IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AHCENE ZEMIRI, *et al.*,	)	
	)	
Petitioners,	)	
	)	
v.	)	**Civil Action No. 04-2046-CKK**
	)	
GEORGE W. BUSH,	)	
President of the United States, *et al.*,	)	
	)	
Respondents.	)	
	)	

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS AND MOTION TO DISMISS OR FOR JUDGMENT AS A MATTER OF LAW AND SUPPORTING MEMORANDUM

Petitioner Ahcene Zemiri has sued respondents in their official capacities and seeks a writ of habeas corpus and injunctive and declaratory relief on grounds that he has been unlawfully detained. Specifically, petitioner alleges that his detention violates Article II of the United States Constitution, Petition ¶¶ 77-81, and the Fifth Amendment Due Process Clause of the United States Constitution, id. ¶¶ 39-45; the Administrative Procedures Act, 5 U.S.C. § 706(2), id. ¶¶ 82-91; international law, id. ¶¶ 51-54, including the Geneva Conventions, id. ¶¶ 40, 46-50, 52, 62, 63; and the Alien Tort Statute, 28 U.S.C. § 1350, id. ¶¶ 55-76. The claims are similar to legal claims previously asserted in various other of the coordinated Guantanamo Bay detainee cases.

The claims against respondents are without merit and should be dismissed for the reasons set forth in the Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss or for Judgment as a Matter of Law and Memorandum in Support,[1] filed October 4, 2004, in the

[1] Respondents' motion is not a Fed. R. Civ. P. 12 motion to dismiss, whose applicability in the habeas context is at best debatable. Compare Browder v. Director, Ill. Dep't of

coordinated cases. In the interest of economy, those reasons will not be restated here, but instead, the brief is attached as Exhibit 1 and incorporated herein.

Allegations of Mistreatment. Furthermore, to the extent petitioner's Due Process claim encompasses the notion that allegations of mistreatment somehow undermine that Due Process has been provided to petitioner through the Combatant Status Review Tribunal (CSRT) process, this claim must be rejected. Allegations of mistreatment cannot salvage petitioner's claims that he has been deprived of due process.[2] Assuming, arguendo, that petitioner has due process

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Corrections, 434 U.S. 257, 269 n.14 (1978) (stating in dictum that a motion "explicitly based on" Rule 12(b)(6) was not an appropriate motion in a habeas case), with Tomoney v. Warden, S.C.I. Graterford, No. Civ. A. 01-0912, 2002 WL 1635008 (E.D. Pa. July 17, 2002) (rejecting argument that response that was "the functional equivalent of a Rule 12(b)(1) and 12(b)(6) motion to dismiss" was inappropriate under Browder following the enactment of the § 2254 Rules). The combined response and motion respondents filed, along with the factual return, is well within the norm of habeas practice and state the cause of the detention and demonstrate why no relief is appropriate. See 28 U.S.C. § 2243; White v. Lewis, 874 F.2d 599, 603 (9th Cir. 1989) (approving general motion to dismiss as vehicle to "show cause by written response" why writ of habeas corpus should not issue, and noting that "responding to a habeas petition with a motion to dismiss is common practice"); Ukawabuto v. Morton, 997 F. Supp. 605, 608-09 (D.N.J. 1998) ("The answer to a habeas petition . . . . should respond in an appropriate manner to the factual allegations of the petition and should set forth legal arguments in support of the respondent's position, both the reasons why the petition should be dismissed and the reasons why the petition should be denied on the merits.").

[2] The United States abhors torture, has ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), Nov. 20, 1994 Treaty Doc. 100-20, 1465 U.N.T.S. 85, 23 I.L.M. 1027, and has effected its policy against torture by approving statutes and regulations that, inter alia, provide for criminal sanctions against torture. See 18 U.S.C. §§ 2340-2340B, as amended by Pub. L. No. 108-375, 118 Stat. 1811 (Oct. 28, 2004) (making torture a criminal offense); 8 U.S.C. § 1231 note (noting policy against removal of persons to a country likely to torture); 8 C.F.R. § 208.17 (immigration context: regarding deferral of removal to country likely to torture).

Consistent with its policy, in the context of the government's detention and treatment of enemy combatants at Guantanamo Bay, any credible allegations of mistreatment are investigated and, as appropriate, punished and corrected, as published reports establish. Examples of such investigations and corrective actions or punishments taken are available at

rights, the CSRT procedures have safeguards to account for the reliability and provenance of evidence, including allegations that evidence was derived coercively. As discussed in the Response, the CSRTs consist of tribunals of commissioned officers not "involved in the apprehension, detention, interrogation, or previous determination of status of the detainee," see CSRT Order ¶ e; Response at 38-39, who make a decision regarding a detainee's status afresh, by a majority vote, and based on a preponderance of the evidence. A detainee has the right to testify and present his case with the assistance of a personal representative. See Response at 33-35. In addition, the CSRT Recorder is obligated to search government files for, and provide to the CSRT any "evidence to suggest that the detainee should not be designated as an enemy combatant." Id. at 34. The CSRTs issue written decisions articulating the basis for their decisions, and those decisions undergo a legal sufficiency review by a higher authority, empowered to return the record to the tribunal for further proceedings, if appropriate. Id. at 35.

In considering nontraditional forms of evidence, such as hearsay, the CSRT members are also instructed to take into account the "reliability" of the evidence "in the circumstances." See, e.g., CSRT Implementation Memorandum Encl. (1) ¶ G(7). And, importantly, the members of the CSRT are bound by oath to examine the evidence before them "impartially" and in light of their "professional knowledge, best judgment, and common sense," and to be guided by their "concept of justice." See CSRT Implementation Memorandum Encl. (8), p. 2.[3] These

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http://www.defenselink.mil/news/detainee_investigations.html, or have been reported in the media, see http://news.orb6.com/stories/ap/20041105/guantanamo_abuse.php (Associated Press story).

[3] In full, the oath provides:

Do you [the Tribunal member] swear (affirm) that you will faithfully perform your

instructions adjure CSRT members to take appropriate account of the "common sense" notion that statements obtained by severe pain and suffering can be unreliable. And as neutral decisionmakers, CSRT members have discretion to decide how much weight, if any, to accord evidence before them.[4] The sworn duty of the CSRT members, combined with the other procedural protections afforded detainees, are more than adequate to account for allegations that evidence is of questionable provenance or weight to the extent such issues ever credibly arise.

Of course, determinations of combatant status strike at the heart of the Military's ability to conduct war successfully. They also implicate the safety of the Nation's troops and, ultimately, its citizens, as well as the safety and support of allied and coalition forces and countries. Given that the issues involved are not ones of "guilt" or "innocence" as in a criminal context, but rather, involve judgments as to whether an individual may properly be prevented from serving the enemy, see Response at 8-13, it is an inherent and perhaps inescapable fact – an incident of the nature of war – that the deciding military officials may need to rely on information that would be

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> duties as a member of this Tribunal; that you will impartially examine and inquire into the matter now before you according to your conscience, and the laws and regulations provided; that you will make such findings of fact as are supported by the evidence presented; that in determining those facts, you will use your professional knowledge, best judgment, and common sense; and that you will make such findings as are appropriate according to the best of your understanding of the rules, regulations, and laws governing this proceeding, and guided by your concept of justice (so help you God)?

See CSRT Implementation Memorandum Encl. (8), p.2.

[4] While a presumption exists in favor of the genuineness and accuracy of the government's evidence in the CSRT, the presumption is rebuttable. See CSRT Implementation Memorandum Encl. (1) ¶ G(11). Thus, a detainee has the opportunity to provide evidence or testimony regarding any factor casting doubt on the evidence, and the CSRT can accord the evidence any weight it may be due.

deemed insufficiently reliable in a criminal trial. This is especially so in the context of an unconventional war waged against a secretive and unorthodox enemy such as al Qaeda, in which information requiring action may come from other governments and a multitude of intelligence sources.

These factors, along with the uniqueness of the enemy combatant status determination, involving quintessentially military judgments made for the purpose of waging war successfully and representing a core exercise of the Commander in Chief authority, necessarily and appropriately circumscribe the role of a court in reviewing any determination of the combatant status of detainees. See Response at 43-51; Reply at 19-20. The Executive has a unique institutional capacity to determine whether evidence gathered is sufficiently reliable to guide the use of military force (including the task of determining enemy combatant status), while the judiciary lacks any corresponding institutional competence, experience, or accountability, to make such military judgments at the core of the war-making powers. See Curran v. Laird, 420 F.2d 122, 130 (D.C. Cir. 1969) (en banc) ("It is – and must – be true that the Executive should be accorded wide and normally unassailable discretion with respect to the conduct of the national defense and the prosecution of national objectives through military means.").

Morever, courts reconsidering the evidentiary basis regarding an individual's enemy combatant status and second-guessing the judgment of military commanders on the issue, as petitioner apparently seeks, would severely hamstring the Executive's conduct of national defense. See Johnson v. Eisentrager, 339 U.S. 763, 779 (1950) (noting that litigation by enemy combatants over the propriety of their detention could result in "a conflict between judicial and military opinion highly comforting to the enemies of the United States"). This approach would

regularly require the judiciary to intrude deeply into the military's decisionmaking process for classifying enemy combatants, given the stated tactic of the enemy to allege mistreatment and torture to judicial authorities regardless of whether such treatment actually occurred,[5] and could require military commanders to return a known, hostile combatant to the enemy's front lines. The judicial role petitioners envision would trench upon separation of powers concerns, potentially damage the Executive's ability to obtain cooperation and information from other nations, and ultimately impair the Military's ability to wage this war successfully. In addition, searching judicial inquiry based upon allegations of mistreatment or torture with the purpose of addressing whether such information could legitimately be considered in CSRT proceedings would essentially result in detainees obtaining private, judicial enforcement of the CAT in the absence of implementing legislation, in the face of Congress's specific declarations that the CAT is not self-executing. See S. Exec. Rep. 101-30, at 31 (1990); 136 Cong. Rec. S17486-01, S17491-92 (Oct. 27, 1990); Declarations and Reservations at http://www.ohchr.org/english/countries/ratification/9.htm#reservations; see also Reply at 30. Purported allegations of evidence obtained by "torture" therefore cannot redeem petitioner's claims with respect to the CSRT process.

ATS Claims. As explained in the Response, the Alien Tort Statute ("ATS") claims, such as those asserted in the Zemiri petition, must fail not only because the ATS itself does not waive the government's sovereign immunity, but also because several key exceptions to the waiver of immunity provided in the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, render that

[5] See Al Qaeda Training Manual seized in Manchester, England, at page 16 of 17, available at http://www.usdoj.gov/ag/manualpart1_4.pdf.

waiver inapplicable to petitioner's ATS claims.[6] See Response at 53-65.

That the APA's waiver of sovereign immunity does not extend to tort claims asserted by a petitioner through the ATS is further made unquestionably clear by the last clause of § 702, which provides that the APA's waiver of immunity does not "confer[] authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702(2). As noted in the 1976 legislative history of § 702, which resulted in the current waiver of sovereign immunity expressed in the APA, this clause is

> concerned with situations in which Congress has consented to suit and the remedy provided is intended to be the exclusive remedy. For example, in the Court of Claims Act [10 Stat.612], Congress created a damage remedy for contract claims with jurisdiction limited to the Court of Claims except in suits for less than $10,000. The measure is intended to foreclose specific performance of government contracts. In the terms of the proviso, a statute granting consent to suit, *i.e.*, the Tucker Act, "impliedly forbids" relief other than the remedy provided by the Act. Thus, the partial abolition of sovereign immunity brought about by this bill does not change existing limitations on specific relief, if any, derived from statutes dealing with such matters as government contracts, as well as patent infringement, tort claims, and tax claims.
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> Th[e] language [of § 702(2)] makes clear that the committee's intent to

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[6] Among petitioner's ATS claims is a claim that respondents' acts "violated customary international law prohibiting enforced disappearances as reflected, expressed, and defined in multilateral treaties and other international instruments, international and domestic judicial decisions, and other authorities." Petition ¶ 75. "Enforced disappearance" has not been discussed in federal case law; in fact, respondents' counsel are aware of only two federal cases in which "enforced disappearance" is mentioned, and in both cases, the courts only mentioned "enforced disappearance" in passing. See Schneider v. Kissinger, 310 F. Supp. 2d 251, 257 n.6 (D.D.C. 2004); Wiwa v. Royal Dutch Petroleum Co., No. 96 Civ. 8386 (KMW), 2002 WL 319887 at *9 (S.D.N.Y. Feb. 28, 2002) (not reported in F. Supp. 2d). In any event, "enforced disappearance," as a tort, would appear to have no application to forbid or make actionable the detention of enemy combatants during a time of war. See Response at 6-19 (detention of enemy combatants is integral and inexorable part of President's war powers and within authority granted by Authorization for Use of Military Force.) (collecting cases); see also Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2766 n.21 (2004) (deference to political branches may counsel against availability of relief in federal courts under ATS).

> preclude other remedies will be followed with respect to all statutes which grant consent to suit and prescribe particular remedies. The proviso as amended also emphasizes that the requisite intent can be implied as well as expressed.

House Rep. No. 94-1656, at 12-13 (1976), reprinted in 1976 U.S.C.C.A.N. 6121, 6133 (footnotes omitted) (emphasis added).

In the area of tort claims against the government, Congress has consented to suit for such claims, but has forbidden relief on such claims as are sought by petitioner. The Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-2680, grants consent to suit, i.e., provides a waiver of sovereign immunity, for claims against the government for torts committed by federal employees acting within the scope of their employment. The FTCA's consent to suit, however, is subject to a number of express and implicit exceptions and exclusions that bar petitioner's tort claims and prevent application of the APA waiver of sovereign immunity.

The FTCA expressly excludes from its waiver of sovereign immunity claims "arising out of combatant activities of the military . . . during time of war." See 28 U.S.C. 2680(j). Here, the military's detention of petitioners as enemy combatants under the exercise of the President's Commander in Chief powers and authority under the Authorization for the Use of Military Force of 2001 ("AUMF") during this ongoing war with al Qaeda and its supporters are undoubtedly "combatant activities" falling within the FTCA's exclusion. See Response at 6-19 (detention of enemy combatants is a fundamental incident of war and of use of force to subdue and incapacitate the enemy); see generally Koohi v. United States, 976 F.2d 1328, 1332-36 (9th Cir. 1982) (discussing § 2680(j) exception). The FTCA also expressly excludes from its waiver of sovereign immunity claims "arising in a foreign country." See 28 U.S.C. § 2680(k). This exclusion bars tort claims arising on military bases and embassies under U.S. control overseas,

see MacCaskill v. United States, 834 F. Supp. 14, 16 (D.D.C. 1993), aff'd, 24 F.3d 1464 (D.C. Cir. 1994), and thus, in Guantanamo Bay, which is in Cuba. See Response at 22-23 (Guantanamo Bay is outside of U.S.); Smith v. United States, 507 U.S. 197, 201-04 (1993) (FTCA bars tort claims arising in Antarctica); see also Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2754 (2004) (repudiating doctrine that § 2680(k) inapplicable where wrongful conduct occurs in U.S. but has operative effect overseas and holding exception bars claims "based on any injury occurring in a foreign country, regardless of where the tortious act or omission occurred").

By these explicit exclusions from the waiver of sovereign immunity regarding tort claims, the FTCA "expressly . . . forbids the relief which is sought" by petitioner for alleged torts associated with his detention and thereby renders the APA's waiver of sovereign immunity in § 702 inapplicable. Cf. Neighbors for Rational Development, Inc. v. Norton, 379 F.3d 956, 960-965 (10th Cir. 2004) (APA waiver does not apply to quiet title claim pertaining to Indian trust land where other statute [28 U.S.C. § 2409a] waiving immunity for quiet title claims excludes from its waiver claims pertaining to such lands); Robishaw Engineering, Inc. v. United States, 891 F. Supp. 1134, 1146-47 (E.D. Va. 1995) (noting that statute [28 U.S.C. § 1498] waiving sovereign immunity only for certain types of patent claims and providing only a damages remedy represents Congressional judgment as to types of claims that may be brought, thus expressly or implicitly forbidding other claims for relief regarding patents).

Furthermore, the FTCA only provides a waiver of immunity for damages; it does not waive sovereign immunity for equitable or injunctive relief for tort claims against the government. See Women Prisoners of the District of Columbia Dep't of Corrections v. District of Columbia, 899 F. Supp. 659, 666 (D.D.C. 1995) (noting that while injunctive relief to prevent

torts may be available under the common-law against actors not protected by sovereign immunity, the FTCA does not waive sovereign immunity for equitable relief against the federal government); 28 U.S.C. § 1346(b); see also Hatahley v. United States, 351 U.S. 173, 182 (1956) (court lacked power under FTCA to issue injunction). The FTCA, thus, "impliedly forbids" the type of prospective injunctive relief sought by petitioner in this case with respect to a tort claim against the government.[7] Cf., e.g., Sharp v. Weinberger, 798 F.2d 1521, 1523 (D.C. Cir. 1986) (APA waiver of immunity for equitable relief does not apply to actions for specific performance of a contract because the waiver, by its terms, is "inapplicable if 'any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought,' and the Tucker Act [28 U.S.C. § 1491(a), permitting damages and very limited injunctive relief incident thereto] and Little Tucker Act [28 U.S.C. § 1346(a)(2), permitting damages] impliedly forbid such relief.").[8]

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[7] The FTCA's implicit proscription against equitable relief is also consistent with enactments respecting potential liability of foreign persons and entities for torts. For example, the Torture Victims Protection Act, 28 U.S.C § 1350 note, provides for potential liability of individuals for acts of torture committed under color of foreign law, but permits liability only for damages. A foreign government is subject to the jurisdiction of U.S. courts for claims for money damages only for torts occurring in the U.S. or for torture and related acts against U.S. nationals committed under the auspices of states designated as state sponsors of terrorism (subject to certain conditions). See 28 U.S.C. §§ 1604, 1605 (a)(5), (7). These statutes only reinforce the FTCA's implicit proscription on equitable relief against the federal government for tort claims, demonstrating that in area of torts committed by individuals acting under color of state authority, Congress has consistently limited permissible potential relief to money damages.

[8] The relevance of the FTCA's implied and express proscriptions to the scope of the APA's waiver of immunity is not diminished by United States Information Agency v. Krc, 989 F.2d 1211 (D.C. Cir. 1993). In that case, the Court of Appeals, before affirming the grant of summary judgment for the government on the district court's alternate ground, distinguished Sharp and construed the FTCA's exclusion of tort claims for "interference with contract rights" (28 U.S.C. § 2680(h)) as not necessarily barring injunctive relief. Id. at 1216-17. The Court of Appeals rested this distinction in part on its sense that "the relief [plaintiff] does seek would impose a far lesser burden upon the Government than would an equitable action for breach of contract." Id. at 1216. That relief was not detailed in the opinion, but would appear to consist of

Given that the FTCA existed at the time § 702 was amended to its current form in 1976, see 28 U.S.C. 1346(b) (1976), the legislative history of § 702, quoted above, contemplated these express and implied exclusions limiting application of the APA's waiver of immunity in its statement that § 702 does not abrogate express or implied limits on specific relief "derived from statutes dealing with . . . tort claims." House Rep. No. 94-1656, at 12-13 (1976), reprinted in 1976 U.S.C.C.A.N. 6121, 6133, The APA does not "confer[] authority" to override FTCA's implicit proscription against equitable relief for alleged torts or its express proscriptions on the type of tort claims raised by petitioner. Thus, the APA's waiver of immunity simply cannot apply, and petitioner's ATS claims fail.[9]

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withdrawal of certain inter-agency communications – something akin to the vacatur of agency action that would ordinarily be available upon a demonstration that the action is arbitrary and capricious, irrespective of any tort allegations. In contrast to Krc, however, the burden and intrusion threatened by the equitable relief sought in the instant case are qualitatively different, and orders of magnitude greater, than in either Krc or Sharp. Petitioner seeks a broad, general injunction that necessarily foreshadows continuous judicial oversight and monitoring of all aspects of DoD's detention facility at Guantanamo, in an area – conditions of confinement abroad of alien enemy combatants – into which the Judiciary has never before inserted itself. See Petition ¶¶ 59, 64, 69, 73, 76; id. (Prayer for Relief) ¶¶ 2, 3, 4, 5, and 15. Having deliberately chosen in the FTCA not to expose the United States to equitable remedies on tort theories, and to preserve sovereign immunity for tort claims either "arising out of the combatant activities of the military or naval forces . . . during time of war," "arising in a foreign country," or, as here, both, it would be anomalous to infer that Congress intended nevertheless to allow such claimants to use those same claims as the basis for obtaining judicial supervision of military activities and operations.

[9] Petitioner also raises a novel and incorrect claim that respondents' acts violated "Additional Protocol II of the Geneva Conventions." Petition ¶ 63. Protocol II is inapposite in the instant case because it addresses protection for victims of non-international armed conflicts and both of the conflicts Zemiri was involved with, the international war on terrorism and the war in Afghanistan, are international conflicts. Further, petitioner's reliance on Protocol II fails, because, although the United States has signed Protocol II, the Senate has not ratified it. See, e.g., Kadic v. Karadzic, 70 F.3d 232, 243 n.8 (2d Cir. 1995); M.A. A26851062 v. I.N.S., 858 F.2d 210, 219 n.7 (4th Cir. 1988); see also Senate Treaty Document 2, 100th Cong., 1st Sess. iii-iv (1987). And, in any event, the Geneva Conventions, including Protocol II, are not self-

For these reasons, the claims in this case should be dismissed, judgment in favor of respondents should be granted, a writ of habeas corpus should not issue, and the relief requested by petitioner should be denied.

Dated: December 28, 2004

Respectfully submitted,

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executing. See Response at 67-70.

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