

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re Guantanamo Bay Detainee Cases

JARALLAH AL-MARRI, *et al.*,)
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)
 Petitioners,)
)
 v.) Civil Action No. 04-CV-2035 (GK)
)
)
 GEORGE W. BUSH,)
 President of the United States, *et al.*,)
)
)
 Respondents.)

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

**REPLY MEMORANDUM IN SUPPORT OF RESPONDENTS'
MOTION TO DISMISS OR FOR JUDGMENT AS A MATTER OF LAW**

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In opposing respondents' motion to dismiss or for judgment as a matter of law, petitioners Al-Marri and Zemiri jointly adopt the Petitioners' Memorandum in Opposition to Respondents' Motion to Dismiss, filed in In Re Guantanamo Detainee Cases on November 5, 2004, and the Al Odah Petitioners' Reply to the Government's "Response to Petition for Writ of Habeas Corpus and Motion to Dismiss," filed in Al Odah v. United States, No 02-CV-0828 (CKK), on October 20, 2004. Petitioners also raise additional arguments in their opposition. See Memorandum of Petitioners Zemiri and Al-Marri In Opposition to Motion to Dismiss, filed January 13, 2005 ("Pets' Opp.") at 1. In the interest of economy and in recognition of the coordinated nature of these cases, and in response to petitioners' opposition, respondents accordingly hereby incorporate respondents' Reply Memorandum in Support of Motion to Dismiss or for Judgment as Matter of Law filed in In Re Guantanamo Detainee Cases ("Reply Mem.") on November 16, 2004, and respondents' Reply Memorandum in Support of Respondents' Motion to Dismiss or for Judgment as a Matter of Law filed in Al Odah v. United States on October 27, 2004, which are attached as Exhibits A and B, respectively.

Further, in their additional arguments, petitioners Zemiri and Al-Marri attack the Combatant Status Review Tribunals ("CSRTs"), claiming that the tribunal process falls short of what due process requires on a variety of fronts. Petitioners' arguments are all based on the premise that petitioners are fully possessed of constitutional rights accorded United States citizens. As we have previously explained, this premise is baseless: as aliens held outside the sovereign territory of the United States, and whose only connection to this country is a desire to bring harm to its citizens, petitioners have no cognizable constitutional rights. See Respondents' Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss or for Judgment as a Matter of Law and Memorandum in Support, filed Oct. 4, 2004, and attached as Exhibit 1 to the

motions to dismiss in these cases ("Response") at 19-30. Indeed, on January 19, 2005, Judge Richard Leon of this Court ruled that alien enemy combatants held at Guantanamo Bay do not have constitutional rights. Khalid v. Bush, Nos. 04-CV-1142 (RJL), 04-CV-1166 (RJL), 2005 WL 100924, *6-*8 (D.D.C. Jan. 19, 2005). Judge Leon also rejected statutory and international law claims also raised by these petitioners. Id. at *8-*11. For these and other reasons more fully developed herein, petitioners' claims in these cases likewise should be dismissed.

I. PETITIONERS' DEMAND FOR FULL-BLOWN PROCEEDINGS AKIN TO CRIMINAL TRIALS IS WITHOUT BASIS OR PRECEDENT.

Petitioners claim the CSRTs fall short of what due process requires with respect to procedural protections provided by the tribunal process. See Pets' Opp. at 16-21, 26-32. In doing so, petitioners follow in the footsteps of their counterparts who have briefed the issue before them by again failing entirely to mention or perform the controlling test identified by the Supreme Court plurality, and never setting forth definitively what specific "additional or substitute safeguards" they contend are necessary for due process, but absent from the CSRT process – the necessary starting point for any meaningful analysis. See Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2646 (2004) (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)). More clearly than their forebears, however, petitioners now all but openly admit that their position is that nothing short of a full criminal trial would suffice:

- They imply that the CSRTs should be subject to Brady rules governing the disclosure of exculpatory evidence. Pets' Opp. at 16 (citing Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1972); United States v. Bagley, 473 U.S. 667, 676 (1985)).
- They suggest that the detainees must have an unfettered "ability to see and confront the witnesses and evidence against them," including, apparently, classified information. Pets' Opp. at 18 (citing Crawford v. Washington, 124 S.

Ct. 1354 (2004); Jenkins v. McKeithen, 395 U.S. 411 (1969); California v. Green, 399 U.S. 149 (1970)).

- They contend that a "full-blown adversary hearing before a neutral judicial officer" is required. Pets' Opp. at 27, 28 (citing United States v. Salerno, 481 U.S. 739 (1987)).

The common thread running through all of these assertions and supporting citations is that they prescribe standards for criminal procedure, emanating from constitutional rights afforded to criminal defendants. See, e.g., Crawford, 124 S. Ct. at 1359 (beginning legal analysis with statement: "The Sixth Amendment's Confrontation Clause provides that, '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."); Jenkins, 395 U.S. at 428-29 (expressly limiting holding to "the present context, where the Commission allegedly makes an actual finding that a specific individual is guilty of a crime"). Indeed, petitioners themselves betray their eagerness to import the whole of criminal law, reasoning that "the government may not sidestep the constitutional requirements of criminal law," Pets' Opp. at 26 (emphasis added), which necessarily implies the corollary that such "constitutional requirements of criminal law" are applicable in the first place.¹

¹ Petitioners' insistence that only procedures coextensive with the full panoply of rights available in a criminal trial would satisfy due process is of a piece with their startling assertion that "[t]he commission of an act of terror within the United States does not render an otherwise traditional crime an act of war." Pets' Opp. at 30-31. As petitioners' argument goes, then, the Executive Branch is impotent to treat the September 11, 2001 attacks – the paradigmatic "act of terror within the United States" – as an "act of war"; instead, they were merely a "traditional crime," and the government cannot use military means to engage the enemy but instead is relegated to "the sphere of the criminal justice system" to combat terrorism and prevent future attacks. Id. at 31. This argument must be rejected because, under our constitutional system, judgments about how to provide for the national defense and whether to recognize a state of war and/or employ military force are the province of the political branches. See, e.g., Ludecke v. Watkins, 335 U.S. 160, 170 (1948); United States v. The Three Friends, 166 U.S. 1, 63 (1897); Khalid, 2005 WL 100924, at *13.

Petitioners simply try to blink away the well-recognized fact that detention of enemy combatants is not a criminal or punitive measure. As stated by the Hamdi Plurality and more fully explained by authorities cited therein, "[t]he purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again." Hamdi, 124 S. Ct. at 2640; see also Response at 10-11. The Hamdi Plurality therefore rejected, even in the case of a United States citizen with the full array of constitutional rights, the notion that the Due Process Clause entitles a putative enemy combatant to the full panoply of procedures that would apply in the criminal setting. Specifically, after identifying the approach the district court took – "The District Court, agreeing with Hamdi, apparently believed that the appropriate process would approach the process that accompanies a criminal trial." – the Plurality held that "the process apparently envisioned by the District Court" does not "strike[] the proper constitutional balance when a United States citizen is detained in the United States as an enemy combatant" because "some of the 'additional or substitute procedural safeguards' suggested by the District Court are unwarranted in light of their limited 'probable value' and the burdens they may impose on the military in such cases." 124 S. Ct. at 2646, 2648.

If process that "approach[es] the process that accompanies a criminal trial" is unwarranted even for a United States citizen detained within the United States, it follows a fortiori that the equivalent of a criminal trial is equally or more unwarranted for an enemy alien detained outside the United States who is not possessed of constitutional rights. Yet, petitioners persist in asking this Court to strike down the CSRTs on the ground that they do not equate to a "full-blown

adversary hearing" and for not including, e.g., the unbounded right of cross-examination emanating from the Confrontation Clause as developed in criminal jurisprudence.²

Petitioners invoke United States v. Salerno, 481 U.S. 739 (1987), which sustained pretrial detention provisions of the Bail Reform Act against Due Process Clause challenge. Pets' Opp. at 26-28. However, they neglect to mention the passage in Salerno that is most germane to these cases, in which the Court recognized that a unique set of considerations – rather than the normal framework of criminal procedure – governs detention of enemy combatants at wartime:

We have repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest. For example, in times of war or insurrection, when society's interest is at its peak, the Government may detain individuals whom the government believes to be dangerous. See Ludecke v. Watkins, 335 U.S. 160, 68 S.Ct. 1429, 92 L.Ed. 1881 (1948) (approving unreviewable executive power to detain enemy aliens in time of war); Moyer v. Peabody, 212 U.S. 78, 84-85, 29 S.Ct. 235, 236-237, 53 L.Ed. 410 (1909) (rejecting due process claim of individual jailed without probable cause by Governor in time of insurrection).

Salerno, 481 U.S. at 748. Moreover, to the extent petitioners' contention is that the particular procedural safeguards embodied in the Bail Reform Act as approved in Salerno were held there to be constitutionally mandated, see Pets' Opp. at 27-28, that argument is misguided. To the contrary, the Court was able to "dispose briefly" of Salerno's procedural due process challenge by observing that the procedures prescribed by the Act "are more exacting than" and "far exceed" what it had previously found constitutionally sufficient in similar contexts. Salerno, 481 U.S. at 751, 752. That is, the statute provided more process than was constitutionally due. In any event,

² Petitioners can derive no aid or comfort from the fact that the above-quoted statements in Hamdi repudiating their position were made by a plurality of four Justices. A fifth Justice would have held that even the level of process suggested by the plurality was excessive. Hamdi, 124 S. Ct. at 2683-85 (Thomas, J., dissenting). Thus, a majority of the Justices on the Court have rejected the very arguments made by petitioners here.

it is clear under Mathews and its progeny that the procedural safeguards necessary to satisfy due process will vary from case to case depending on the nature of the governmental and private interests at stake. See also Hamdi, 124 S. Ct. at 2650 (noting that "the full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting").³

Like their precursors, petitioners ignore the fact that many of the features of the CSRTs that draw their most strident objection were endorsed by the plurality of Justices in Hamdi, either directly, or indirectly through the plurality's approving citation of Article 5 tribunals, which served as a blueprint for the CSRT procedures. Compare Pets' Opp. at 18 (stressing importance of detainee being able "to see and confront the witnesses and evidence against them" and citing recent case⁴ involving constitutional ramifications of admitting hearsay in a criminal case), with

³ In their haste to contrast the CSRT procedures with the procedures upheld in Salerno, petitioners get key facts about the CSRTs wrong. They protest that detainees in CSRTs "do not have the right to call witnesses" and "do not have the right to present evidence." Pets' Opp. at 28. However, as we pointed out in the original Response, "[t]he detainee has the right to (a) call witnesses if reasonably available; (b) question witnesses called by the tribunal; and (c) testify or otherwise address the tribunal," as well as "to introduce relevant documentary evidence." Response at 33, 35, citing CSRT Order ¶¶ g(8), g(10). Many petitioner-detainees in the various Guantanamo habeas cases have indeed availed themselves of those rights. (While petitioners Al-Marri and Zemiri themselves both voluntarily declined to call witnesses or present evidence, that fact only calls into question their standing to object that the CSRTs did not allow them to do so, not the existence of the underlying right.) Moreover, petitioners' distinction that "the determination of enemy combatant status is not made by a neutral judicial officer" is misleading if not downright inaccurate. There is no question that the determination is made by a panel of sworn, neutral, senior officers, one of whom is a judge advocate. To the extent that by use of the adjective "judicial" petitioners mean to imply that the only competent decision-maker would be a civilian Article III or federal magistrate judge, that position finds no support in the case law, which is replete with examples of adequate process being provided by administrative tribunals, and, in fact, is contradicted by the Hamdi Plurality's observation that due process can appropriately be provided by a military tribunal.

⁴ Crawford v. Washington, 124 S. Ct. 1354 (2004).

Hamdi, 124 S. Ct. at 2649 ("Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding."); compare Pets' Opp. at 15 (complaining about the presumption that the government's evidence is genuine and accurate), with Hamdi, 124 S. Ct. at 2649 ("Likewise, the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided."). See also Response at 32-35 & nn. 34-43 (reviewing numerous similarities between CSRTs and Article 5 tribunals as well as aspects of CSRTs that provide more process than do Article 5 tribunals).

Finally, petitioners casually shrug off the governmental and national security interests that would be impaired by accommodating their requests for a "full-blown adversary hearing," asserting in conclusory fashion that unspecified "greater procedural safeguards will not interfere with military operations." Pets' Opp. at 32. They reason simplistically that such interference is "difficult to see" because they are "far removed geographically" and "far removed temporally" from the place and time of their capture. Id. But the governmental interests militating against various additional procedures that might be hypothesized have been laid out in detail in earlier briefing, see, e.g., Response at 31-42, and they are not in any sense lessened by passage of time or geographic movement. These include, for example, not only resource concerns, but also, significantly, the obvious and compelling governmental interest in not revealing classified information and intelligence sources and methods to its enemies. See also infra text accompanying note 11. Thus, petitioners' due process objections to the CSRTs should be overruled.

II. PETITIONERS' CONCLUSORY AND SPECULATIVE ALLEGATIONS OF TORTURE AND MISTREATMENT DO NOT UNDERMINE THE DUE PROCESS PROVIDED BY THE CSRTs.

Petitioners' argument that alleged "torture and other mistreatment of Guantanamo detainees, and the CSRTs' consideration of evidence obtained through such tactics" completely derails the entire CSRT process, see Pets' Opp. at 3, 9-21, 14, 23, is premised upon erroneous assumptions and flawed reasoning.

A. Petitioners' General, Unsupported Assertions of Abuse Do Not Cast Doubt on the Legitimacy of the CSRTs' Determinations That They Are Enemy Combatants.

Contrary to petitioners' faulty logic, allegations of mistreatment by some detainees do not render all CSRT proceedings for all detainees per se invalid.⁵ Petitioners' argument is based on the fundamental misconception that all CSRT panels rely solely on evidence obtained through mistreatment, and thereby deprive all detainees of their purported rights under our Constitution. There is no basis for this sweeping generalization, and petitioners offer none.⁶ The detainees

⁵ The documents and news articles that petitioners claim constitute "mounting evidence of egregious abuses committed by the United States officials at Guantanamo," see Pets' Opp. at 13, offer general allegations of aberrational mistreatment that fail to bear out petitioners' sensationalistic portrait of pervasive, universal, or institutionally sanctioned abuse of detainees at Guantanamo Bay. Nevertheless, the Military has stated publicly, and the President has made clear as a matter of policy, that even a single instance of improper treatment, however isolated, is absolutely unacceptable, will not be (and has not been) tolerated, and will be investigated and punished appropriately.

⁶ Petitioners implicitly acknowledge this flaw in their analysis when they argue: "To the extent the CSRT has determined that a detainee is an enemy combatant based upon information obtained through the use of torture, that determination is unlawful and invalid on its face." Pets' Opp. at 3 (emphasis added). Curiously, petitioners later discard their attempt to hedge their argument and state broadly and without any foundation in fact: "The CSRTs' reliance on evidence obtained through torture and other mistreatment not only violates the Constitution . . . but is unlawful under 28 U.S.C. § 2241(c)(1)." Id. at 8.

who filed petitions in the cases at issue here, petitioners Jarallah Al-Marri and Ahcene Zemiri, have presented no specific complaint of mistreatment that would cast any doubt upon the legitimacy of their enemy combatant status as determined through the CSRT process. Although petitioners vaguely refer in their brief to "the well-pled allegations of torture and other mistreatment," see Pets' Opp. at 1, their petitions contain nothing more than vague assertions of abuse "on information and belief" that are not linked to the CSRT process at all. See, e.g., Al-Marri Petition, ¶ 26 ("On information and belief, Jarallah is being held under physically and emotionally abusive and harmful conditions."); Zemiri Petition, ¶ 18 ("[Zemiri's] wife, Karina, believes based upon the letters she has received from her husband, that he may have been tortured and abused.").⁷ Even if it were proven that petitioners were subjected to some abuse, in order to give any credence to petitioners' argument that such mistreatment renders their enemy combatant status invalid, the Court would have to engage in a series of logical leaps. In sum, petitioners are requesting that the Court assume, in the absence of evidence supporting any of these points, that: (1) petitioners Al-Marri and Zemiri suffered mistreatment during interrogation, (2) that the interrogation resulted in information, (3) that the information acquired is unreliable, (4) that the information was submitted to the CSRT, (5) that the CSRT relied on it,

⁷ Respondents' motion is not brought under Fed. R. Civ. Proc. 12(b)(6). Thus, petitioners are mistaken that "[t]hese allegations [of mistreatment] must be taken as true" consistent with the Federal Rules of Civil Procedure. Pets' Opp. at 11. As is standard practice in habeas cases, respondents filed combined responses to the petition and motions to dismiss, including factual returns, that state the cause of petitioners' detention and demonstrate why no relief is appropriate. See Responses to Petitions for Writs of Habeas Corpus and Motions to Dismiss or for Judgment as a Matter of Law filed in Al-Marri and Zemiri, each filed Dec. 28, 2004, at n.1 (hereinafter "Al-Marri Response" and "Zemiri Response"). Petitioners' vague references to mistreatment need not be blindly accepted as fact; rather, they must be considered as bare allegations and given appropriate weight in the context of all of the evidence presented to the Court.

and (6) that there was no other sufficient evidence supporting petitioners' enemy combatant status. As demonstrated by the factual returns pertaining to petitioners Al-Marri and Zemiri filed by respondents in response to their petitions, there is no indication that these multiple conditions occurred so as to cast doubt on the legitimacy of petitioners' CSRT proceedings.

See Respondents' Factual Returns to Petitions for Writ of Habeas Corpus by Petitioners Jarallah Al-Marri and Ahcene Zemiri, each filed Dec. 28, 2004 (hereinafter "A-Marri Factual Return" and "Zemiri Factual Return"). Petitioners' mere general allegations of mistreatment do not mechanically lead to the conclusion that they have been deprived of due process under the habeas statute or under the Constitution. Even if proven, these allegations would not alter the facts that made petitioners enemy combatants in the first place, and would certainly not constitute grounds for releasing petitioners, enabling them potentially to return to the hostilities in which they were previously engaged.

B. Petitioners Have Failed to Identify Any Structural Flaw in the CSRT Process That Renders It Facially Invalid.

Petitioners' criticism of the CSRTs' ability to discern and weigh accordingly evidence obtained through mistreatment or abuse is based on the fundamental misconception that the CSRT panels blindly and solely rely on evidence obtained through such means. Even assuming petitioners, as enemy aliens without connections to the United States, have due process rights under our Constitution (as Judge Leon has held, they do not), petitioners fail to identify any structural flaw in the CSRT procedures that compels, or even invites, reliance on evidence that may be deemed unreliable due to its provenance. To the contrary, the CSRTs can take appropriate account of the reliability of the evidence available to them – including, where

applicable, allegations that evidence was derived coercively – in the course of making the very sensitive determinations with which they are charged. See Al-Marri Response at 2-5; Zemiri Response at 2-5. Furthermore, a mere theoretical possibility that evidence obtained through mistreatment could be reviewed by a CSRT does not serve as a wholesale indictment of the Military's entire classification process.

Most compelling among all of the safeguards that prevent the CSRTs from premising a given detainee's enemy combatant classification exclusively on evidence of questionable provenance is the ability of the detainee to make his case before the CSRT panel. Instead of "prevent[ing] . . . abuses from ever seeing the light of day," see Pets' Opp. at 14, the CSRT process enables detainees to raise concerns about mistreatment and other evidence that would cast doubt upon their enemy combatant status at multiple occasions throughout the process. The CSRT process grants the detainee a right to testify, call and question reasonably available witnesses, and submit documentary evidence to the Tribunal. See Response at 33-35. To facilitate the proceedings and presentation of evidence, the detainee is presented with an unclassified summary of the evidence tending to demonstrate he is an enemy combatant, and is given the assistance of a personal representative and, as needed, an interpreter. See id. The detainee meets with his personal representative prior to the CSRT hearing, at which time the personal representative explains the process, and informs the detainee that he may request that testimony or documentary evidence be presented to the CSRT panel on his behalf. See id. Thus, detainees may present concerns about coerced admissions and mistreatment, if any, during the initial meeting with the personal representative, through documentary evidence submitted to the

CSRT panel, and through verbal testimony at the CSRT hearing.⁸ These multiple opportunities to address the panel, if the detainee chooses to take advantage of them, provide ample protections against reliance on unreliable evidence.⁹ 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." See id. This further ensures that any evidence that casts doubt on a detainee's enemy combatant status, e.g., a detainee's disavowal of a prior statement by him, will be presented to the CSRT panel for review and consideration.

The members of the CSRT panel, in turn, have the discretion to decide how much weight, if any, to accord evidence before them. See, e.g., CSRT Implementation Memorandum Encl. (1) ¶ G(7) (CSRT panels must take into account the "reliability" of the evidence "in the

⁸ Several have presented such concerns. See Pets' Opp. at 19-20.

⁹ Petitioner Al-Marri attended his CSRT hearing but declined to participate. The CSRT panel permitted his personal representative to present evidence on his behalf learned through their initial meeting, however, because "the Tribunal did not want to discourage the introduction of any exculpatory evidence." See Al-Marri Factual Return (Unclassified Summary of Basis for Tribunal Decision at 2). Petitioner Zemiri did not attend his CSRT hearing and affirmatively declined to participate. In addition to the government's documentary evidence, the CSRT panel considered petitioner's verbal statement to his personal representative in which he agreed that he is an enemy combatant. See Zemiri Factual Return (Unclassified Summary of Basis for Tribunal Decision at 1-2).

As petitioners note, Pets' Opp. at 17 n.18, respondents' Al-Marri Response inadvertently included a reference to a petitioner in another coordinated case, Richard Belmar. See Al-Marri Response at 4 n.4 ("Indeed, in petitioner's CSRT hearing, the Tribunal members inquired as to certain statements the petitioner made while feeling 'pressured.' See Respondents' Factual Return to Petition for Writ of Habeas Corpus [by Richard Belmar in Belmar v. Bush, No. 04-1897-RMC] (filed Dec. 8, 2004) Enclosure (3) (Summarized Detainee Statement at 1, 6-7)."). Although respondents agree that "on its face, the CSRT record [for Al-Marri] contains no indication that the tribunal inquired at all into as to whether he had made any statements under pressure," Pets' Opp. at 17 n.18 (emphasis in original), there is an obvious reason for this: Al-Marri, unlike Belmar, made no such allegations to the tribunal, despite being given more than ample opportunity to present his case during the CSRT process.

circumstances"). In undertaking this task, they are obligated 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. Rather than "an invitation for abuse," see Pets' Opp. at 17, this duty, vested solely in the Executive and executed by senior military officers including a judge advocate, is taken very seriously and held to the highest standards. Indeed, each and every CSRT panel issues written decisions articulating the bases for its decision, 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. See Response at 33-35. Any criticism of the integrity and motives of the military officers involved in the CSRT process is wholly unwarranted.

Petitioners also misunderstand the CSRT panel's rebuttable presumption that the government's evidence is "genuine and accurate." CSRT Implementation Memorandum Encl. (1) ¶ G(11). The CSRT panel must presume that the interview reports and other evidence that they consider when determining a detainee's enemy combatant status are an accurate and authentic reflection of the interview or circumstances detailed therein. There is no presumption of enemy combatant status, and the presumption in favor of the accuracy of government interview reports and the like does not dictate the weight that a CSRT panel must give to any given piece of evidence. 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. The CSRTs typically rely on multiple pieces of evidence that tend to corroborate each other, and, as explained above, are duty-bound to discount any information that is unreliable because of its questionable provenance.

In sum, the multiple opportunities given to the detainee to present his case, the duty of the Recorder to present evidence that casts doubt on the detainee's enemy combatant status, and the sworn duty of the CSRT members to give each piece of evidence the weight that it is due in the circumstances of each case, provide more than adequate protections against reliance on evidence that is of questionable provenance or weight, for whatever reason, to the extent such issues may ever credibly arise.

Furthermore, to the extent petitioners' arguments move beyond the issue of accuracy of the CSRT determination and into assertions that the very possibility that evidence obtained through mistreatment may be relied upon in the CSRTs, rendering the process facially invalid, that argument must be rejected. As discussed above, mere generalized allegations that mistreatment of detainees occurred cannot serve to impeach the CSRT process facially. Petitioners' position boils down to the assertion that, in this context, due process requires the CSRTs to operate under a formally codified rule requiring thorough investigation of the circumstances under which each piece of evidence before them was obtained, and the exclusion of any evidence not confirmed after investigation to have been obtained properly. But they do not, and cannot, cite any authority for this proposition. The fact is that no court has found the Due Process Clause (which, as we have explained and Judge Leon has held, does not protect petitioners here) to warrant the kind of micromanagement of the Military's enemy combatant classification procedures that petitioners demand.

Petitioners may instead be suggesting that due process would be offended in their specific cases if their specific CSRTs relied on specific evidence obtained through questionable means. As explained above, see supra pp. 8-9, petitioners have made no allegation – let alone a showing

– that the evidence admitted in their cases is of questionable provenance, and it is clear that petitioners do not enjoy due process rights under the Constitution. Even if the circumstances were different, however, there would be no legal basis for the Court to disturb the exercise of war powers embodied in the CSRT determinations challenged here.

As an initial matter, while petitioners are correct that the use of evidence obtained by torture has been held to be inconsistent with due process in criminal cases, see Pets' Opp. at 9-11 (citing criminal cases), the case law even in that context is not, as petitioners would apparently have it, that any incantation of the word "torture" by a litigant warrants a conclusion that a due process violation has occurred or must be redressed through judicial process. Not just any intense, unpleasant, or even inappropriate interrogation or interrogation technique, or any instance of mistreatment, amounts to torture or to a violation of due process. Rather, for a violation of due process to be found even with respect to criminal defendants fully possessed of constitutional protections (unlike petitioners here), a conviction must be "based on evidence obtained by methods that are 'so brutal and so offensive to human dignity' that they 'shoc[k] the conscience.'" Chavez v. Martinez, 538 U.S. 760, 774 (2003) (plurality) (quoting Rochin v. California, 342 U.S. 165, 172, 174 (1952) (overturning conviction based on evidence obtained by involuntary stomach pumping)). See also County of Sacramento v. Lewis, 523 U.S. 833, 846-49 & n.8 (1998) ("[I]n a due process challenge to executive action, the threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience."). The purpose of this standard is to protect against purely arbitrary deprivations without justification in a legitimate governmental objective. See Lewis, 523 U.S. at 845-46; Briscoe v. Potter, No. Civ. A. 03-2084 (RMC), 2004 WL 2785284, at

*11-*12 (D.D.C. Nov. 19, 2004) (Collyer, J.).¹⁰

"Rules of due process are not, however, subject to mechanical application in unfamiliar territory"; application of such rules "demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking." See Lewis, 523 U.S. at 850. Thus, due process standards depend on the context and nature of interests involved. As the Supreme Court has stated, "the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended. The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field." Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992).

"[B]reak[ing] new ground in this field," on an unprecedented scale, is precisely what petitioners demand from the Court. Petitioners contend that the Court is duty bound, either across the board or in a given case, to redetermine through full evidentiary proceedings the Executive's determination that each detained individual is an enemy combatant subject to detention, simply because of allegations of a possibility that some of the evidence establishing a combatant's hostile nature may have been obtained through means that would not meet due process standards for admission in a criminal proceeding. But the special Executive powers that are at stake here, and the wartime setting, counsel judicial restraint. As we have previously explained, these cases are not criminal cases, and the issues involved are not ones of "guilt" or "innocence" involving an exercise of the Nation's power to enforce criminal laws within its own

¹⁰ Westlaw attributes the Briscoe decision to "Attridge, J.," but, as indicated on the Court's docket, Judge Collyer issued the decision.

borders. See supra § I; Zemiri Response at 4. Rather, the cases involve judgments as to whether an individual should be considered an enemy combatant who may properly be prevented from returning to the fight or otherwise serving a secretive and unorthodox enemy in an unconventional war. See Response at 8-13. Such judgments are quintessentially military judgments made for the purpose of waging war successfully; they 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. Such judgments accordingly represent a core exercise of authority demonstrably committed to the Commander in Chief. See id.; Hamdi, 124 S. Ct. at 2647 (the "Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them"); see also 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").

The road that petitioners demand the Court take, that of so-called "meaningful inquiry" into allegations of mistreatment and enforcement by the Court of government policies against torture through the exclusion of any evidence believed to have been obtained by torture, see Pets' Opp. at 9-11, 14-23, would require the Court to inject itself deeply into these core military matters, to undertake a full evidentiary inquiry regarding each petitioner, including not only detailed assessment and second-guessing of each piece of evidence relied on by a CSRT in making its enemy combatant finding regarding a petitioner, but full evidentiary development to determine whether any piece of that evidence was obtained under circumstances that could be considered "egregious" or "shock[ing to] the conscience" as a constitutional matter. The inquiry

would amount essentially to serial suppression proceedings ad infinitum with respect to each and every statement from petitioner, another detainee, or other human source that found its way into materials relied upon by each CSRT. The circumstances of each interrogation would be explored; participants and witnesses to the interrogations would be called upon to testify. The Court would opine upon every such interrogation and every interrogation technique implicated in any case before it, to determine which interrogation sessions and techniques were acceptable, producing fruits that may be legitimately used to permit the detention of an individual as an enemy combatant.¹¹ This extended inquiry, meanwhile, would bear some fruits of its own: a surreptitious enemy who we have reason to believe has no qualms about fabricating allegations of mistreatment to manipulate judicial proceedings would be given unprecedented insights into our interrogation methods, enabling it to enhance its own counter-interrogation methods and techniques.

These and other potential consequences of such an approach are grave in the extreme. It would involve deep intrusion by the judiciary into the Military's methods of obtaining and using information about the enemy, an inescapable aspect of the exercise of war powers committed by the Constitution to the political branches. The judicial role that logically follows from petitioners' position, thus, implicates the safety of the Nation's troops and citizens, and those of coalition partners; it potentially damages the Executive's ability to obtain cooperation and information from other nations; and it ultimately impairs the Military's ability to wage war successfully. And the impact of such a precedent could very well impact not just the current, but

¹¹ Thus, petitioners' assertion that "[g]reater [p]rocedural [s]afeguards [w]ill [n]ot [i]nterfere [w]ith [m]ilitary [o]perations," Pets' Opp. at 32, is baseless.

future conflicts.

Petitioners fail in any credible way to account for these grave separation of powers concerns. Like other petitioners before them, they latch onto a wholly fanciful and erroneous interpretation of Rasul v. Bush, 124 S. Ct. 2686 (2004), this time arguing that the Supreme Court in that case "squarely rejected" the separation of powers concerns involved here. See Pets' Opp. at 22. As evidence of this proposition, petitioners cite to a mention of separation of powers concerns in the government's brief in Rasul, and equate the fact that the government did not prevail before the Supreme Court to that Court's "square[] reject[ion]" of separation of powers concerns. Even a cursory reading of Rasul, however, makes clear that the Supreme Court did not consider or reject separation of powers concerns, especially of the type at issue here. The Rasul decision concerned only interpretation of the habeas statute, 28 U.S.C. § 2241. Indeed, the Court specifically declined to address in the case "[w]hether and what further proceedings may become necessary after respondents make their response to the merits of petitioners' claims," 124 S. Ct. at 2499, and, thus, left open the impact that separation of powers may have on the nature and shape of any such further proceedings.¹² See also Khalid, 2005 WL 100924, at *7-*8, *12-*13 (noting limited scope of Rasul and dismissing petitions based on, inter alia, separation of powers concerns).

Proper consideration of the context of these cases, and of principles of judicial restraint applicable in that context, therefore require that petitioners' argument be rejected.

Rejection of petitioners' arguments certainly does not mean, however, that instances of

¹² Petitioners likewise fail to appreciate that any discussion of separation of powers concerns in Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004), was limited to the context of process due a U.S. citizen and not aliens such as petitioners.

mistreatment of any detainee will go unchecked. Petitioners themselves expound at length about the longstanding law and policy of the United States neither to practice nor condone torture under any circumstances. Pets' Opp. at 3-7. Respondents have publicly made clear that even a single incident of improper treatment of detainees is absolutely unacceptable, will not be (and has not been) tolerated, and will be punished appropriately. Indeed, the Military and other agencies already have a number of investigations underway to this end.¹³ See also Khalid, 2005 WL 100924, at *9 n.18, *12 (noting efforts of political branches to address occurrences of mistreatment of prisoners).

At bottom, petitioners are unable to invoke due process protections under the Constitution. Even if they could, they would be unable to establish that due process principles require the courts to police the evidence relied upon by the Military in sorting hostile combatants from "the errant tourist, embedded journalist, or local aid worker," see Hamdi, 124 S. Ct. 2649, or others innocently caught up in the blur of war.¹⁴

¹³ Examples of such investigations and corrective actions or punishments taken are available at 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); Military to Investigate FBI Prison Abuse Charges, N.Y. Times (Jan. 5, 2005); Justice Department Opens Inquiry into Abuse of U.S. Detainees, N.Y. Times (Jan. 14, 2005).

¹⁴ Petitioners' approach seeking searching judicial inquiry based upon allegations of mistreatment or torture, with the purpose of addressing whether information can legitimately be considered in CSRT proceedings, is also flawed because it would essentially result in detainees obtaining private, judicial enforcement of treaties such as 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, in the absence of implementing legislation, in the face of Congress's specific declarations that the CAT is not self-executing, and thus do not provide private parties with judicially enforceable rights. 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 Mem. at

III. DUE PROCESS IS NOT VIOLATED BY THE MILITARY'S DEFINITION OF ENEMY COMBATANT.

Petitioners object to what they call an "elastic and vague" definition of "enemy combatant," in particular, that it exceeds the Hamdi Plurality's formulation and could include individuals who are "associated" with the Taliban or al Qaeda.¹⁵ See Pets' Opp. at 23-26, 28-32. As a preliminary matter, however, petitioners fail to explain why due process concepts of vagueness even apply in the context of the Executive's detention of enemy combatants in a time of war. Petitioners have cited no authority to support their position that the Executive's authority to detain enemy aliens at war with the United States is somehow constrained by the vagueness principles applicable in domestic criminal law. Indeed, there is no support for the proposition that aliens at war with the United States have a right, as a matter of constitutional law, to "reasonable notice" (Pets' Opp. at 31) delineating precisely what or how many belligerent activities they may feel free to conduct before our Military may deem it appropriate to apprehend them. The Executive captured and is detaining petitioners pursuant to its war powers under Article II and the AUMF, see Response at 6-13, and there is no authority indicating that the doctrine of statutory vagueness in any way constrains the categories of enemy combatants who may be subject to detention. Cf. U.S. ex rel. Knauff v. Watkins, 173 F.2d 599, 603 (2d Cir.

30. No provision of law enacted by Congress to implement the CAT requires, or even permits, the type of judicial intervention petitioners demand. See Khalid, 2005 WL 100924, at *10.

¹⁵ Pursuant to the July 7, 2004 Order establishing the CSRTs, an "enemy combatant" is defined as "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." See Order Establishing Combat Status Review Tribunals (July 7, 2004), at ¶ a.

1949) (rejecting vagueness challenge to Executive regulations regarding the category of excludable aliens during World War II on the basis that "regulations were within the wide sweep of delegation to executive discretion under the war power" and were "are reasonably drawn to accomplish the evident purpose of Congress."). In the end, petitioners' vagueness argument is yet another attempt to import principles of criminal law, which as explained in § I supra, have no application to the present circumstances.

Even considering vagueness and overbreadth principles, however, petitioners' argument is without merit. Perhaps tellingly, petitioners do not even tie their complaints about the breadth of the enemy combatant definition to the specific facts of their particular cases. For example, petitioners contend that definition of enemy combatant must be limited solely to traditional battlefield captures and suggest that the definition is so broad that suspected terrorists may be taken into custody "anywhere on the face of the planet." Pets' Opp. at 24; see id. at 25, 32 (complaining that the battlefield is "the entire planet"). Throughout all their planetary rhetoric, however, petitioners completely ignore the fact that they were indisputably taken into custody on a traditional battlefield, in an active theater of military operations. See Zemiri Factual Return (captured in Afghanistan); Al-Marri Factual Return (captured at border between Pakistan and Afghanistan).¹⁶ Development of the outer boundaries of the enemy combatant category, if ever an appropriate matter for judicial scrutiny, should properly await particular cases actually raising those issues. See Hamdi, 124 S. Ct. at 2642 n.1 ("The legal category of enemy combatant has not

¹⁶ Moreover, petitioner Zemiri admitted to his personal representative – in a setting that supports no inference of coercion and petitioners have not even suggested involved coercion – that he agrees with his designation as an enemy combatant. See Zemiri Factual Return (detainee election form).

been elaborated upon in great detail. The permissible bounds of the category will be defined by the lower courts as subsequent cases are presented to them."¹⁷

Thus, petitioners do not have standing to assert a facial challenge¹⁸ to the definition of enemy combatant because, as traditional captures in an active theater, their own cases undoubtedly fall within its core.¹⁹ Further, petitioners have failed to establish that the definition of enemy combatant is "impermissibly vague in all of its applications." Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494-95 (1982); see Hill v. Colorado, 530 U.S. 703, 733 (2000) ("[S]peculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid in the vast majority of its intended applications[.]" (internal quotation marks omitted)); United States v. Salerno, 481 U.S. 739, 745 (1987) (explaining that to prevail on a facial vagueness claim, the "challenger must establish that no set of circumstances exists under which the Act would be

¹⁷ Indeed, in cases that, unlike these, actually involve detainees captured outside the theater of operations in Afghanistan, Judge Leon has held that the government's definition of enemy combatant is not invalid for not containing an Afghanistan-based limitation. See Khalid, 2005 WL 100924, at *5 (rejecting the geographic overbreadth argument as "fanciful, at best" because, *inter alia*, "the AUMF does not place geographic parameters on the President's authority to wage this war against terrorists"); see also Response at 13-16; Reply Mem. at 9-13 (explaining that the detention powers of the Executive transcend the geographic borders of Afghanistan).

¹⁸ Because petitioners argue that the "vagueness of the term 'enemy combatant' renders any process invalid," see Pets' Opp. at 32 (emphasis in original) – a ludicrously sweeping proposition implying that even the full criminal trial petitioners insist on elsewhere would be inadequate, requiring the release of even dangerous al Qaeda terrorists confirmed as such in such a trial – they raise a facial vagueness challenge. See Steffel v. Thompson, 415 U.S. 452, 474 (1974) (explaining that a "facial" challenge means a claim that the law is "invalid in toto – and therefore incapable of any valid application").

¹⁹ See Parker v. Levy, 417 U.S. 489, 495 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.").

valid"). Petitioners do not even attempt to make this showing, nor could they, because the definition of enemy combatant is well-supported in the laws of war and federal case law alike, which universally permit the military detention of persons connected with opposing military forces, irrespective of whether they personally carry arms or instead aid the enemy in some other capacity.²⁰ See authorities cited in Response at 15-16 & nn. 15, 16. Indeed, petitioners readily acknowledge that the Executive may detain enemy combatants in order to prevent them from returning to the battlefield, see Pets' Opp. at 23, thus they apparently concede, as they must, that the enemy combatant definition has valid applications.

In any event, there is no merit to the contention that the enemy combatant definition is vague. Even in an ordinary case where the vagueness doctrine is properly applicable, it does not require "impossible standards of clarity." Kolender v. Lawson, 461 U.S. 352, 361 (1983) (internal quotation marks and citation omitted). In the context of a military campaign, striving to provide our enemies – particularly as unorthodox, surreptitious, and elusive an enemy as al Qaeda and the Taliban – with "impossible standards of clarity" about our standards and definitions not only is unnecessary, but would be fundamentally misguided. Given that "[c]ondemned to the use of words, we can never expect mathematical certainty from our language," Grayned v. City of Rockford, 408 U.S. 104, 110 (1972), the definition of enemy combatant adequately "delineates its reach in words of common understanding," id. at 112

²⁰ To the extent petitioners contend that the definition of enemy combatant is vague because it permits the detention of individuals "associated with" the Taliban or al Qaeda, the D.C. Circuit rejected a vagueness challenge to similar language in United States v. Swiderski, 593 F.2d 1246, 1248-49 (D.C. Cir. 1978) (rejecting vagueness challenge to language in the Racketeer Influenced and Corrupt Organizations statute, 18 U.S.C. § 1962(c), which imposes criminal sanctions on persons "associated with" any enterprise engaged in a pattern of racketeering activity).

(citation omitted), and therefore should "not be struck down as vague even though marginal cases could be put where doubts might arise." U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 578-79 (1973) (internal quotation marks and citation omitted).

Promulgated pursuant to the Executive's war-making power both under Article II and pursuant to authority under the AUMF, it hews to well-established historical understandings regarding the detention of enemy forces, the object of which is to prevent the captured individual from serving the enemy. See Response at 8-13.

CONCLUSION

For these reasons, petitioners' claims should be dismissed, judgment in favor of respondents should be granted, writs of habeas corpus should not issue, and the relief requested by petitioners should be denied.

Dated: January 21, 2005

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