both groups from any claim of lawful combatancy.

The President, has, in fact, already determined that both groups are unlawful combatants as part of his decision to deny prisoner of war ("POW") status to Taliban and al Qaeda members being detained at "Camp X-Ray," Guantanamo Bay, Cuba. This determination was based both upon customary international law, the qualifying standards of the Geneva Conventions, and the relevant facts, and was reiterated in a White House statement of February 7, 2002. The President's determination concerning the unlawfulness of the belligerency of al Qaeda and the Taliban is entitled to extraordinary deference from the courts.

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[1] The term "unlawful combatant" (or the equivalent "unlawful belligerent") is a recognized usage from American military practice. See Ex parte Quirin, 317 U.S. 1, 32 (1942) (quoting U.S. War Dept. 1940 Rules of Land Warfare, ¶ 351). Moreover, "[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war." Id. at 37-38. Startling though the phrase may be, Quirin notes that there may be "citizen enemies who have violated the law of war applicable to enemies." Id. at 44.

Significantly, since September 11, Afghanistan's new and *lawful* government, the interim administration chaired by Mr. Hamid Karzai, has concurred (by a statement made on January 29, 2002, in Washington, D.C.), in the President's finding that both the Taliban and al Qaeda are unlawful combatants. "They are criminals," Chairman Karzai noted, "I don't see them as prisoners of war. ... They brutalized Afghanistan. They killed our people. They destroyed our land. There was no war there. It was plain killing fields. Very plain killing fields. And these people are the perpetrators of that atrocity." See National Press Club Afternoon Newsmaker with Hamid Karzai, Chairman of Afghanistan's Interim Administration, National Press Club, Washington, D.C., Jan. 29, 2002, in Lexis-Nexis Library, Federal News Service. Thus, the two states parties to the Geneva Conventions with an interest in this matter have agreed on this interpretation of international law and the treaty.

John Walker Lindh is not, under the laws and customs of war, entitled to combat immunity, and is fully subject to criminal prosecution in the courts of the United States.

ARGUMENT

I. "Combat Immunity" is Reserved for "Lawful Combatants," and Lindh Was an Unlawful Combatant.

The "combat immunity" claimed by Lindh is reserved, under the laws and customs of war, exclusively to "lawful combatants" – as the defendant has himself conceded. See Defendant's Motion at 4. Individuals who join terrorist groups like al Qaeda, and their supporting factions like the Taliban, are unlawful combatants who do not qualify for combat immunity. They can be prosecuted as criminals.

To merit the status of a lawful combatant, two fundamental requirements must be satisfied: (1) the individual must fight as part of the military force of a state, or other

recognized authority, with the legal right to use force; and (2) that group must satisfy four well established and accepted criteria that all military forces, regular and irregular, must meet in order to qualify as lawful combatants. The most important of these criteria is that the group must conduct its operations in accordance with the laws and customs of war. In Lindh's case, none of these requirements were met.

A. The Four Prerequisites for "Lawful Combatant" Status.

Even where a group is otherwise eligible to engage in war, it still must meet four additional requirements to qualify as a lawful belligerent. These criteria originated in customary international law, but have been codified a number of times, beginning with the Brussels Declaration of 1874. Under this instrument, lawful combatant status for a national army, militia, or volunteer corps requires

"compl[iance] with the following conditions:

1. That they have at their head a person responsible for his subordinates;
2. That they wear some settled distinctive badge recognizable at a distance;
3. That they carry arms openly;
4. That in their operations, they conform to the laws and customs of war."

The Brussels Declaration, Article IX, July 27, 1874, reprinted in The Laws of Armed Conflicts 25 (Dietrich Schindler & Jiri Toman eds., 3d. ed. 1988) (drafted by representatives of 15 European States). These four requirements were restated in the Hague Convention of 1907 Respecting the Laws and Customs of War on Land, With Annex of Regulations, to which the United States is a party:

"Section I, Chapter I ("The Qualifications of Belligerents")
"Article I

> "The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:
>
> 1. To be commanded by a person responsible for his subordinates;
> 2. To have a fixed distinctive emblem recognizable at a distance;
> 3. To carry arms openly; and
> 4. To conduct their operations in accordance with the laws and customs of war."

Hague Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539, 1 Bevans 631 [hereinafter "Hague Regulations"]. As explained in the British Manual of Military Law contemporaneous with the Hague Regulations, "[i]t is taken for granted that all members of the army . . . as a matter of course will comply with the four conditions [required for lawful combatant status]; should they, however, fail in this respect . . . they are liable to lose their special privileges of armed forces." Manual of Military Law 240 (British War Office 1914) [hereinafter "British Manual"].[2]

The members of any group that does not meet these requirements are classified as unlawful combatants, and may be prosecuted for any acts of violence they undertake.[3]

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[2] The requirement that armed forces generally obey the laws of war in order to qualify as lawful combatants also reflects American priorities and practice. American military lawyers, serving as judge advocates general, deploy into the field with commanders to advise on questions of the law of war. American forces conduct an after-action inquiry concerning any operation in which civilians were inadvertently killed in the course of an attack on military targets. Theatre commanders also maintain targeting staffs, to make sure that target choices and methods of delivery are consistent with the obligations of proportionality and discrimination in battlefield conduct. The American military justice system is effective and demanding.

[3] The most familiar types of "unlawful combatants" in conventional warfare are saboteurs (at issue in Quirin) and spies. See, e.g., Francis Lieber, Instructions for the Government of Armies of the United States in the Field, originally published as U.S. War Department, Adjutant General's Office, General Orders No. 100, Art. 88 (Apr. 24, 1863) [hereinafter The Lieber Code], reprinted in The Laws of Armed Conflicts 373 (Dietrich Schindler & Jiri Toman eds., 3d ed. 1988), at 3, also reprinted in The Law of War: A Documentary History (Leon Friedman, ed., 1972), at 158 ("The spy is punishable with death by

B. Neither Al Qaeda Nor the Taliban Meet The Requirements for Lawful Combatancy.

Although each of the four requirements for lawful combatant status is highly important, designed to ensure the discipline of an armed force, and to distinguish combatants from protected civilians, there is little doubt that the fourth is the most critical. An armed force that does not generally comply with the laws and customs of war is nothing but a terrorist gang, preying on the civilian population. Not surprisingly, it is with respect to this element that both al Qaeda and the Taliban have most manifestly failed to qualify as lawful combatants. The deliberate murder of civilians in terrorist operations (both in the United States and abroad), the betrayal of the terms of surrenders at Mazar-e-Sharif and elsewhere, and other violations of the humanitarian rules of warfare serve to disqualify the members of this terrorist network from any conceivable claim of lawful belligerency.

Al Qaeda's illegal methods were open and notorious even before the date of Lindh's arrival in Afghanistan. In August 1998, Al Qaeda targeted the American embassies in Kenya and Tanzania, killing 24 persons and wounding 4000 in massive truck bomb explosions. This murderous attack on diplomats and civilians, as well as diplomatic property, was utterly illegal under international law, including the law of war. The Vienna Convention on Diplomatic Relations and customary international law each demand that embassies be considered inviolable. See Vienna Convention on Diplomatic Relations, April 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95 (entered into force 1964; U.S. became a party in 1972). See also Restatement (Third) of the Foreign Relations Law of the United States, Ch. 6, subchapter A (1987) (on the

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hanging by the neck, whether or not he succeeds in obtaining the information or in

coincident standards of customary international law). In addition, the United Nations Convention on Internationally Protected Persons forbids violence against diplomats. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T.1975, 1035 U.N.T.S. 167. The laws and customs of war forbid deliberate attacks on innocent civilians.

So, too, in August 1999, an al Qaeda member was caught at the Canadian border with explosives, and admitted his intention to blow up Los Angeles Airport in order to kill civilians. And of course, on September 11, 2001, al Qaeda hijacked four commercial airliners and used them as weapons of mass destruction to kill 3000 civilians, topple the World Trade Center towers in New York City, and attack the Pentagon. Targeting civilians for deliberate destruction was a blatant violation of the law of war, and the disguise of the hijackers as civilians also constituted an illegal act of perfidy. See Annotated Supplement to the Commander's Handbook on the Law of Naval Operations (Newport, Rhode Island 1997), at 12-8 ("Since civilians are not lawful objects of attack as such in armed conflict, it follows that disguising combatants in civilian clothing in order to commit hostilities constitutes perfidy.")

Bin Laden has never been reticent about his intentions and plans for al Qaeda. See, e.g., Transcript of Interview by Salah Najm with Osama Bin Laden, aired June 10, 1999 ("Our enemy, the target -- if God gives Muslims the opportunity to do so -- is every American male, whether he is directly fighting us or paying taxes."),[4] *and* Transcript of Interview with Osama bin Laden, Oct. 20, 2001 ("we calculated in advance the number

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conveying it to the enemy.").

of casualties from the enemy, who would be killed based on the position of the tower. We calculated that the floors that would be hit would be three or four floors. I was the most optimistic of them all. ... due to my experience in this field, I was thinking that the fire from the gas in the plane would melt the iron structure of the building and collapse the area where the plane hit and all the floors above it only. That is all that we had hoped for.")[5]

Al Qaeda's cooperating auxiliary is no better. Like al Qaeda, the Taliban has systematically violated the laws of war in ground combat, by betraying surrenders such as the rebellion at Mazar-e-Sharif, and even more crucially, by assisting al Qaeda's unlawful attacks around the world by protecting its bases in Afghanistan. One of the fundamental principles of the law of war is "command responsibility" – that a party to a conflict has a duty of repressing and punishing criminal conduct of which it knew or should have known, where it enjoys a situation of control. Rather than attempting to repress al Qaeda attacks, the Taliban continued to invite al Qaeda to use its territory as a launching pad, and defied the demand of the U.N. Security Council that it shut down al Qaeda operations and surrender Osama bin Laden.

Indeed, the Taliban operated as illegal belligerents long before the United States took military action against it. Numerous reports suggest that the Taliban *routinely* targeted civilian populations, murdered POWs, treated women as war "booty," and sacked the cities they captured -- all strictly forbidden by the law of armed conflict. See, e.g., Ahmed Rashid, Taliban 73, 79 (2000) (Taliban "carried out intensive bombing of

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[4] Available on-line at the Terrorism Research Center web site,www.terrorism.com /terrorism/BinLadinTranscript.shtml>.

[5] Available on line at British government web site, "10 Downing Street Facts," www.number-10.gov.uk/output/page436.asp.

civilian targets."); Neamatollah Nojumi, The Rise of the Taliban in Afghanistan: Mass Mobilization, Civil War, and the Future of the Region 229 (2002) (Red Cross reports of thousands of civilian casualties); Amnesty Int'l, Women in Afghanistan: Pawns in Men's Power Struggles (Jan. 11, 1999) at www.amnesty.org (Jan. 11, 1999) ("In the context of the ongoing fighting there have been reports of the Taliban militia carrying out indiscriminate killings and deliberate and arbitrary killings on a mass scale" and "Rape of women by armed guards appeared to be condoned by leaders as a method of intimidating vanquished populations and of rewarding soldiers.").

C. The Geneva Convention Does Not Strengthen Lindh's Claim.

To support his claim to combat immunity, Lindh invokes the provisions of the Geneva Convention (Third) Relative to the Treatment of Prisoners of War of 12 August 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]. That instrument, however, does not help his cause. To begin with, it does not address (or purport to address), the issue of combat immunity, and how that doctrine may apply in a case where an individual is captured fighting against the forces of his own state. Customarily, as a matter of international law, such individuals do not enjoy immunity from their own national legal processes. As explained in an early edition of the British Manual: "Deserters and *subjects of a belligerent fighting in the enemy's ranks* . . . cannot claim the privileges of the members of the armed force of the enemy, but terms may be specially made for them." British Manual at 242 (emphasis added).

In addition, the Geneva Convention applies only in instances of "international" armed conflict, between two or more High Contracting Parties, see Geneva Convention

III, art. 2,[6] and governs who is to be considered a POW, not the issue of "combat immunity." Lindh's participation in al Qaeda and the Taliban began well before the United States dispatched its armed forces to Afghanistan. At the time he embarked on his lethal adventure, the armed conflict in Afghanistan was an internal, civil war, and *not* an international one to which the Convention would apply.

Moreover, "[t]he determinative criterion for lawful combatancy" under Article 4 of the Third Geneva Convention or otherwise is not "membership in the armed forces of a High Contracting Party," as Lindh purports. Defendant's Motion at 15. Rather, the criteria are membership in an armed force that *also* meets the four fundamental requisites of the Hague Regulations and customary law. These are restated in Article 4(A)(2) of the Third Geneva Convention in regard to militias and certain resistance movements as follows:

> (a) that of being commanded by a person responsible for his subordinates;
> (b) that of having a fixed distinctive sign recognizable at a distance;
> (c) that of carrying arms openly;
> (d) *that of conducting their operations in accordance with the laws and customs of war.*

(Emphasis added.) Although these conditions were not also repeated *in haec verba* in the treaty text of Article 4(A)(1) and (A)(3), they are singled out by the Geneva commentary as equally applicable to the armed forces of a High Contracting Party, as necessary to the very concept of regular "armed forces." As the International Committee of the Red Cross ("ICRC") makes clear in its commentary, the parties to the treaty simply took this as self-

[6] The important exception is the humanitarian guarantees of so-called "common Article 3" of the 1949 Geneva Conventions. "Common Article 3" provides basic humanitarian minima for the treatment of people who are *hors de combat* in non-international armed

evident. In particular, the commentary noted that qualification as a "regular armed force" requires these same four "material characteristics" and qualifying "attributes," and that the "delegates to the 1949 Diplomatic Conference were therefore fully justified in considering that there was no need to specify for such armed forces the requirements stated in sub-paragraph (2)(a), (b), (c), and (d)." See International Committee of the Red Cross, The Geneva Conventions of 12 August 1949 Commentary III Geneva Convention Relative to the Treatment of Prisoners of War 63 (Jean S. Pictet & Jean de Preux eds., 1969) [hereinafter "ICRC Commentary"].[7]

This rule is, of course, based on the purest reason. The criteria for lawful combatant status are designed to ameliorate the horrors of war, particularly with respect to the civilian population, by clearly distinguishing combatants from protected non-combatants, and by ensuring proper military discipline. A belligerent faction that wholly exempts itself from observance of the law of war can hardly claim its benefits. Indeed, reciprocity is a fundamental aspect of these requirements, and of treaty law generally. It makes little sense to hold one party to a set of rules, restricting its operations, while

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conflict. This provision does not, and does not purport to, create "combat immunity" for individuals engaged in a non-international armed conflict.

[7] Similarly, the text of the Additional Geneva Protocol of 1977 (to which the United States and Afghanistan are not state parties) notes in Article 43(1) that a system to enforce observance of the law of war is prerequisite to qualifying as an "armed force": "The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates ... Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter "Additional Protocol I"]. See Dieter Fleck (ed.), The Handbook of Humanitarian Law in Armed Conflicts § 304 (1995) ("The two express requirements -- of a responsible command and an internal disciplinary system -- contained in [Art. 43(1) of 1977 Additional Protocol I] follow from the aforesaid

permitting an adversary to scoff at the same rules and openly foreswear reciprocal performance.

Thus, even without any explicit treaty text or commentary, al Qaeda and the Taliban would be ineligible for lawful combatant status by the general principles of treaty law. An adversary who consistently declined to observe the law of war would justify a victimized treaty party to suspend its own adherence to the treaty rules – except perhaps where the suspension would unduly burden innocent enemy civilians. See Vienna Convention on the Law of Treaties, art. 60, May 23, 1969, 1155 U.N.T.S. 33, reprinted in 8 International Legal Materials 679 (1969) (signed but not ratified by the United States) ("Material breach of a multilateral treaty by one of the parties entitles: ... (b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State.").[8]

Finally, the United States never recognized the Taliban as the government, *de facto* or *de jure*, of Afghanistan. Such determinations are exclusively vested in the Executive Branch. See United States v. Pink, 315 U.S. 203, 230 (1942) (presidential recognition decision "conclusive" and binding on the courts; United States v. Belmont, 301 U.S. 324, 330 (1937) (same). Under Article 4(A)(3) of the Geneva Convention III, an "unrecognized" group can qualify for its benefits only, as the ICRC commentary makes clear, if it "either consider[s] itself as representing one of the High Contracting Parties, or declare[s] that it accepts the obligations stipulated in the Convention and

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construction of the term 'armed forces' ... Given its fundamental duty to comply with the law, such a party is also bound to ensure that its organs' behaviour is lawful.").

[8] Though the United States has not ratified the Vienna Convention on the Law of Treaties, it recognizes the convention as largely incorporating the customary law of treaties. See Restatement (Third) of Foreign Relations Law, Part III, Introductory Note (1987).

wishes to apply them." ICRC Commentary, supra, at 63. The Taliban, which seized control of central and southern Afghan territory in the 1990's, have not referred to themselves as a High Contracting Party to the Geneva Convention, or accepted as binding on themselves the pre-existing treaty obligations of the Afghan state. Indeed, the Taliban's supreme leader, Mullah Omar, has openly rejected the constraints of international law: "[w]e do not accept something which somebody imposes on us under the name of human rights which is contradictory to the holy Quranic law," see Amnesty Int'l, Women in Afghanistan: Pawns in Men's Power Struggles," supra. Not surprisingly, the Taliban also have not declared that they would be bound by the Geneva Convention, or evinced any willingness to abide by the standards of lawful warfare it incorporates.

In any event, Article 4(A)(3) does not purport to deal with self-styled regimes that have been denied the status of a legitimate government by a decision of the U.N. Security Council and the U.N. General Assembly. It speaks only to the situation where an individual state has refused to recognize the group in question, and then only in limited circumstances.[9] And, like the United States, the United Nations never accepted the Taliban as Afghanistan's government. Throughout the relevant period, the U.N. maintained the government of Burhanuddin Rabbani in Afghanistan's General Assembly seat. For its part, the Security Council has characterized the Taliban as a mere "Afghan faction," in Chapter VII resolutions demanding that the Taliban "cease the provision of sanctuary and training for international terrorists and their organizations" and "turn over Usama bin Laden without further delay" for criminal prosecution. See S.C. Res. 1267,

[9] It should be noted that, even in circumstances where a government might qualify for *de facto* recognition, "as a practical matter the regime will enjoy the status and benefits of a government only if it is treated as such by a substantial number of other governments." Restatement (Third) of Foreign Relations Law § 203 cmt. b.

U.N.S.C., 4051st mtg. § 1 (15 Oct. 1999); S.C. Res. 1333, U.N.S.C., 4251st mtg. § 2 (19 Dec. 2000). Today, the legitimate government of Afghanistan would be entirely free to prosecute both the Taliban's members, and the members of Al Qaeda -- including defendant Lindh – for their criminal conduct in that country.

D. Neither Al Qaeda Nor the Taliban Had the Right to Use Force in the First Instance.

Finally, it is important to note that neither al Qaeda nor its Taliban supporters ever had the legal right to use force in the first instance. The law of armed conflict limits its reach to states. As explained in a classical treatise on the subject: "[i]t is the general rule that the operations of war on land can legally be carried on only through the recognized armies or soldiery of the State as duly enlisted or employed in its service." William Winthrop, Military Law and Precedents 782 (2d ed. 1920). See also Emmerich de Vattel, The Law of Nations, or, Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns 591, bk. 3, ch. 15 (Dublin, Luke White ed. 1792) (1758) ("The right of making war.... belongs alone to the sovereign power; which not only decides whether it be proper to undertake the war, and declare it, but likewise directs all the operations. ... Therefore subjects cannot act herein of themselves, and without the sovereign's order they are not to commit any hostility."); Dieter Fleck (ed.), The Handbook of International Humanitarian Law in Armed Conflicts § 304, supra note 7 ("Only states or other parties which are recognized as subjects of international law can be parties to an international armed conflict. ... On the level of international law, the members of [the.] armed forces are entitled to take part directly in hostilities. ... combatants are privileged solely by that entitlement, the lack of which makes them criminals liable to prosecution."). Soldiers serving in the national army of a state are thus

privileged to use armed force and to kill enemy combatants, without criminal liability. Their actions are supported by, and attributable to, their state. When captured, such individuals are entitled to be treated as honorable prisoners of war.

By contrast, the law of war does not purport to authorize, or immunize, violence by private individuals, whether acting alone or in association with self-appointed groups like al Qaeda or the Taliban regardless of whether the group's motivation is ideological, religious, political, or otherwise. See also H.W. Halleck, International Law; or Rules Regulating the Intercourse of State in Peace and War 348 (1861) ("For anything done in violation of the laws of war, the individual is liable to punishment. So, also, for any act within the rules of war, *not authorised or assumed by his government*, as the act of the state.") (emphasis added); Cornelius van Bynkershoek, A Treatise on the Law of War 127 (Peter Stephen DuPonceau, trans. & ed.) (Philadelphia 1810) ("We call pirates and plunderers (*praedones*) those, who, without the authorization of any sovereign, commit depredations by sea or land."). The whole idea of "combat immunity" is misplaced in the instant case.

II. President Bush Already Has Determined that al Qaeda and the Taliban Are Unprivileged Belligerents, and this Presidential Determination Deserves Great Deference.

For its part, the Court need not revisit the status of al Qaeda and the Taliban in Afghanistan, or engage in a factual inquiry to determine whether they met the several requirements necessary to be lawful combatants. President Bush, in his constitutional role as Commander-in-Chief, already has made these determinations, concluding that neither group qualifies as such. The President's statement regarding this matter was

issued on February 7, 2002, at the time he determined that captured members of al Qaeda and the Taliban would not be treated as POWs. In relevant part it provided as follows:

> Under Article 4 of the Geneva Convention, however, Taliban detainees are not entitled to POW status. To qualify as POWs under Article 4, Al Qaeda and Taliban detainees would have to have satisfied four conditions: They would have to be part of a military hierarchy; they would have to have worn uniforms or other distinctive signs visible at a distance; they would have to have carried arms openly; and they would have to have conducted their military operations in accordance with the laws and customs of war.
>
> The Taliban have not effectively distinguished themselves from the civilian population of Afghanistan. Moreover, they have not conducted their operations in accordance with the law and customs of war. Instead, they have knowingly adopted and provided support to the unlawful terrorist objectives of the Al Qaeda.
>
> Al Qaeda is an international terrorist group and cannot be considered a state party to the Geneva Convention. Its members, therefore, are not covered by the Geneva Convention and are not entitled to POW status under the treaty.
>
> The war on terrorism is a war not envisaged when the Geneva Convention was signed in 1949. In this war, global terrorists transcend national boundaries and internationally target the innocent. The president has maintained the United States' commitment to the principles of the Geneva Convention, while recognizing that the convention simply does not cover every situation in which people may be captured or detained by military forces, as we see in Afghanistan today.

See White House Statement on Guantanamo Bay Detainees, Feb. 7., 2002, U.S. Newswire. This Presidential determination was supplemented by a "Fact Sheet – Status of Detainees at Guantanamo" issued later in the day by the White House press office, reiterating the same conclusions.[10]

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[10] The White House Fact Sheet is available on-line at www.whitehouse.gov/news /releases/2002/02/20020207-13.html. A prior statement to the same effect was made in a

The President's interpretation of customary international law, the Hague Regulations, and the Geneva Convention, are entitled to extraordinary deference by the courts. See In re The Paquete Habana, 175 U.S. 677 (1900) (courts should defer to controlling political acts, including a presidential interpretation of customary international law); Sumitomo Shoji America, Inc. v. Avagliano, et al., 457 U.S. 176, 184-85 (1982) ("Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight."); Kolovrat v. Oregon, 366 U.S. 187, 194 (1961) ("While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight."); Restatement (Third) of Foreign Relations Law § 326 ("The President has authority to determine the interpretation of an international agreement to be asserted by the United States in its relations with other states." And even in matters of judicial application, "Courts in the United States ... will give great weight to an interpretation [of an international agreement] made by the Executive Branch."); id. § 112, cmt. c (1987) ("Courts give particular weight to the position taken by the United States Government on questions of international law because it is deemed desirable that so far as possible the United States speak with one voice on such matters." (citation omitted)) and "The views of the United States Government, moreover, are also state practice, creating or modifying international

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November 29, 2001 address to the United States Attorneys' Conference. See George W. Bush Delivers Remarks at U.S. Attorney's Conference, Federal Document Clearing House, Nov. 29, 2001. In remarking on the order establishing military commissions to try captured terrorists who were non-citizens, the President said, "I've also reserved the option of trial by military commission for foreign terrorists who wage war against our country. Non-citizens – non-U.S. citizens, who plan and /or commit mass murder are more than criminal suspects, they are unlawful combatants who seek to destroy our country and our way of life."

law."). Accord id., § 1, Rpts' Note 2 ("The United States role in the development of customary international law ... consists in substantial measure of governmental and diplomatic practice, largely though not exclusively, the work of the President and those acting on his behalf.").

This deference is especially incumbent on the courts when the President's authority to interpret the international legal obligations of the United States, including the requirements of the laws and customs of war, is exercised during time of war. The interpretation and application of the law of armed conflict are, in fact, interwoven with the President's power as Commander-in-Chief to protect American troops in the field, and to prosecute a war successfully. And, as the Supreme Court noted in Ex parte Quirin, presidential actions involving an exercise of "his powers as Commander-in-Chief of the Army in time of war and of grave public danger are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted." 317 U.S. at 25; Johnson v. Eisentrager, 339 U.S. 763, 789 n.14 (1950) (enforcement of treaties concerning the law of war will largely belong to the political branches, noting the "obvious scheme of the Agreement that responsibility for observance and enforcement of these rights is upon political and military authorities. Rights of alien enemies are vindicated under it only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention.").

Deference to the President's application of treaty and customary law also is particularly appropriate where the matter also depends on delicate questions of fact concerning the conduct of an adversary in war, such as al Qaeda and the Taliban, and

where the consequences are so grave. The characterization of the Taliban as a faction that has declined to observe the laws and customs of war depends upon numerous incidents and observations of the faction's behavior, including reports from potentially sensitive sources. It has enormous importance in the conduct of our foreign policy, including the status and interrogation of detainees at Guantanamo and the conduct of American operations in the field. Indeed, the so-called combat immunity sought by defendant Lindh as a shield against all criminal charges would also permit rump factions such as the Taliban to provide sanctuary and assistance in the future – as accessories before the fact – to terrorist operations such as Al Qaeda, with the assurance that they could later deem themselves to be immunized "soldiers."[11] Most members of al Qaeda would newly seek to disguise themselves as Taliban (there are no membership cards for either faction), arguing they were also mere foot soldiers in a war they did not choose. The worldwide operations launched by al Qaeda from Afghanistan – as protected and assisted by al Qaeda and Taliban fighters on the northern front – constituted terrorism, pure and simple, not the honorable pursuit of arms.

III. The Lawful Government of Afghanistan Agrees that the Taliban and al Qaeda are Unlawful Combatants.

Significantly, the new government of Afghanistan, established under U.N. authority,[12] has agreed that the al Qaeda and Taliban fighters, like defendant Lindh,

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[11] It is noteworthy that the same federal criminal statute from which Lindh claims absolute immunity has been central in other criminal cases concerning the al-Qaeda and Taliban terrorist conspiracy. This includes the indictment in the Southern District of New York concerning the 1998 East African Embassies bombings. See Indictment S(10) 98 Cr. 1023 (LBS) -- charging 22 defendants with conspiracy to murder U.S. nationals, under 18 U.S.C. § 2332(b).

[12] See S.C. Res. 1383, U.N.S.C., 4435st mtg. § 1 (6 Dec. 2001) (endorsing Bonn Agreement for Interim Authority in Afghanistan pending re-establishment of permanent

captured by the United States are unlawful combatants. At a January 29, 2002, briefing in Washington, the head of this internationally recognized government, chairman Hamid Karzai, made clear that the captured individuals:

> are not prisoners of war. I see it in very clear terms, gentlemen, ladies. They are criminals. They brutalized Afghanistan. They killed our people. They destroyed our land. There was no war there. It was plain killing fields. Very plain killing fields. And these people are the perpetrators of that atrocity. They committed the same thing in America, in a much more dramatic, much more glaring manner, in a matter of half an hour, I believe, or how much time it took to have the two planes hit the twin towers.
>
> No, I don't see them as prisoners of war. I seem them as – whatever, I don't know, detainees, I have no name for that....

See National Press Club Afternoon Newsmaker with Hamid Karzai, Chairman of Afghanistan's Interim Administration, National Press Club, Washington, D.C., Jan. 29, 2002, in Lexis-Nexis Library, Federal News Service. See also Todd Purdum, A Nation Challenged: Diplomacy -- In Flash of an Afghan Cape, A World Star is Born, New York Times, Jan. 30, 2002, at A9.

Mr. Karzai's frank response, which presumably reflects other private communications with the Executive Branch, amounts to a ratification of the President's determination that the al Qaeda and Taliban detainees are unlawful combatants. The atrocities cited by Mr. Karzai restate the disqualification of al Qaeda and the Taliban from status as lawful combatants because of their failure to observe the laws and customs of armed conflict. The malicious way in which both factions have conducted their terrorist operations serves, apart from everything else, to exclude them from the protected class of lawful combatants. Mr. Karzai's determination corroborates the factual

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institutions); S.C. Res. 1386, U.N.S.C., 4443rd mtg. § 1 (authorizing International

judgment made by the President of the United States concerning the consistently unlawful conduct of the Taliban and al Qaeda terrorist factions.

In addition, Afghanistan's coincident interpretation of the Geneva Convention is of great moment in establishing the intention of the treaty parties. See Restatement (Third) Foreign Relations Law § 325(2) ("Any subsequent agreement between the parties regarding the interpretation of the agreement, and subsequent practice between the parties in the application of the agreement, are to be taken into account in its interpretation."). And finally, insofar as any Afghan or other person seeks to claim public prerogatives or immunity by virtue of Afghanistan's sovereign rights as a treaty party, it is within the decision of the Afghan government to waive those rights. Accord Restatement (Third) Foreign Relations Law § 464, cmt. j (treaty law and customary international law immunities of diplomats and consuls "are not the personal rights of the individual agent, but are conferred by international law on the sending state. The immunity therefore may be waived by that state").

IV. Defendant John Walker Lindh Deliberately Joined a Criminal Conspiracy to Commit Terrorism Abroad and Joined in its Purposes.

Overall, it is clear that Lindh was a member of a criminal conspiracy, not a government army. According to the affidavit of FBI Special Agent Anne Asbury, filed with the Court on January 15, 2002, the defendant stated to agents that he "was accepted to al Qaeda" and went to the al-Farooq training camp at the beginning of June 2001. Though he preferred to fight on the front lines in the north of Afghanistan rather than go personally to the United States, he knew that his colleagues were engaged in suicide attacks on the United States. The complaint notes that within the "first several weeks of

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Security Assistance Force to assist the Afghan Interim Authority).

his arrival there, ... Walker learned from one of his instructors that Bin Laden had sent people to the United States to carry out several suicide operations." He also knew of the September 11 attacks on the World Trade Center mounted by al Qaeda, and understood that "additional attacks would follow." Thus, Lindh was fully aware of the illegal methods and aims of the groups with which he was collaborating. He knew of the American military effort on the northern front after September 11 that sought to deprive al Qaeda of its Taliban sanctuary and to capture the al Qaeda leadership, and he continued to fight anyway.

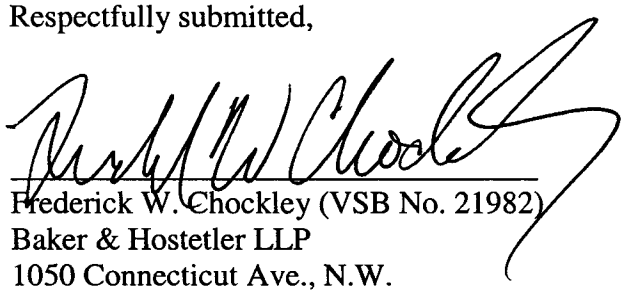
Whether Lindh is considered as a member of al Qaeda, as he said he was to the agents, or as part of the Taliban, Lindh was engaged in a broad-ranging conspiracy to commit terrorist acts. The Taliban's illegal part in this conspiracy included sheltering al Qaeda, permitting al Qaeda operatives to train on Afghan soil, and protecting Osama bin Laden. Moreover, it should be recalled that Lindh fought with non-Afghans, in the Arabic-speaking "Anser" brigade, funded by bin Laden. He is charged as a witting co-conspirator and criminal accessory before and after the fact to the activities of al Qaeda. The translation of the Arabic phrase "al Qaeda" is best rendered as "the base" – and it was indeed the protection of a base in Afghanistan that permitted bin Laden's network to flourish and to mount its worldwide terrorist operations. If there is any question regarding Lindh's knowledge of al Qaeda's activities, or his intentions to further those activities, that is a matter for proof at trial. Such a factual challenge concerning a defendant's provable intent cannot be determined on the face of a motion to dismiss the indictment, including on specious grounds of "foot soldier immunity."

CONCLUSION

Military service in a nation's armed forces is an honorable occupation often involving serious hardship and substantial risks of injury or death. Members of national military forces are protected by a large body of international law established by centuries of customary practice and treaty law. No one wishes to endanger the protections afforded to lawful combatants when called upon the defend their countries in accordance with the laws of armed conflict.

Defendant Lindh, however, comes before this court not as a lawful combatant in a national military force, but as a terrorist committed to the murder of innocent civilians -- and it is not insignificant that the victims he conspired to kill were, for the most part, his fellow citizens. He was not a lawful combatant entitled to combat immunity, he was merely a criminal.

Respectfully submitted,



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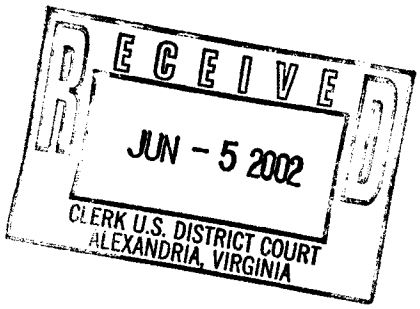

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA,	
v.	**CR No. 02-37-A**
JOHN PHILLIP WALKER LINDH,	
Defendant	

ORDER

UPON CONSIDERATION of the Motion for Leave of Law Professors and Practitioners to File Memorandum Amicus Curiae Opposing Recognition of "Combat Immunity"for Defendant Lindh in Regard to His Armed Support of Terrorism,

It Is Hereby ORDERED that the Motion is GRANTED.

ENTERED this ___ day of ____, 2002.

Judge T.S. Ellis, III
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that, on this 5th day of June, 2002, I served true and correct copies of the foregoing Motion for Leave of Law Professors and Practitioners to File Memorandum Amicus Curiae Opposing Recognition of "Combat Immunity" For Defendant Lindh in Regard to His Armed Support of Terrorism, by First Class Mail, postage prepaid, upon the following:

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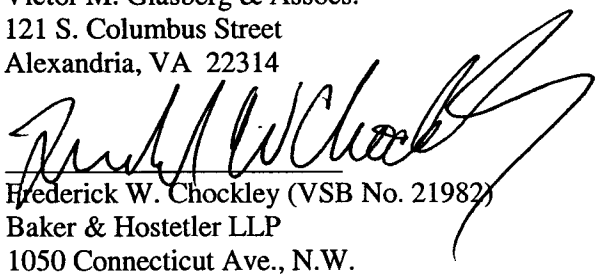

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