

I. INTRODUCTION

Pursuant to this Court’s instructions during the December 2, 2004 oral argument on Respondents’ Motion to Dismiss or for a Judgment as a Matter of Law (“Respondents’ Motion”), the *Boumediene* and *Khalid* Petitioners (“Petitioners”) respectfully submit this joint supplemental memorandum of law in opposition to Respondents’ Motion.

As discussed below, Respondents have failed to show, as they must on a motion to dismiss, that there is no set of facts that would entitle Petitioners to relief, and dismissal would be premature, at best, because the issues raised by Petitioners – including whether evidence used against Petitioners has been procured by torture – require further scrutiny by the Court.

Respondents ask the Court to bury the separation of powers. They ask the Court to ratify the President’s attempt to make law in an area reserved for Congress, and then ask the Court to rule that such President intrusion is beyond judicial review. The Court should reject this claim of unlimited and unreviewable power. Long-standing precedent requires this Court to review Petitioners’ claims and to evaluate the legality of their detention. Although Respondents protest that such review would invade Executive authority, it is the Executive that seeks to invade the authority of the other Branches here.

In answer to the Court’s specific questions: *First*, the “deferential” standard of review that Respondents advocate would represent an unprecedented and unjustifiable abdication of judicial power to the Executive.¹ *Second*, this Court can and should adjudicate Petitioners’ international law claims because customary international law—including its prohibition on torture and other mistreatment of prisoners—is a part of the federal common law that federal

¹ As discussed below, *Ex parte Quirin*, 317 U.S. 1 (1942), does not support the deferential standard Respondents advocate here. *See* Section IV(B)(3), *infra*.

courts are bound by apply. *Third*, dismissal would be premature, at best, because serious questions raised by the petitions – including whether determinations by the Combatant Status Review Tribunals (“CSRT”) were based on evidence procured by torture – require further scrutiny by this Court.

For these reasons and those provided at oral argument and in Petitioners’ earlier memoranda,² Respondents’ motion should be denied.

II. THE COURT’S INQUIRY IS LIMITED AT THIS MOTION TO DISMISS STAGE

The inquiry before the Court is an extremely limited one. Respondents have moved to dismiss. The Court therefore is not faced with resolving disputes of fact, or determining the legality of Petitioners’ detention. Instead, the sole question at this Rule 12(b)(6) stage is whether, accepting Petitioners’ factual allegations as true, and resolving every inference in their favor, their petitions state a cognizable claim for relief. *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113 (D.C. Cir. 2000). Accordingly, the Court must not assess at this point “the truth of what is asserted or []determine[] whether a plaintiff has any evidence to back up what is in the complaint.” *ACLU Found. of S. Cal. v. Barr*, 952 F.2d 457, 467 (D.C. Cir. 1991). The Court may consider only “the facts alleged in the [petitions], any documents either attached to or incorporated in the [petition] and matters of which [the Court] may take judicial notice.” *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997). The primary issue in resolving a motion to dismiss is not whether the plaintiff will ultimately prevail, but

² Prior briefs by Petitioners herein include: Petitioners’ Memorandum in Opposition to Respondents’ Motion to Dismiss, dated November 5, 2004 (“Petitioners’ Opposition”); Al-Odah Petitioners’ Reply to the Government’s “Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss,” dated October 20, 2004 (“Al-Odah Opposition”); and Boumediene and El-Banna Petitioners’ Amended Supplemental Reply and Opposition to Government’s “Response to Petitions For Writ of Habeas Corpus and Motion to Dismiss or For a Judgment As a Matter of Law,” dated November 8, 2004 (“Boumediene Opposition”).

whether [he] is entitled to offer evidence to support [his] claims.” *Briscoe v. Potter*, No. Civ. A. 03-2084 (RMC), 2004 WL 2785284, at *6 (D.D.C. Nov. 19, 2004) (internal citations omitted).

Respondents’ alternative request for judgment “as a matter of law” – which is properly viewed as a Rule 12(c) motion – likewise must be rejected because “a 12(c) motion, like a Rule 12(b)(6) motion, should be granted only where ‘it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.’” *Schuchart v. La Taberna Del Alabardero, Inc.*, 365 F.3d 33, 35 (D.C. Cir. 2004) (citation omitted). In deciding a motion under Rule 12(c), the Court must “accept as true the allegations in the [Petitioners’] pleading, and as false all controverted assertions of the [Respondents],” and the Respondents must show “that no material issue of fact remains to be resolved.” *Haynesworth v. Miller*, 820 F.2d 1245, 1249 n.11 (D.C. Cir. 1987). If the Court considers facts outside the pleadings, Respondents’ motion becomes one for summary judgment, *Yates v. Dist. of Columbia*, 324 F.3d 724, 725 (D.C. Cir. 2003) (per curiam), and the Court must offer all parties a “reasonable opportunity to present all material made pertinent to such a motion by Rule 56.” *Stearns v. Veterans of Foreign Wars*, 500 F.2d 788, 790 n. 7 (D.C. Cir. 1974).

Under either Rule 12(b)(6) or Rule 12(c), Respondents’ motion must be denied. Petitioners allege facts that, if true, demonstrate that their detentions are unlawful, that Respondents have violated their rights under U.S. and international law; and that on its face and as it has been applied in their individual cases – the CSRT process violates their fundamental rights. Petitioners also have raised a claim for review of their detention under the common law of *habeas* embodied in 28 U.S.C. § 2241(c)(1). These factual allegations state cognizable claims. Whether or not they ultimately succeed, they plainly are not ripe for dismissal at this stage.

III. THE EXECUTIVE CANNOT USURP CONGRESS'S LEGISLATIVE FUNCTION

Respondents' position that a full *habeas* review of Petitioners' detention would encroach upon Executive authority ignores the fact that it is Congress – not the President – that is empowered to enact laws with respect to the conduct of war and the detention of individuals during war time. “The Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952). The Constitution is unambiguous: Only Congress has the authority to make the law. U.S. Const. art. I. The Executive, by contrast, “shall take care that [those] Laws be faithfully executed.” U.S. Const. art. II, § 3.

The separation of powers between the President and Congress is clearly demarcated in the Constitution:

In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make the laws which the President is to execute.

Youngstown, 343 U.S. at 587-88. “The lawmaking functions belongs to Congress...and may not be conveyed to another branch or entity.” *Loving v. United States*, 517 U.S. 748, 758 (1996). That Congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.” *Field v. Clark*, 143 U.S. 649, 692 (1892). Even when national security is invoked, “[c]onvenience and political considerations of the moment do not justify a basic departure from the principles of our system of government.” *New York Times Co. v. United States*, 403 U.S. 713, 742-43 (1971). The President has no power not granted by Article II or Congress the Executive can demonstrate that his actions have either been authorized by

Congress or are part of the powers bestowed upon him by Article II of the Constitution, his actions are constitutionally proscribed. *See Youngstown Sheet & Tube Co.*, 343 U.S. at 635-38. Here, Respondents have failed to show that Congress has authorized the President to detain so-called “enemy combatants,” as variously defined by Respondents.

The Constitution provides Congress – and only Congress – with the power to “‘provide for the common Defence,’ [U.S. Const.] art. I, § 8, cl. 1; ‘To raise and support Armies,’ ‘To provide and maintain a Navy,’ art. I, § 8, cls. 12, 13; and ‘To make Rules for the Government and Regulation of the land and naval Forces,’ art. I, § 8, cl. 14. [] . . . ‘To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water,’ art. I, § 8, cl. 11; and ‘To define and punish Piracies and Felonies committed on the high seas and Offences against the Law of Nations,’ art. I, § 8, cl. 10 . . . [and] ‘To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.’ art. I, § 8, cl. 18.”³ *Ex parte Quirin*, 317 U.S. at 26. “Offenses against the Law of Nations” include offenses against the law of war. *See id.* at 27-28 (“From the very beginning of 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.”).

³ At the December 2 oral argument, the Court asked whether Article I, § 8 of the Constitution applies to these detentions at Guantanamo. Congress’s specific power to “make rules concerning captures on land and water” under Article I, § 8 of the Constitution “extends to rules respecting enemy property.” *Brown v. United States*, 12 U.S. 110, 126 (1814) (Marshall, C.J.). *See also, e.g., Miller v. United States*, 78 U.S. 268, 305 (1871) (describing the captures power as “the right to seize and confiscate all property of an enemy and to dispose of it at the will of the captor”). We have found no cases that interpret this power to extend to captures of real persons.

It is Congress that has the constitutional authority to make rules governing the conduct of military tribunals to try offenders for offenses against the law of war, *see id.* at 28, and it has done so in the Uniform Code of Military Justice. *See Hamdan v. Rumsfeld*, Civ. No. 04-1519 (JR), Mem. Op. at 12 (Nov. 8, 2004) (noting that Article 21 of Uniform Code of Military Justice represents Congressional approval of military tribunals for trials of offenses against the law of war). The President, as Commander-in-Chief, may issue orders invoking those laws, to “exercise the authority conferred upon him by Congress,” and pursuant to Article II, clause 2, “to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in a time of war.” *Ex parte Quinn*, 317 U.S. at 28.

The Executive may not, however, do what it has done here: legislate a vaguely defined new category of individuals who may be plucked from their homes anywhere on Earth, and detained, without charge, for an unlimited period. Nor may it invent unto itself, years after the fact, a status determination process to ratify its decision that detainees properly fall within its newly created category. In doing so, the Executive has acted without Constitutional authority. Congress may not delegate to another branch the lawmaking function conferred on it by Article I, Section 1, and no other branch may assert this power. *See, e.g., Loving*, 517 U.S. at 758 (“The lawmaking function belongs to Congress. . . and may not be conveyed to another branch or entity.”); *Field v. Clark*, 143 U.S. 649, 692 (1892) (“That Congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.”).

The Authorization for Use of Military Force (hereinafter “AUMF”) does nothing to change that result. AUMF, Pub. L.107-40, 115 Stat. 224 (Sept. 18, 2001). That legislation does not authorize the capture and detention of civilians, from allied nations, thousands of miles from

the battlefield, purportedly based on allegations that, on their face, have nothing whatsoever to do with the terrorist attacks of September 11, 2001. The AUMF specifically authorized President Bush to use force against:

nations, organizations, or persons...[that] ***planned, authorized, committed or aided the terrorist attacks on September 11, 2001***, or [that] harbored such organizations or persons in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.

Id. (emphasis supplied). The express terms of the AUMF limit executive authority to use force against only those individuals with some nexus to the terrorist attacks of September 11, 2001.

See Hamdi, 124 S. Ct. at 2640, 2641-42 (“the AUMF authorizes the President to use ‘all necessary and appropriate force’ against ‘nations, organizations, or persons’ ***associated with the September 11, 2001, terrorist attacks.***”) (emphasis supplied).⁴

Further, for all of the reasons set forth in the Boumediene Opposition at pp. 21-27, and the Declaration attached thereto, the laws of war do not apply to them.⁵ Consequently, no military tribunal convened would have jurisdiction over them. If there is a need to define a new offense against the law of nations, then it is Congress – not the President – who must do so.

Indeed, the separation of powers between the President and Congress is clearly demarcated in the Constitution:

In the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The

⁴ Although the Supreme Court found in *Hamdi* that with the AUMF, Congress had authorized the detention of enemy combatants as defined in that case, the Court’s finding was specific to that definition and limited to the Afghanistan war theater. *Hamdi*, 124 S.Ct. at 2639-41. Thus, *Hamdi* does not authorize the President’s concoction of an ever-changing definition of “enemy combatant” or the application of those definitions outside the Afghan theater.

⁵ Although Petitioner Khalid did not specifically join in the Boumediene Petitioners’ Supplemental Brief, these arguments apply to him with full force. Because he was captured at a mosque in Pakistan – well away from the Afghan battlefield – the laws of war are likewise inapplicable to him.

Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make the laws which the President is to execute.

Youngstown Sheet & Tube Co., 343 U.S. at 587-88. Because the President lacks congressional authorization unilaterally to define an “enemy combatant” category as he has done here, his orders to this effect constitute Executive lawmaking. *Youngstown Sheet & Tube Co.*, 343 U.S. at 588 (“The President’s order does not direct that a congressional policy be executed in a manner prescribed by Congress – it directs that a presidential policy be executed in a manner prescribed by the President.”). Indeed, the shifting definitions of the term “enemy combatant” proffered by Respondents over the past three years, and set forth in the Boumediene Opposition at pp. 13-14, illustrate the enormous danger that arises when the President legislates in the guise of exercising his Commander-in-Chief power. Indeed, as recently as the oral arguments on this motion on December 1 and 2, Respondents offered inconsistent interpretations of what conduct would constitute “supporting” the Taliban and Al Qaeda for purposes of the Wolfowitz Order:

Representation of Attorney Boyle to Judge Green on December 1, 2004	Representation of Attorney Boyle to Judge Leon on December 2, 2004
<p>THE COURT: I want to go back to give you some hypotheticals, and very quick answer, very quick hypotheticals, about when an individual would be considered – because it goes together with your most recent answers to me – would be considered again an enemy combatant or supporting those forces, the Taliban, al-Qaeda and the like.</p> <p>A little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but really is a front to finance al-Qaeda activities. Would she be considered an enemy combatant or supporting? Now, these are real questions. I know you smile, but they are questions.</p>	<p>But in any event, I was misquoted on the one answer that was discussed by counsel, the 80-year old grandma who unwittingly contributed money to an organization that turned it over to an al-Qaeda operation. What I said was in the fog that is often the case in these situations that it would be up to the military applying its process and in going through its classification function to determine whom to believe.</p>

Representation of Attorney Boyle to Judge Green on December 1, 2004	Representation of Attorney Boyle to Judge Leon on December 2, 2004
<p>MR. BOYLE. Let me answer it on two levels. First, I would say that someone’s intention or motivation for being a part of al-Qaeda forces or Taliban forces, for instance somebody who says well, I didn’t really want to do this, but I was brought along unwillingly, this was never my gig, but I just got caught up in the moment, never my intention. But that, as I think is clearly defined by tradition, is not a factor that would disable the military from detaining the individual as an enemy combatant.</p> <p>It may be a factor that, in the discretion of the military would be considered in the annual review process to determine whether the person can be released without danger to the country.</p> <p>THE COURT: So the person could be considered, hypothetically?</p> <p>Mr. BOYLE: In your precise hypothetical, I think the question – if in fact unwittingly this poor woman was financing al-Qaeda operations, but her story was, gosh, I didn’t know I was financing al-Qaeda operations. I thought it was a charity. I can tell you this much. It would be up to the military, and great deference would need to be paid to its judgment, as to what to believe in that scenario. I would think it would be up to the military to make the decision.</p> <p>THE COURT: But she would be taken into custody?</p> <p>MR. BOYLE: I think she could.</p> <p>THE COURT: And denominated as an enemy combatant and then subsequently have a tribunal hearing.</p> <p>MR. BOYLE: I think she could be subject to that process, and it would be up to the military to decide whom to believe.</p>	<p>If in fact this woman, there was some reason to believe this woman did know that she was financing a terrorist operation, that would certainly merit a detention both theoretically and practically and certainly the fact as we know that it is basic doctrine of al-Qaeda for its operatives to have plausible cover stories in reserve if they are captured to present their conduct as innocent is all the more reason that that kind of judgment needs to be committed to our military intelligence experts and so forth.</p> <p>That’s the way I answered the question. The military is fundamentally the one that has to make that classification judgment.</p>

Transcript of the December 1, 2004 Oral Argument (“December 1 Argument Transcript”) at 25:3-26:18; Transcript of the December 2, 2004 Oral Argument (“December 2 Argument Transcript”) at 119:15-120:25 (emphasis supplied).

As these excerpts demonstrate, without clear standards and limits emerging from a congressionally defined authorization to detain, there is no official articulation of what constitutes an “enemy combatant,” what circumstances will trigger the President’s designation,

and when the detention of a citizen shall cease. As discussed further below, in such cases, the scrutiny of an Article III court is critical to ensuring the process due the Petitioner.

This case is not like *In re Quirin*. In that case, the Court found that Congress passed Articles of War that *specifically authorized* the Commander-in-Chief to conduct the military trials at issue. 317 U.S. at 29.

The Court further noted that Congress, “by reference in the 15th Article of War to ‘offenders or offenses that by the law of war may be triable by such military commissions,’ [] had incorporated by reference, as within the jurisdiction of military commissions, all offenses which are defined as such by the law of war.” 317 U.S. at 30. Here, by contrast, Congress has *never* specifically authorized detention of “enemy combatants,” nor has it defined that term in accordance with international law standards.

The unfettered and undefined nature of Executive power Respondents advocate here is an unconstitutional effort to usurp Congress’s authority to define violations of domestic law as well as violations of the Law of Nations.⁶ No less than the seizure of steel in *Youngstown Sheet & Tube Co.*, the President’s seizure of Petitioners – through what amounts to Executive lawmaking – exceeds constitutional limits upon Executive power.

The Executive, except for recommendation and veto, has no legislative power. The Executive action we have here originates in the individual will of the President and represents an exercise of authority without law. No one, perhaps not even the President, knows the limits of the power he may seek to exert in this instance and the parties affected cannot learn the limits of their rights.

⁶ Additionally, unilateral action by any single participant in the law-making process is precisely what the Bicameralism and Presentment Clauses of the Constitution were designed to prevent. A law can only be repealed or amended through another, independent legislative enactment, which itself must conform with the requirements of Article I. Because the President’s creation of new “enemy combatant” rules constitutes the creation of a law in violation of the requirement of bicameral passage, and because it permitted the President unilaterally to repeal a duly enacted law, it violates the requirements of Article I, and is therefore unconstitutional.

Youngstown Street & Truck Co., 343 U.S. at 655 (Jackson, J., concurring). For all of these reasons, Respondents’ efforts to undo these well-established separation of powers principles must be rejected.

IV. A ROBUST JUDICIAL REVIEW OF THE LEGALITY OF PETITIONERS’ DETENTION IS REQUIRED TO PRESERVE SEPARATION OF POWERS

A. *Rasul And Hamdi, Taken Together, Settle The Question Of The Judiciary’s Role In Habeas Review Of War Time Executive Detentions Of Both Citizens And Aliens.*

At oral argument, Respondents pressed their position that a plenary *habeas* review of the legality of Petitioners’ detention would unduly interfere with the President’s authority. *See* December 2 Argument Transcript at 18:18-19:5; Respondents’ Motion at 6-19; Respondents’ Reply Memorandum in Support of Motion to Dismiss or for Judgment as a Matter of Law, dated November 16, 2004 (“Respondents Reply”) at 9-13. According to Respondents, any substantive review undertaken by this Court of the facts underlying the Executive’s detention of Petitioners as “enemy combatants,” would exceed the constitutionally-authorized power of the Judiciary in this context and impede the President’s ability to conduct this war effectively. *Id.*

These are not new arguments. Indeed, Respondents raised — and lost — precisely the same arguments before the Supreme Court when they opposed the exercise of federal court jurisdiction over the *habeas* petitions of the Guantanamo detainees in *Rasul* and judicial review of the military detention in *Hamdi*.⁷ In *Rasul*, the Supreme Court squarely rejected Respondents’ contention that permitting alien detainees at Guantanamo to invoke federal court authority under

⁷ *See* Brief for the Respondents in *Rasul v. Bush*, 124 S. Ct. 2686 (March 3, 2004), dated March 3, 2004 at 35-36); Brief for the Respondents in *Hamdi*, dated March 3, 2004 at 12-24.

28 U.S.C. § 2241 would constitute an improper encroachment by the Judiciary on the President's Commander-in-Chief powers:

Consistent with the historic purpose of the writ, ***this Court has recognized the federal courts' power to review applications for habeas relief in a wide variety of cases involving Executive detention, in wartime as well as in times of peace.***

The Court has, for example, entertained the *habeas* petitions of an American citizen who plotted an attack on military installations during the Civil War, *Ex Parte Milligan*, 4 Wall. 2 (1866), and of admitted enemy aliens convicted of war crimes during a declared war and held in the United States, *Ex Parte Quirin*, 317 U.S. 1 (1942), and its insular possessions, *In re Yamashita*, 327 U.S. 1 (1946).

Rasul, 124 S. Ct. at 2692-93 (emphasis supplied). The Court concluded that this same judicial authority applies to Executive detentions at Guantanamo. Extending this analysis in *Hamdi*, the Court expressly stated that a review of the factual and legal basis for Mr. Hamdi's detention would not undermine the President's authority as Commander-in-Chief:

In so holding, ***we necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances.*** Indeed, the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to condense power into a single branch of government. . . . Likewise, we have made clear that, unless Congress acts to suspend it, the Great Writ of *habeas corpus* allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions. *See [INS v. St. Cyr, 533 U.S. 289, 301]* ("At its historical core, the writ of *habeas corpus* has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest.")

Hamdi, 124 S. Ct. at 2650 (emphasis supplied). That ruling was consistent with two centuries of Supreme Court decisions. *See Ex parte Bollman*, 8 U.S. 75, 75 (1807). Accordingly, the Court found a plenary *habeas* review of the underlying basis for Mr. Hamdi's detention preserved separation of powers.

Based on the *Hamdi* and *Rasul* decisions, Judge Kollar-Kotelly ruled that the Guantanamo detainees before her "are entitled to present the facts surrounding their confinement

to the Court,” and that her role is to afford those detainees “the careful consideration and plenary processing which is their due.” *Al Odah v. United States*, Civ. No. 02-828 (CKK), October 20, 2004 Mem. Op. at 10, 12 (internal quotations omitted).

Faced with clear direction from the Supreme Court and two hundred years of unfavorable precedent, Respondents quickly fell back to the ultimate bastion of the over-reaching Executive – Separation of Powers, arguing that, because Petitioners are aliens allegedly without rights, this Court has no power to review their detentions. However, the fact that Petitioners are aliens is a “red herring” here, though one Respondents seek to exploit.

Reduced to its essence, Respondents’ argument is that (1) because *Hamdi* concerned a U.S. citizen, its reasoning has no application to these alien detainees; and (2) *Rasul* resolves only the question whether this Court may exercise jurisdiction over these petitions, not the question of what rights the detainees are afforded. *See* Respondents’ Motion at 1-2, 19-21, 31-32; Respondents’ Reply at 2, 15. Respondents’ arguments completely overlook the fact that Petitioners need not demonstrate the existence of *any* Constitutional or other right to obtain a plenary *habeas* review pursuant to 28 U.S.C. § 2241(c)(1), and that it is *Respondents’* burden to show why the detention is lawful. Moreover, Respondents’ argument conflates two separate issues by asserting that, because Petitioners purportedly have no such substantive rights, there can be no role for the Judiciary in reviewing their detention.⁸

The separation of powers question does not turn on Petitioners’ status as citizens or aliens. Rather, it turns on the structural constitutional relationship between the three branches of

⁸ *Rasul* and *Hamdi*, taken together, establish that alien detainees at Guantanamo have substantive rights to assert in *habeas* pursuant to the federal *habeas* statute, 28 U.S.C. § 2241(c)(3). Petitioners’ prior briefing fully addressed this argument. *See* Petitioners’ Opposition at 16-27.

our government and the court decisions delineating the role of each in war-time decision-making. The relevant question, therefore, is what role do the Constitution and the relevant precedents give to the Judiciary when the Executive, acting alone and without legislative guidance, issues a declaration that constitutes legislative rulemaking. Whether an alleged “enemy combatant” is a citizen or an alien, or what, if any, substantive rights attach based on that status, is irrelevant to that question. Consistent with that analysis, the Supreme Court’s holding in *Hamdi* that the Judiciary must play a robust role in reviewing enemy combatant detentions was not based on Mr. Hamdi’s status as a citizen – it was based instead on centuries of precedent establishing that the Judiciary plays a vital role in limiting the Executive’s exercise of war powers, particularly in reviewing the legality of detentions.

B. *Rasul* and *Hamdi* Reflect the Constitutional Mandate of Separation of Powers In Review of Executive Detention

1. Separation of Powers Was A Fundamental Concern of the Framers

It was “the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty,” *Mistretta v. United States*, 488 U.S. 361, 380 (1989), an insight that finds repeated expression in the United States Reports.⁹ “The very structure of the Articles delegating and separating powers under Arts. I, II, and III exemplifies the concept of separation of powers. . . .”. *Chadha*, 462 U.S. at 946. As Justice Brandeis noted, “[t]he doctrine of separation of powers was adopted by the convention of 1787 not to promote efficiency but to

⁹ See, e.g., *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring); *Clinton v. Jones*, 520 U.S. 681, 699-700 (1997); *Loving*, 517 U.S. at 756-57; *INS v. Chadha*, 462 U.S. 919, 949, 951-59 (1983); *Youngstown Sheet & Tube Co.*, 343 U.S. at 613-14. (Frankfurter, J., & Douglas, J., concurring).

preclude the exercise of arbitrary power . . . [and] to save the people from autocracy.” *Myers v. United States*, 52, 293 (1926) (Brandeis, J., dissenting).

The danger posed by the collection of power in one branch of government was well known to the Framers. *See, e.g., The Federalist No. 47*, at 301 (James Madison) (Clinton Rossiter ed., 1961)(“The accumulation of all powers legislative, Executive and Judiciary in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”). The constitutional protections against this danger were intended particularly to withstand the opposing momentum caused by war and national crises. As the Supreme Court has recognized, “[t]hey knew – the history of the world told them – the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen.” *Ex parte Milligan*, 71 U.S. 2, 125 (1866); *accord Youngstown Sheet & Tube Co.*, 343 U.S. at 650 (Jackson, J., concurring). Respondents’ bold appeal to separation of powers principles to justify the Executive’s unreviewable prerogative to deprive Petitioners of their liberty indefinitely stands those cardinal principles on their heads.

2. Judicial Review of Executive Detention Is Central To Anglo-American Law And Is Memorialized in the Constitution

Judicial review – particularly of Executive detention during times of war or peace – has long been recognized as a critical component of the separation of powers. The Great Writ, in fact, was designed precisely for this purpose. Title 28 U.S.C. § 2241 (c)(1) and (c)(3) confer jurisdiction on the district court to hear applications for *habeas corpus* filed, respectively, by any person imprisoned “under or by color of the authority of the United States,” or “in violation of the Constitution or laws or treaties of the United States.” As the Supreme Court found in

Rasul, nothing in the text purports to exclude *habeas* jurisdiction on the basis of nationality or territory. 124 S. Ct. at 2696. On the contrary, “[t]his legislation is of the most comprehensive character. It brings within the *habeas corpus* jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties, or laws. It is impossible to widen this jurisdiction.” *Ex parte McCordle*, 73 U.S. 318, 325-26 (1867) (in reference to the predecessor statutes to § 2241).

Since the Magna Carta was signed almost eight hundred years ago, Anglo-American law has viewed Executive detention as contrary to a system of ordered liberty. *See, e.g., Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 218 (1953) (Jackson, J., dissenting) (“Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land.”)¹⁰ By expressly guaranteeing the

¹⁰ As an historical matter, *habeas corpus* developed as a counter to the King’s assertion of an “Executive prerogative” to detain subjects without formal charges in alleged furtherance of the national interest. The issue came to a head in *Darnel’s Case*, 3 How. St. Tr. 1 (K.B. 1627), in which five individuals (among hundreds similarly detained) unsuccessfully challenged their imprisonment for refusing to contribute to a forced loan that Charles I deemed critical to the defense of the kingdom, which was then at war with France and Spain. *See* Robert S. Walker, *The Constitutional and Legal Development of Habeas Corpus as the Writ of Liberty* 59 (1960). The King’s counsel asserted that the imprisonment was “by the special command of his majesty”— a power that the King deemed necessary for those “matter[s] of state” that were “not ripe nor timely” for the ordinary criminal process. *Darnel’s Case*, 3 How. St. Tr. at 3, 37; *see also* Walker, *supra*, at 67. The prisoners’ counsel countered that, unless the Crown were required to provide a charge for which the prisoners could be tried, their imprisonment “shall not continue on for a time, but for ever,” and all people “may be restrained of their liberties perpetually” without remedy. *Darnel’s Case*, 3 How. St. Tr. at 8; *see also* Walker, *supra*, at 67.

Parliament responded to *Darnel’s Case* by enacting the Petition of Right, prohibiting imprisonment without due process and imposing restraints on the use of martial law. 3 Car. 1, c. 1 (1627) (Eng.). When the King nonetheless continued detaining individuals on vague, ill-defined charges, Parliament enacted the Habeas Corpus Act of 1641, commanding jailors to provide a lawful basis for confinement and requiring courts to act promptly by discharging, bailing or remanding prisoners to custody for criminal trial. 16 Car. 1, c. 10, § 6 (Eng.) (court shall promptly “examine and determine whether the cause of such commitment be just and legal or not”). The 1641 Act also eliminated the notorious Star Chamber and restricted the jurisdiction of the King’s Privy Council, long associated with arbitrary and Executive imprisonment, secrecy and torture, particularly for suspected offenses against the State. *Id.* at § 3; *see also* John H. Langbein, *Torture* (continued...)

availability of the writ in the Constitution, the Framers sought to prevent arbitrary Executive detention through the mechanism of judicial review. *St. Cyr*, 533 U.S. at 301 (“at its historical core, the writ of *habeas corpus* has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest”); *Swain v. Pressley*, 430 U.S. 372, 386 (1977) (Burger, C.J., concurring in result) (“the traditional Great Writ was largely a remedy against Executive detention”).¹¹

This understanding of the writ as a vehicle to ensure due process informed the Framers when they crafted the Constitution and Bill of Rights. The Framers believed that the writ of *habeas corpus* would provide “greater securities to liberty” than other provisions of the Constitution, because “the practice of arbitrary imprisonments [has] been, in all ages, [one of] the favorite and most formidable instruments of tyranny.” *The Federalist No. 84*, at 512 (Alexander Hamilton)(Clinton Rossiter ed., 1961).

The courts have been diligent to carry out faithfully their role as a check against unfettered Executive detention. The Supreme Court has consistently required a clear and

(continued...)

and the Law of Proof 90, 136 (1976). The subsequent Habeas Corpus Act of 1679 provided reinforcement by requiring that, in cases of commitment for any “criminal or supposed criminal matters,” prisoners must either be released or quickly brought to trial. 31 Car. 2, c. 2 (Eng.); *see also* Gerald L. Neuman, *The Habeas Corpus Suspension Clause After INS v. St. Cyr*, 33 Colum. Hum. Rights L. Rev. 555, 563 (2002).

Through these developments, the Great Writ ensured that detention absent formal charges would not be permitted. Sir William Holdsworth, *A History of English Law* 118 (3d ed. 1944) (describing the writ as “the most effective weapon yet devised for the protection of the liberty of the subject”); William Blackstone, *Commentaries* 130 (habeas corpus is the “great and efficacious writ, in all manner of illegal confinement”); *Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring in result) (“The historic purpose of the writ has been to relieve detention by Executive authorities without judicial trial”); Zechariah Chafee, Jr., *The Most Important Human Right in the Constitution*, 32 B.U.L. Rev. 144, 144 (1952).

¹¹ The Framers’ decision to charter a government of enumerated powers can also be viewed as a direct response to their experience with Executive overreaching. *See* The Declaration of Independence, para. 2 (U.S. 1776) (“The history of the present King of Great Britain [George III] is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States.”).

unequivocal statement of legislative intent before concluding that Congress has stripped the federal courts of their *habeas* jurisdiction. *Ex parte Yerger*, 75 U.S. 85, 102 (1868); *Demore v. Kim*, 538 U.S. 510-517 (2003); *see also St. Cyr*, 533 U.S. at 308-09. And, it is well established that the Executive cannot amend the *habeas* statute by fiat. *Cf. Youngstown Sheet & Tube Co.*, 343 U.S. at 637 (Jackson, J., concurring) (“When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb. . .”).

Over time, Executive detention has taken countless forms. But the genius of *habeas* is “its capacity to reach all manner of illegal detention – its ability to cut through barriers of form and procedural mazes.” *Harris v. Nelson*, 394 U.S. 286, 291 (1969). To that end, the Supreme Court has long recognized that federal courts have the power to review every species of Executive imprisonment, wherever it occurs and whatever form it takes. The Court has entertained *habeas* petitions by aliens detained on ships at sea, *e.g.*, *Chew Heong v. United States*, 112 U.S. 536 (1884); by United States citizens detained at American military installations overseas, *e.g.*, *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960); and even by enemy aliens convicted of war crimes during a declared war, whether in the United States, *Ex parte Quirin*, 317 U.S. at 1, or in territories overseas, *In re Yamashita*, 327 U.S. 1 (1948).

3. Judicial Review of Executive Detention on *Habeas* Must be Robust Notwithstanding Alleged National Security Concerns

Unlike the very different context of successive federal *habeas corpus* petitions by prisoners in state custody who have already had an opportunity for full judicial process in the state court system, *see* 28 U.S.C. § 2254 (d)(1), the cases before this Court arise instead in the totally dissimilar context of Executive detention. Executive detentions, by definition, lack prior judicial process. *See Henderson v. INS*, 157 F.3d 106, 120 (2d Cir. 1998). Petitioners have never had their claims reviewed by any court — federal, state, or military. This circumstance

places their petitions at the very core of traditional applications of the writ. *See Felker v. Turpin*, 518 U.S. 651, 663 (1996) (noting that the writ originally only extended to prisoners who were not “detained in prison by virtue of the judgment of a court”) (citation and internal quotation marks omitted); *Swain*, 430 U.S. 372, 380 n.13, 385-86 (Burger, C.J. concurring) (joined by Blackmun and Rehnquist, JJ.) (“A doctrine that allowed transfer of the historic *habeas* jurisdiction to an Art. I court could raise separation-of-powers questions, since the traditional Great Writ was largely a remedy against Executive detention.”); *Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring in the result) (“The historic purpose of the writ has been to relieve detention by Executive authorities without judicial trial.”).

The Supreme Court has long held that “[a]t its historical core, the writ of *habeas corpus* has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest.” *St. Cyr*, 533 U.S. at 301; *Swain*, 430 U.S. at 380 n.13. Consequently, judicial review of the return in a *habeas* proceeding under the common law was least deferential in the context of Executive detentions. *See* Rollin Hurd, *A Treatise on the Right of Personal Liberty and on the Writ of Habeas Corpus* 271 (Da Capo Press ed. 1972) (noting that in cases of non-criminal imprisonment, the exceptions to the general rule against controverting the return were “governed by a principle sufficiently comprehensive to include most . . . cases”). In such cases, a full review of the facts on which the Executive purports to base the detention is required. *Id.* The absolute deference Respondents demand here did not exist at common law, and the Supreme Court expressly recognized the importance of non-deferential review of Executive detentions in *St. Cyr*: “[w]hile *habeas* review of a court judgment was limited to the issue of the sentencing court’s jurisdictional competency, an attack on an Executive order could

raise *all* issues relating to the legality of the detention.” 533 U.S. at 301 n.14 (internal citations omitted)(emphasis supplied).

The fact that Respondents contend the detentions at issue relate to matters of national security does not mitigate this Court’s duty. Respondents’ claim that the Executive branch possesses, in effect, unreviewable discretion in matters related to national security repeatedly has been rejected by the Supreme Court. *See United States v. Nixon*, 418 U.S. 683, 706-07 (1974); *New York Times Co.*, 403 U.S. at 719; *United States v. Robel*, 389 U.S. 258, 263-64 (1967); *Youngstown Sheet & Tube*, 343 U.S. at 587; *Sterling v. Constantin*, 287 U.S. 378, 398 (1932). Under our form of government, the federal courts, not the Executive, decide whether Petitioners’ imprisonment is consonant with due process. *See Nixon*, 418 U.S. at 704 (“Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch.”).

The Government took a similar position in defending its detentions in *Ex parte Bollman*, and the Supreme Court squarely rejected it. There, Aaron Burr’s co-conspirators were apprehended by the military and charged with treason, and the Supreme Court independently reviewed their pre-trial commitment. The Court found its obligation in *habeas* was to conduct a searching review of the factual basis of their detention by the Executive – not simply defer to the Executive’s untested declarations and other representations as to the evidence supporting detention. The Court conducted a five-day factual hearing in which it heard witness testimony and independently examined all the evidence upon which the charges were grounded. The Court thereafter concluded that the evidence was insufficient to support the detention. 8 U.S. at 135. In conducting this review over the Government’s objection that it amounted to judicial encroachment on Executive authority, the Court warned that it would be “extremely dangerous to

say, that because the prisoners were apprehended, not by a civil magistrate, but by the military power, there could be given by law a right to try the persons so seized in any place which the [Executive] might select, and to which he might direct them to be carried.” *Id.* at 136.

Contrary to Respondents’ suggestion, *Ex Parte Quirin* does not stand for the proposition that robust judicial review is impermissible here. That case concerned a question that is not before this Court — namely, whether the Supreme Court should grant leave to file applications for writs of *habeas corpus* after the Quirin petitioners had been tried by a military commission that received evidence in their defense and in which they were represented by counsel. In fact, the Supreme Court in *Ex parte Quirin* observed that it was departing from the “usual procedure” in considering and determining “whether the facts alleged by the petition, if proved, would warrant discharge of the prisoner.” 317 U.S. at 9.

Nearly six months ago, the Supreme Court in *Rasul* decided not only that Petitioners could file applications for *habeas* relief, but that their allegations of long-term detention without charge, if proved, “unquestionably describe ‘custody in violation of the Constitution or laws or treaties of the United States.’” *Rasul*, 124 S. Ct. at 2698 n.15 (internal citations omitted). *Quirin* shows that, in the context of a declared war, the Court closely considered the facts of the *Quirin* petitioners’ entry into the United States, and their subsequent conduct, in making its determinations whether (i) any of the acts with which they were charged were offenses against the law of war cognizable before a military tribunal; and (ii) if so, whether the Constitution prohibited such a trial. At the very least, after *Rasul*, the Court must do that here. Respondents’ contention that there should essentially be no inquiry into the factual circumstances of potentially indefinite detentions is contrary to the historic function of the writ of *habeas corpus* as “the

fundamental instrument for safeguarding individual freedom against arbitrary and lawless” Executive detention. *Harris*, 394 U.S. at 290-91.¹²

The Executive simply may not hold people indefinitely without charge, and then claim its actions are virtually unreviewable. Respondents invite this Court’s judicial rubber-stamp rather than the required independent check on the Executive’s power to engage in unauthorized detentions, a result plainly at odds with the separation of powers principle and one that should be rejected. *See United States v. Klein*, 80 U.S. 128, 145-47 (1871).

4. Plenary Review of the Factual Record Upon Which Petitioners’ Enemy Combatant Determinations Were Based Is Required

As set forth *supra*, at common law, “while habeas review of a court *judgment* was limited to the issue of the sentencing court’s jurisdictional competency, an attack on an *Executive* order could raise all issues relating to the legality of the detention.” *Developments in the Law – Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1238 (1970) (emphasis supplied); *see also Ex parte Randolph*, 20 F. Cas. 242, 254 (C.C. D. Va. 1833). Thus, from the founding of the Republic to the present, the review of Executive determinations regarding custody and detention has been comprehensive. *See, e.g., Ex parte Watkins*, 28 U.S. 193, 201-07 (1830) (drawing a crucial distinction between superior courts of general jurisdiction empowered to enter judgments that are entitled to a presumption of validity in subsequent litigation and inferior tribunals – such as Executive tribunals – arising from statutory or common law authority whose determinations could be reexamined on habeas); *Ex parte Bollman*, 8 U.S. at 93-94, Chief Justice Marshall, in *Ex parte Randolph*, described the close review mandated of detentions ordered by Executive

¹² Of course, as the Supreme Court has recognized, there has been no suspension of the Writ, and Respondents do not contend otherwise. *Hamdi*, 124 S. Ct. at 2644 (“All agree suspension of the Writ has not occurred here.”)

officers: “[T]he authority, whether given by legislative act, or otherwise, must be strictly pursued. Such agents cannot act on other persons, or on other subjects, than those marked out in the power, nor can they proceed in a manner different from that it proscribes.” 20 F. Cas. at 254.

Among other considerations, the inquiry has encompassed the law establishing the tribunal or office, the particular decision-maker’s entitlement to exercise the office, the substantive scope of authority to detain, and compliance with statutory constraints. *See* Neuman, 98 Colum. L. Rev. at 984; *see, e.g., McClaughry v. Deming*, 186 U.S. 49, 62 (1902) (“A court-martial is the creature of statute, and, as a body or tribunal, it must be convened and constituted in entire conformity with the provisions of the statute or else it is without jurisdiction.”); *Randolph*, 20 F. Cas. at 251 (reviewing “whether the person and the subject matter are such as to bring the case within the provisions of the act of Congress”); *Meade v. Deputy*, 16 F. Cas. 1291, 1293 (C.C.D. Va. 1815) (reviewing appointment of court martial and legality of its procedures). For example, where a magistrate’s jurisdiction to review an extradition request presented by the Executive requires a determination of probable cause that the prisoner committed the underlying offense, a court reviewing the Executive’s detention of the prisoner on *habeas* is empowered to conduct an equivalent fact-finding. *See, e.g., In re Kaine*, 14 F. Cas. 84, 88, 90 (C.C.S.D.N.Y. 1852); *Benson v. McMahon*, 127 U.S. 457, 463 (1888). A similar level of fact-finding has been permitted in other contexts as well. *See Nelson v. Cutter*, 17 F. Cas. 1316 (C.C.D. Ohio 1844) (on *habeas* review of debtor’s imprisonment, fact-finding with respect to the underlying debt permitted). This fact-finding authority of the federal *habeas* courts was expressly expanded in

the 1867 Act that extended the writ to all persons restrained of liberty in violation of federal law.¹³ See *Cunningham v. Neagle*, 135 U.S. 1, 69-75 (1890).

Moreover, federal court decisions addressing *habeas* challenges to a detainee's status under the Alien Enemies Act of 1798 – which authorizes the President to detain, relocate, or deport enemy aliens living in the United States in time of war – further compels the conclusion that a searching review of the facts underlying an Executive detention is required on *habeas*. 50 U.S.C. §§ 21-24. Those cases stand for the propositions that courts can review whether war has been declared, whether the detainee is an alien, and whether the detainee is among the “natives, citizens, denizens, or subjects of a hostile nation” within the meaning of the Act – plainly all matters which require an examination of the factual bases for detention. See *United States ex. rel. Schwarzkopf v. Uhl*, 137 F.2d 898, 902 (2d Cir. 1943) (holding that Czech national born in Prague is not a native or citizen of Germany); *United States ex rel. De Cicco v. Longo*, 46 F. Supp. 170, 172 (D. Conn. 1942) (characterizing alienage as jurisdictional fact); *Minotto v. Bradley*, 252 F. 600, 602-03 (N.D. Ill. 1918) (construing “native” as including Italian national born in Germany). Following those cases, the Court must review whether the detainees here are “enemy combatants.” And, for all the reasons set forth in the Boumediene Opposition, to do so the Court must review the facts.

5. *A De Novo Review is Required Here*

The requirements of constitutional due process mandate *de novo* review in situations where an initial decision has been made without a hearing before an administrative tribunal that

¹³ See Act of Feb. 5, 1867, ch. 28, 1, 14 Stat. 385. The Act provided that the “petitioner may deny any of the material facts set forth in the return, or may allege any fact to show that the detention is in contravention of the Constitution or laws of the United States,” and required the court to “proceed in a summary way to determine the facts of the case, by hearing testimony and the arguments of the parties interested.”...*Id.*

comports with due process. This is true even where the detention purportedly results from military decision-making. For example, in the context of reviewing decisions of courts-martial on petitions for *habeas corpus*, the Supreme Court has explained that *de novo* review is required for claims that the court-martial did not adequately consider:

Had the military courts manifestly refused to consider those claims, the District Court was empowered to review them *de novo*. For the constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers — as well as civilians — from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness rather than finding truth through adherence to those basic guarantees which have long been recognized and honored by the military courts as well as the civil courts.

Burns v. Wilson, 346 U.S. 137, 142-43 (1953). See also, e.g., *Monk v. Zelez*, 901 F.2d 885 (10th Cir. 1990) (granting relief upon *de novo* review of claim that reasonable doubt instruction violated due process); *Schlomann v. Ralston*, 691 F.2d 401 (8th Cir. 1982) (suggesting district court should review record *de novo* to determine accused’s competency); *Owings v. Secretary of the Air Force*, 447 F.2d 1245 (D.C. Cir. 1971) (re-examining evidence to determine sufficiency); *Thompson v. Parker*, 308 F. Supp. 904 (M.D. Pa. 1970) (conducting evidentiary hearing to determine whether admission of petitioner’s statements violated Fifth Amendment); *Swisher v. United States*, 237 F. Supp. 921, 931 (W.D. Mo. 1965) (“[W]e must search and review the military proceedings *de novo* in order to determine whether the manner in which petitioner’s mental competency was handled either denied him a fair trial, or otherwise deprived him of some right guaranteed him under the Constitution”), *aff’d*, 354 F.2d 472 (8th Cir. 1966).

This analysis applies with equal force here. Respondents have conceded that their “determinations that Petitioners are enemy combatants” resulted not from a CSRT or other administrative proceeding, but by the Military through what is essentially an *ad hoc* process. See Respondents’ Motion at 4; Wolfowitz Order at 1 (“Each detainee subject to this Order has been determined to be an enemy combatant through multiple layers of review by officers of the

Department of Defense.”); December 1 Argument Transcript at 44:21-45:25; 59:18 - 60:7.

December 2 Argument Transcript at 6:17-24. The CSRT results merely “confirm” a previously made determination. These circumstances require a *de novo* review. See Petitioners’ Opposition at 27-40; Al-Odah Opposition at 21-22.¹⁴

6. The “Some Evidence” Standard Does Not Apply Here.

At oral argument, Respondents argued that, so long as there is “some evidence” supporting the detentions, these *habeas* petitions should be dismissed. As set forth in Petitioners’ Opposition, the “some evidence” standard is inapposite here. See Petitioners’ Opposition at 41-43.

In stark contrast to the limited contexts in which that deferential standard has been approved, Petitioners here have never had the benefit of an adversarial proceeding to determine the legality of their detention. *Id.* Indeed, Respondents have not cited to this Court *a single case in which the government has asked a court to find “some evidence” based on a process in which the claimant had no meaningful right to participate.* The “some evidence” standard would deny Petitioners even the most minimal level of due process. *Id.* That was the conclusion of the Court in *Hamdi*, 124 S. Ct. at 2645-46, and it applies with equal force here.

Indeed, even a brief examination of the history of the “some evidence” standard demonstrates that it has no application here. For nearly one hundred years the standard has been understood as a fundamental guarantee of the due process norms that ensure the integrity of adjudicative procedures. See Gerald L. Neuman, “The Constitutional Requirement of ‘Some

¹⁴ At the December 1 oral argument before Judge Joyce Hens Green, Respondents conceded that they are uncertain of the extent to which these “multiple levels of review” were documented. December 1 Argument Tr. 46:6 – 46:11.

Evidence,” 25 San Diego L. Rev. 631, 636-58 (1988). This standard of review first appeared in the early 1900s as a due process requirement applicable to *habeas corpus* review of decisions by immigration officials to exclude Chinese immigrants.

The Chinese Exclusion Act of 1888 permitted judicial review of exclusion decisions. Amendments to that statute excluded judicial review and conferred finality on such decisions by immigration officials. Notwithstanding the finality imposed by the statute, the Supreme Court issued a series of decisions emphasizing that immigration officials were not free from due process constraints. *See Kaoru Yamataya v. Fisher*, 189 U.S. 86, 99-101 (1903) (“But this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in ‘due process of law’ as understood at the time of the adoption of the Constitution.”); *Chin Yow v. United States*, 208 U.S. 8, 12-13 (1908) (holding that under the statute the Executive decision was final only “on the presupposition that the decision was after a hearing in good faith, however summary in form.”).

In *Chin Yow*, the Supreme Court permitted an excluded passenger from China to prove that immigration officials had arbitrarily denied him the opportunity to present evidence in support of his claim of American birth.¹⁵ Similarly, in *Kwock Jan Fat v. White*, 253 U.S. 454 (1920), the Supreme Court found that the Secretary of Labor had abused his power and violated due process when he failed to permit the claimant to confront the witnesses against him, and – failed to record portions of the testimony of witnesses favorable to the claimant’s assertion of

¹⁵ In doing so, the Court went further, holding that if Chin Yow could show misconduct by the hearing officers – as for example in their failure to comply with hearing rules – then the district court should determine his citizenship claim *de novo* rather than giving the Executive an opportunity to reconsider its prior determination. *Chin Yow*, 208 U.S. at 12-13.

citizenship. *See also United States v. Woo Jan*, 245 U.S. 552, 556 (1918) (administrative proceeding lacks “safeguards of impartiality and providence” that judicial proceeding offers).

The Supreme Court has applied the “some evidence” standard in a limited number of substantive areas in the past ninety years, including the Interstate Commerce Commission’s decisions regulating railroad operations. The Court extended the standard as an exception to the finality of selective service classification decisions, and applied it to test determinations made by officials in state prison disciplinary proceedings. In every such case, however, the Court recognized that application of the “some evidence” standard by a reviewing court *presupposes the existence of a fair process by the underlying decision-maker*. That precondition does not exist here. *See* Petitioners’ Opposition at 27-42.

In the ICC context, the Court in *ICC v. Louisville & Nashville R.R. Co.*, 227 U.S. 88 (1913), while ultimately upholding the ICC’s order, emphatically rejected the notion that judicial review of the proceeding was to be without teeth:

A finding without evidence is arbitrary and baseless. And if the Government’s contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution’s condemnation of all arbitrary exercise of power.

Id. at 91.

In the selective service cases, the courts were confronted with decisions rendered by local civilian boards under the Selective Training and Service Act of 1940. That statute purported to confer finality on the boards’ decisions regarding classification determinations, orders to report for induction into the armed forces, and orders to report for alternative civilian service. *See* Selective Training and Service Act of 1940, ch. 720, § 10(a)(2), 54 Stat. 885, 893. In

Dickinson v. United States, 346 U.S. 389 (1953), the Supreme Court reviewed the denial of a ministerial exemption to an ordained minister of the Jehovah's Witness faith. The Court, overruling the local board's decision and that of the court below affirming the agency's decision, reviewed the statutory criteria and the evidence presented and determined that the exemption requirements had been met:

[T]he courts may properly insist that there be some proof that is incompatible with the registrant's proof of exemption. The local board may question a registrant under oath, subpoena witnesses to testify, and require both registrant and witnesses to produce documents. The board is authorized to obtain information from local, state, and national welfare and governmental agencies. The registrant's admissions, testimony of other witnesses, frequently unsolicited evidence from a registrant's neighbors, or information obtained from other agencies may produce dissidence which the boards are free to resolve. Absent such admissions or other evidence, the local boards may call on the investigative agencies of the federal government, as they would if the registrant were suspected of perjury. ***But when the uncontroverted evidence supporting a registrant's claim places him prima facie within the statutory exemption, dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the Act and foreign to our concepts of justice.***

Dickinson, 346 U.S. at 396-97 (emphasis supplied).

Similarly, in the prison disciplinary context, the application of the standard has been deemed to require an underlying agency adjudicative process in which the dictates of due process have been followed. As the Supreme Court made clear in *Wolff v. McDonnell*, 418 U.S. 539 (1974), and then later in *Superintendent, Mass. Corr. Inst., Walpole*, 472 U.S. 445 (1985), due process requires that convicted inmates be afforded notice of the charges against them, a hearing at which to contest those charges, the right to present evidence, and a written statement of the fact-finder of the evidence relied on and the reasons for the disciplinary action taken. *Hill*, 472 U.S. at 452-53. The Court in *Hill* stressed that due process mandates these requirements.

Where a prisoner has a liberty interest in good time credits, the loss of such credits threatens his prospective freedom from confinement by extending the length of his imprisonment. Thus the inmate has a strong interest in assuring that the loss of good time credits is not imposed arbitrarily.

Id. at 454.

Since *Hill*, courts have recognized that the “some evidence” standard, because it is so deferential, requires as a predicate a fundamentally fair process by the underlying decision-maker. For example, the Seventh Circuit has observed, “[a] prison disciplinary body may not arbitrarily refuse to consider exculpatory evidence offered by a prisoner simply because the record already contains the minimal evidence suggesting guilt required by *Hill*.” *Viens v. Daniels*, 871 F.2d 1328, 1336 (7th Cir. 1989); *Whitford v. Boglino*, 63 F.3d 527, 536-37 (7th Cir. 1995) (“The adjustment committee may not arbitrarily refuse to consider exculpatory evidence simply because other evidence in the record suggests guilt.”); *see also Cornell v. Woods*, 69 F.3d 1383, 1389 (8th Cir. 1995) (although prison disciplinary finding was supported by “some evidence” it was nonetheless unjustified since prison disciplinary board applied disciplinary rules retroactively).

Because Petitioners have not enjoyed a prior process that meets the fundamental fairness standards articulated in these cases, the “same evidence” standard is wholly inappropriate in this context, and must be rejected.

V. CREDIBLE ALLEGATIONS THAT CSRT DETERMINATIONS HAVE BEEN BASED IN PART ON INFORMATION PROCURED BY TORTURE REQUIRE ROBUST JUDICIAL REVIEW OF THE LEGALITY OF THE CSRT PROCESS

Congress, the President, and the Judiciary have all independently recognized that torture is absolutely prohibited as being inconsistent with “the values of this country.” Remarks by Pres. Bush, June 22, 2004.¹⁶ To the extent the CSRT determinations — and any enemy

¹⁶ Available at <http://www.whitehouse.gov/news/releases/2004/06/20040622-4.html>.

combatant determination made prior to them — were based on information gained by the use of torture, they are, on their face, unlawful.

A. Congress Has Rejected Torture in International and Domestic Contexts

Congress reaffirmed the prohibition against torture less than two months ago, explaining that “the Constitution, laws, and treaties of the United States and the applicable guidance and regulations of the United States Government prohibit the torture or cruel, inhuman, or degrading treatment of foreign prisoners held in custody by the United States.” Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 1091(a)(6), 118 Stat. at 2068. Consistent with that recognition, Congress stated that “[I]t is the policy of the United States to ... ensure that no detainee shall be subject to torture or cruel, inhuman, or degrading treatment or punishment that is prohibited by the Constitution, laws, or treaties of the United States.” *Id.* § 1091(b)(1), 118 Stat. at 2069. Congress also required the Secretary of Defense to take immediate, concrete actions to advance these principles. Specifically, the Secretary of Defense must ensure that policies are developed to guarantee that “members of the Armed Forces, and all persons acting on behalf of the Armed Forces or within facilities of the Armed Forces, treat persons detained by the United States Government in a humane manner consistent with the international obligations and laws of the United States and the policies set forth in section 109(b).” *Id.* §1092(a), 118 Stat. at 2069.

The War Crimes Act provides that it is a war crime for any member of the U.S. Armed Forces or a U.S. national to commit an act “inside or outside the United States” that, among other things, is “defined as a grave breach in any of the [Geneva Conventions] or any protocol to such convention to which the United States is a party.” 18 U.S.C. § 2441(a), (c)(1). Each of the four Geneva Conventions provides that “willful killing, torture or inhuman treatment, including biological experiments, [and] willfully causing great suffering or serious injury to body or

health” constitute grave breaches of the Conventions. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention No. 1), Aug. 12, 1949, art. 50, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (Geneva Convention No. 2), Aug. 12, 1949, art. 51, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention No. 3), Aug. 12, 1949, art. 130, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention No. 4), Aug. 12, 1949, art. 147, 6 U.S.T. 3516, 75 U.N.T.S. 287. The War Crimes Act thus not only provides a basis for imposing criminal liability upon a person who commits torture but also incorporates the prohibition against torture in the Geneva Conventions into U.S. criminal law.

Congress’s emphatic rejection of torture also appears in the treaties to which the United States is a party, which, along with the Constitution and federal laws, are “the supreme Law of the Land.” U.S. Const., art. VI, cl. 2; *see also Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (“By the constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other.”).

The most sweeping repudiation of torture in an international treaty appears in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”), G.A. Res. 46, U.N. GAOR 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984), *reprinted in* 23 I.L.M. 1027 (1984). The Senate ratified CAT (which President Reagan submitted to the Senate and President George H.W. Bush supported) in 1990, and the United States became a party to the treaty with the enactment of 18 U.S.C. § 2340A in 1994.

Article 2 of CAT requires each state party to take all necessary actions “to prevent acts of torture in any territory under its jurisdiction.” *Id.*, art. 2(1). It also provides that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal or political instability or any other public emergency, may be invoked as a justification of torture.” *Id.*, art. 2(2). Article 16 expands the scope of CAT to reach “acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” *Id.*, art. 16(1).¹⁷

Congress enacted 18 U.S.C. § 2340A to implement CAT. Section 2340A prescribes penalties for any person who “commits or attempts to commit torture” outside of the United States. 18 U.S.C. § 2340A(a). With respect to torture occurring within the United States, Congress determined that no implementing legislation was required, because existing laws prohibit such acts. S. Rep. No. 103-107, at 59 (1993); *see also* U.S. Dept. of State, Initial Report of the United States of America to the U.N. Committee against Torture, U.N. Doct. CAT/C/28/Add.5 (1999), at para. 178.

The United States is also a party to the International Covenant on Civil and Political Rights (“ICCPR”), G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966). That treaty — which President George H.W. Bush supported and the Senate ratified in 1992 — contains, among other things, an explicit prohibition against torture:

¹⁷ With respect to the United States’ obligations under Article 16, the Senate specified that the United States considers the term “cruel, inhuman or degrading treatment or punishment” to mean “the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.” U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 136 Cong. Reg. S17486-01 (1990). Thus, U.S. obligations under CAT are measured, at least in part, by constitutional standards.

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” *Id.*, Art. 7.¹⁸ The ICCPR’s prohibition against torture is one of seven articles as to which no derogation is permitted in any circumstances. *Id.* Art. 4 (2). As a result, the ICCPR, like CAT, makes the prohibition against torture absolute.

B. The Executive Branch Recognizes the Absolute Prohibition Against Torture

The President and his designees repeatedly have recognized the absolute prohibition against torture. “Let me make very clear the position of my government and our country. ***We do not condone torture.*** I have never ordered torture. I will never order torture. The values of this country are such that torture is not a part of our soul and our being.” Remarks by Pres. Bush, June 22, 2004 (emphasis supplied).¹⁹ Those statements, moreover, are by no means an aberration. *See* Statement by the President, June 26, 2003 (“Torture anywhere is an affront to human dignity everywhere. We are committed to building a world where human rights are respected and protected by the rule of law. Freedom from torture is an inalienable human right.”)²⁰; *Hamdi v. Rumsfeld*, No. 03-6696, Oral Argument April 28, 2004, Statement of Deputy Solicitor General Paul Clement (“the United States is going to honor its treaty obligations” under “conventions that prohibit torture”).²¹ There can be no doubt that the position of the Executive Branch is that torture is unlawful and will not be tolerated.

¹⁸ As was the case with CAT, the Senate explained that the term “cruel, inhuman or degrading treatment or punishment” is synonymous with “the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States.” U.S. Senate Resolution of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01 (1992).

¹⁹ Available at <http://www.whitehouse.gov/news/releases/2004/06/20040622-4.html>.

²⁰ Available at <http://www.whitehouse.gov/news/releases/2003/06/20030626-3.html>.

²¹ Available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/03-6696.pdf

C. The Judiciary Consistently Has Held That Torture Is Antithetical to Our System of Justice

The unambiguous prohibition of torture embraced both by Congress and the President is entirely consistent with the federal courts' interpretations of the Constitution and acknowledgement of binding international law. *See Miller v. Fenton*, 474 U.S. 104, 109 (1985); *Estelle v. Gamble*, 429 U.S. 97, 102 (1976); *Wilkerson v. Utah*, 99 U.S. 130, 136 (1878); *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980); *see also, Rogers v. Richmond*, 365 U.S. 534, 540 (1961) (“Our decisions under [the Fourteenth] Amendment have made clear that convictions following the admission into evidence of confessions which are involuntary, i.e., the product of coercion, either physical or psychological, cannot stand.”); *Ashcroft v. Tennessee*, 322 U.S. 143, 155 (1944) (“The Constitution of the United States stands as a bar against the conviction of any individual in an American court by means of a coerced confession.”) (footnote omitted); *Brown v. Mississippi*, 297 U.S. 278, 285-86 (1936) (holding that the due process clause of the Fourteenth Amendment prohibited a defendant from being convicted “solely upon confessions obtained by violence,” noting that “[t]he rack and torture chamber may not be substituted for the witness stand.”)

D. The CSRTs Need Not Consider Whether Statements Upon Which They Relied Might Have Been Obtained By Torture.

Pursuant to the July 7 Wolfowitz Order and Secretary England's July 29 Memorandum:

The Tribunal is not bound by the rules of evidence such as would apply in a court of law. Instead, the Tribunal shall be free to consider any information it deems relevant and helpful to resolution of the issue before it. At the discretion of the Tribunal, for example, it may consider hearsay evidence, taking into account the reliability of the evidence in the circumstances.

By design, the CSRTs are free to consider statements without any enquiry whatsoever into whether they were made under torture. As Respondents' counsel stated in response to the Court's questions at the December 2 hearing:

THE COURT: And if a detainee under the CSRT as it exists today were to allege that he had been tortured or believed that he was being held based upon information attained through torture, would the CSRT be duty bound to pursue that allegation to an end to determine whether it was accurate or not?

MR. BOYLE: **I am not sure that's the CSRT's role.**

December 2 Argument Transcript at 85:14-85:20 (emphasis supplied).

For that reason alone, the CSRTs are unlawful and fail to comply not only with *Hamdi*, but with the most rudimentary conceptions of due process in a civil society. See, e.g., *Miller*, 474 U.S. at 109 (“This Court has long held that certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment.”); *Estelle*, 429 U.S. at 102 (explaining that “the primary concern of the drafters [of the Eighth Amendment’s prohibition against cruel and unusual punishment] was to proscribe ‘torture(s)’ and other ‘barbar(ous)’ methods of punishment”); *Wilkerson*, 99 U.S. at 136 (explaining that “punishments of torture” are prohibited by the Eighth Amendment); *Filartiga*, 630 F.2d at 884 (“official torture is now prohibited by the law of nations”).

Even if the Tribunal exercises its discretion to take into account the reliability of such hearing evidence, Respondents have made clear that, notwithstanding the use of torture, if the information obtained is “reliable” the CSRT may consider it:

Mr. Boyle: The fact of the matter is what the guideline, what the overarching guideline for the Combatant Status Review Tribunals is to look for reliable information. It may be information whose providence is unclear. It may be information obtained from a foreign nation. It may be information that is hearsay, and the CSRT is given the guidance to look for reliable information to determine the status of an individual.

If in fact information came to the CSRT's attention that was obtained through a non-traditional means, even torture by a foreign power, I don't think that there is anything in the due process clause even assuming they were citizens--

THE COURT: Well, maybe I think--

MR. BOYLE: -- that would prevent the CSRT from crediting that information for purposes of sustaining the enemy combatant class.

December 2 Argument Transcript at 84:7-84:22 (emphasis supplied).

Respondents have failed to demonstrate the existence of any procedure to ensure the reliability and accuracy of the statements relied upon by the CSRTs. This is particularly egregious in light of the fact that “there is a rebuttable presumption that the Government’s Evidence, as defined in Paragraph H(4) herein, submitted by the Recorder to support a determination that the detainee is an enemy combatant, *is genuine and accurate.*” Combatant Status Review Tribunal Process, attached to July 29, 2004 Memo re: Implementation of Combatant Status Review Tribunal Procedure for Enemy Combatants detained at Guantanamo Bay Naval Base, Cuba, from Secretary England (emphasis supplied); *See also* December 1 Argument Transcript at 52:23-52:25.

It is not just potentially torture-tainted statements relied upon directly by the CSRTs here that could further poison the already deficient “enemy combatant” determination process. The initial “multiple layers of review,” Wolfowitz Order at 1, conducted to determine whether a detainee is an enemy combatant also may have relied on information obtained by torture. Respondents admit that they are “not precisely familiar with the extent to which those prior determinations were papered in the form of formal decisions,” yet, in the next breath, seek to assure the Court that all the information that was the basis for those prior decisions was given to the CSRT.²² December 2 Argument Transcript 41:6-41:11. Aside from the inconsistency in Respondents’ statements, it does not appear that there is in place any mechanism that would

²² Respondents’ representation was made in response to Judge Green’s questions whether the prior decisions were reduced to writing. “Papered,” here, means written down.

allow the CSRT to identify whether torture was used to coerce intelligence sources to provide information that initially formed – or formed at any step in the multiple layers of review – the basis for the enemy combatant determination.

Petitioners' concerns are not speculative. Petitioners are aware of several instances in which detainees claim that statements they made were obtained through the use of torture:

- Moazzam Begg

In a July 12, 2004 letter, Petitioner Begg wrote:

I state here, unequivocally and for the record, that **any documents presented to me by US law enforcement agents were signed and initialed under duress**, thus rendered legally contested in validity.

During several interviews, particularly — though unexclusively — in Afghanistan, I was subjected to pernicious threats of torture, actual vindictive torture and death threats — amongst other coercively employed interrogation techniques. Neither was the presence of legal counsel ever produced, or made available.

The said interviews were conducted in an environment of generated fear, resonant with terrifying screams of fellow detainees facing similar methods. In this atmosphere of severe antipathy towards detainees was compounded use of racially and religiously prejudiced taunts. **This culminated, in my opinion, with the deaths of two fellow detainees, at the hands of US military personnel, to which I myself was partially witness.**

See July 12, 2004 Letter from Petitioner Moazzam Begg (emphasis supplied).²³

- Feroz Abassi

During his CSRT, Mr. Abassi requested that the Tribunal consider his medical records in order to document the mistreatment he received at the hands of his captors. The CSRT determined his medical records were not relevant, and denied his request. Allegations of “maltreatment” instead were forwarded to the CSRT director for “appropriate action.” *See*

²³ Available at <http://www.ccr-ny.org/v2/reports/report.asp?ObjID=qTpzEKtEPc&Content=446>.

Respondents' Factual Return to Petition for Writ of Habeas Corpus by Petitioner Feroz Abassi, Unclassified CSRT Record, Summary of Basis for Tribunal Decision for Mr. Feroz Abassi at 3.

- Martin Mubanga

Petitioner Mubanga's CSRT record states:

The detainee made his verbal statement through his Personal Representative and the detainee's statement recanted all statements previously made to interrogators and authorities. **The detainee stated in his written statement that he made previous statements under physical and emotional duress and asked the Tribunal to disregard those statements.**

See July 12, 2004 Respondent's Factual Return to Petition for Writ of Habeas Corpus by Petitioner Martin Mubanga, Unclassified CSRT Record, Enclosure (1) at 3 of 4 (emphasis supplied). Moreover, a handwritten statement by Mr. Mubanga reads:

Since having been picked up by the Zambian authorities on the instructions of the American government, I have been denied my rights physically and mentally. Intimidated and abused **I retract everything I ever said from the time the Zambian authorities picked me up on orders from the Americans until now the 25-9-04. Because it was obtained from me by excessive duress.**

See July 12, 2004 Respondents' Factual Return to Petition for Writ of Habeas Corpus by Petitioner Martin Mubanga, Unclassified CSRT Record, Summarized Sworn Detainee Statement at 1. (emphasis supplied).

- Bishar Al-Rawi

During Petitioner Al-Rawi's CSRT, he stated:

As you know, we were taken from Gambia to Kabul and then to Bagram Airbase. **In Bagram, I provide information only after I was subjected to sleep deprivation and various threats were made against me.**

See Respondents' Factual Return to Petition for Writ of Habeas Corpus by Petitioner Bishar Al-Rawi, Unclassified CSRT Record, Enclosure (3) at 24 of 27. (emphasis supplied).

- Mamdouh Habib

Similarly, Petitioner Habib's Personal Representative told the CSRT that statements Mr. Habib made were:

Given under duress and torture; he has been tortured since being captured and has reported that fact to the International Committee of the Red Cross; and he would tell interrogators what they wanted to hear because he was in fear.

See Respondents' Factual Return to Petition for Writ of Habeas Corpus by Petitioner Mamdouh Habib, Unclassified CSRT Record, Enclosure (1) at 1.

Petitioner Habib's allegations of torture were referred by the Tribunal to the CSRT Assistant Legal Advisor, and the OARDEC Liason to the Criminal Investigation Task Force and JTF – GTMO was also notified of the matter on September 22, 2004. Mr. Habib's Personal Representative explained to the Tribunal that Mr. Habib said he could not tell the ICRC the names of his torturers, and that he had asked, "How can I tell you a name if the name tags are taped over?" *See id.*, Enclosure (3) at 1.

An evaluation whether the CSRTs relied upon statements obtained through torture in reaching their determinations that the Petitioners are enemy combatants requires "an examination of all of the attendant circumstances." *Haynes v. Washington*, 373 U.S. 503, 513 (1963). This Court must consider all of the facts and circumstances concerning each of the individual detainees in the cases before it. *Cf. Miller*, 474 U.S. at 452-53 ("the admissibility of a confession turns as much on whether the techniques for extracting the statements, as applied to *this* suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne."). For these reasons as well, Respondents' Motion must be denied, and Petitioners' must have an opportunity to develop facts to determine whether their enemy combatant determinations relied on statements made under torture.

Importantly, the United States has long recognized the perils of military adjudicatory procedures that rely on information obtained by torture. In 1942, two U.S. Army Air Corps personnel were shot down by the Japanese. The Japanese refused to treat the Americans as prisoners of war, provide their names to the United States, state their sentences, or allow diplomatic visits. General Uchiyama, a commander in charge of the 5th Japanese Army, convened a military tribunal to try the Americans on charges of intentionally bombing non-military installations and firing on civilians in connection with the bombardment of Kobe and Osaka. The tribunal relied on statements that were widely believed by the United States to have been obtained by torture. The two fliers were convicted and beheaded. The State Department issued this protest:

With regard to the allegation of the Japanese Government that the American aviators admitted that acts of which the Japanese Government accuses them, there are numerous known instances in which Japanese official agencies have employed brutal and bestial methods in extorting alleged confessions from persons in their power. It is customary for those agencies to use statements obtained under torture, or alleged statements, in proceedings against the victims. If the admissions alleged by the Japanese Government to have been made by the American aviators were in fact made, they could only have been extorted fabrications.

Associated Press, Texts of the Statements on Japan, N.Y. TIMES, Apr. 22, 1943 at 4. In 1947, the United States tried General Uchiyama, and others involved in the proceedings, including the three officers who had presided over the tribunal, for “having failed to apply to these [U.S. Army] prisoners of war the type of procedure they were entitled to.” *U.S. v. Uchiyama* Trial Transcript, Case 35-46, War Crimes Branch Case Files, Records of the Judge

Advocate General, Record Group 153 (Yokohama, July 18, 1947) at 20.²⁴ The Japanese officers were convicted, and most were executed. The Prosecution's opening statement read:

We are now charging the accused with having failed to have applied to these prisoners of war the type of procedure that they were entitled to. In other words, they applied to them a special type of summary procedure which failed to afford them the minimum safeguards for the guarantee of their fundamental rights which were given them both by the written and customary laws of war.²⁵

Id.

Relying on information obtained by torture presents no less of a grave threat now than it did in 1942.

VI. CUSTOMARY INTERNATIONAL LAW IS U.S. LAW

It is well-settled that courts of the United States are bound to apply international law. *See, e.g., The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815) (“the Court is bound by the law of nations which is a part of the law of the land”)(emphasis supplied); *Hilton v. Guyot*, 159 U.S. 113, 163 (1895) (“International law, in its widest and most comprehensive sense . . . is part of our law, and must be ascertained and administered by the courts of justice, as often as such questions are presented in litigation between man and man, duly submitted to their determination”)(emphasis supplied); *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination”)(emphasis supplied); *Banco Nacional de Cuba v. Sabbatino*,

²⁴ Available at http://lawofwar.org/army_lawyer.htm.

²⁵ Of course, the law of war does not apply to Petitioners who were captured thousands of miles from the battlefield. The prohibition against relying on torture, is nevertheless, just as applicable here. And if the Court determines that the law of war does apply, Uchiyama aptly illustrates the rationale for affording the protections due under international humanitarian law.

376 U.S. 398, 423, 25 (1964) (“[I]t is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances . . . [W]e are constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law”); *Filartiga*, 630 F.2d at 886 (2d Cir. 1980) (“The law of nations forms an integral part of the common law, and a review of the history surrounding the adoption of the Constitution demonstrates that it became a part of the common law of the United States upon the adoption of the Constitution”)(emphasis supplied); *Fernandez v. Wilkinson*, 505 F. Supp. 787, 798 (D. Kan. 1980) (“International law is a part of the laws of the United States which federal courts are bound to ascertain and administer in an appropriate case”), *aff’d on other grounds*, *Rodriguez-Fernandez v. Wilkinson*, 654 F. 2d 1382 (10th Cir. 1981); *Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (recognizing that “international disputes implicating . . . our relations with foreign nations” are one of the “narrow areas” in which “federal common law” continues to exist); *Ishtyaq v. Nelson*, 627 F. Supp. 13, 27 (E.D.N.Y. 1983) (“[I]nternational law is a part of the laws of the United States that federal courts are bound to ascertain and apply in appropriate cases . . .”); *United States v. Buck*, 690 F. Supp. 1291, 1297 (S.D.N.Y. 1988) (“International law . . . is a component of this Nation’s domestic law, enforceable in federal courts. International law exists in the federal courts independent of acts of Congress”); *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 978 F.2d 493, 502 (9th Cir. 1992) (“It is . . . well settled that the law of nations is part of federal common law”)(emphasis supplied); *Kadic v. Karadzic*, 70 F.3d 232, 246 (2d Cir. 1995) (referring to the “settled proposition that federal common law incorporates international law”), *cert. denied*, 518 U.S. 1005 (1996); *Xuncax v. Gramajo*, 886 F. Supp. 162, 193 (D. Mass.

1995) (“[W]here the plaintiff alleges a violation of the law of nations, the federal court is required to investigate and discern principles of international law, and it is well settled that the body of principles that comprise customary international law is subsumed and incorporated by federal common law”); *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2761, 64-65 (2004) (“[N]o development in the two centuries from the enactment of [the Alien Tort Statute, 28 U.S.C.S. § 1350] to the birth of the modern line of cases beginning with *Filartiga v. Pena-Irala* . . . has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law. . . . For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations . . . It would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals. . . . We think it would be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism. . . . The position we take today has been assumed by some federal courts for 24 years, ever since the Second Circuit decided *Filartiga v. Pena-Irala*”)(emphasis supplied); Restatement 3d of the Foreign Relations Law of the U.S., § 111 (“International law and international agreements of the United States are law of the United States and supreme over the law of the several States.”); *Operational Law Handbook* (2004), Maj. Joseph B. Berger III, Maj. Derek Grimes, Maj Eric T. Jensen Eds., International and Operational Law Department, The Judge Advocate General’s Legal Center and School, Charlottesville, Virginia, Chapter 3 Human Rights at 42 (“If a specific human right falls within the category of customary international law, it should be considered a ‘fundamental human right.’ As such, it is binding on U.S. forces during all overseas operations. *This is because customary international law is considered part of U.S. law.*”) (emphasis

supplied); *Report on Terrorism and Human Rights, Inter-American Commission on Human Rights*, OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr. 22 October 2002, II, Legal Framework For The Commission's Analysis at ¶ 38 ("Significant aspects of the American Declaration may also be considered to reflect norms of customary international law. On the basis of treaty and custom, therefore, the American Declaration constitutes a source of legal obligation for all OAS member states, including in particular those states that have not ratified the American Convention on Human Rights."); Jordan Paust, "*Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*", Summer, 2003, 44 Harv. Int'l L.J. 503 at 516 ("International law also applies within the United States because customary international law... is directly part of U.S. law."); Louis Henkin, *International Law as Law in the United States*, 82 Mich. L. Rev. 1555, 1561 (1984) ("International law is not merely law binding on the United States internationally but is also incorporated into United States law. It is 'self-executing' and is applied by courts in the United States without any need for it to be enacted or implemented by Congress"); Curtis A. Bradley and Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 816, 816-17 (1996-1997) ("The proposition that customary international law . . . is part of this country's post-Erie federal common law has become a well-entrenched component of U.S. foreign relations law. . . . During the last twenty years, almost every federal court that has considered the modern position has endorsed it."); Harold Hongju Koh, *Is International Law Really State Law?*, 111 Harv. L. Rev. 1824 (1997-1998) (arguing that the hornbook rule that federal courts shall determine questions of customary international law as federal law is "a sensible, settled rule that all three federal branches and the fifty states have consistently followed"); Brief for the United States as Amicus Curiae at I, *Filartiga*, 630 F.2d at 876 (2d Cir. 1980) (No. 79-6090), reprinted in 19 I.L.M. 585, 606 n.49

(1980) (“*Customary international law is federal law, to be enunciated authoritatively by the federal courts*”)(emphasis supplied).

Moreover, it is similarly beyond dispute that 28 U.S.C. § 1331 provides federal courts to hear the claims of individuals predicated upon violations of customary international law. *See Illinois v. Milwaukee*, 406 U.S. 91,100 (1972) (concluding that “[Title 28 U.S.C.] § 1331 jurisdiction will support claims founded upon federal common law as well as those of statutory origin”).

VII. CONCLUSION

For all of these reasons and those set forth in Petitioners' prior submissions, the Court should deny Respondents' Motion.

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TABLE OF CONTENTS

	Page
PETITIONERS’ JOINT SUPPLEMENTAL BRIEF IN OPPOSITION TO RESPONDENTS’ MOTION TO DISMISS OR FOR JUDGMENT AS A MATTER OF LAW	1
I. INTRODUCTION	2
II. THE COURT’S INQUIRY IS LIMITED AT THIS MOTION TO DISMISS STAGE.....	3
III. THE EXECUTIVE CANNOT USURP CONGRESS’S LEGISLATIVE FUNCTION	5
IV. A ROBUST JUDICIAL REVIEW OF THE LEGALITY OF PETITIONERS’ DETENTION IS REQUIRED TO PRESERVE SEPARATION OF POWERS.....	12
A. <i>Rasul</i> And <i>Hamdi</i> , Taken Together, Settle The Question Of The Judiciary’s Role In <i>Habeas</i> Review Of War Time Executive Detentions Of Both Citizens And Aliens.	12
B. <i>Rasul</i> and <i>Hamdi</i> Reflect the Constitutional Mandate of Separation of Powers In Review of Executive Detention	15
1. Separation of Powers Was A Fundamental Concern of the Framers.....	15
2. Judicial Review of Executive Detention Is Central To Anglo-American Law And Is Memorialized in the Constitution.....	16
3. Judicial Review of Executive Detention on <i>Habeas</i> Must be Robust Notwithstanding Alleged National Security Concerns.....	19
4. Plenary Review of the Factual Record Upon Which Petitioners’ Enemy Combatant Determinations Were Based Is Required.....	23
5. A <i>De Novo</i> Review is Required Here	25
6. The “Some Evidence” Standard Does Not Apply Here.....	27
V. CREDIBLE ALLEGATIONS THAT CSRT DETERMINATIONS HAVE BEEN BASED IN PART ON INFORMATION PROCURED BY TORTURE REQUIRE ROBUST JUDICIAL REVIEW OF THE LEGALITY OF THE CSRT PROCESS	31
A. Congress Has Rejected Torture in International and Domestic Contexts.....	32
B. The Executive Branch Recognizes the Absolute Prohibition Against Torture	35
C. The Judiciary Consistently Has Held That Torture Is Antithetical to Our System of Justice	36
D. The CSRTs Need Not Consider Whether Statements Upon Which They Relied Might Have Been Obtained By Torture.	36

TABLE OF CONTENTS
(continued)

	Page
VI. CUSTOMARY INTERNATIONAL LAW IS U.S. LAW	43
VII. CONCLUSION.....	48

An extra section break has been inserted above this paragraph. Do not delete this section break if you plan to add text after the Table of Contents/Authorities. Deleting this break will cause Table of Contents/Authorities headers and footers to appear on any pages following the Table of Contents/Authorities.