

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re Guantánamo Detainee Cases

_____)	
AHCENE ZEMIRI, <i>et al.</i> ,)	
)	ORAL ARGUMENT REQUESTED
Petitioners,)	
)	
v.)	Civil Action No. 04-CV-2046 (CKK)
)	
GEORGE W. BUSH,)	
President of the United States,)	
<i>et al.</i> ,)	
)	
Respondents.)	
_____)	
)	
JARALLAH AL-MARRI, <i>et al.</i> ,)	
)	
Petitioners,)	
)	
v.)	Civil Action No. 04-CV-2035 (GK)
)	
GEORGE W. BUSH,)	
President of the United States,)	
<i>et al.</i> ,)	
)	
Respondents.)	
_____)	

**MEMORANDUM OF PETITIONERS
ZEMIRI AND AL-MARRI IN
OPPOSITION TO MOTION TO DISMISS**

TABLE OF CONTENTS

	<u>Page</u>
FACTUAL AND PROCEDURAL BACKGROUND.....	1
ARGUMENT.....	2
I. ALLEGATIONS AND REPORTS OF TORTURE AND OTHER MISTREATMENT UNDERScore WHY THE COMBATANT STATUS REVIEW TRIBUNALS VIOLATE DUE PROCESS AND THE HABEAS PETITIONS MUST NOT BE DISMISSED.....	2
A. All Three Branches Of Government Recognize That Torture Is Absolutely Prohibited.....	3
B. Detention Based On Evidence Obtained Through Torture And Other Mistreatment Was Prohibited At Common Law	7
C. The Constitution Forbids the Use of Statements Taken Involuntarily or under Other Abusive Conditions of Interrogation	9
D. Recent Disclosures Confirm the Torture and Mistreatment of the Guantánamo Detainees.....	11
E. CSRTs Fail To Prevent Reliance On Evidence Obtained Through Torture And Other Mistreatment.....	144
1. The CSRTs May Receive and Rely on Evidence Derived From Coerced Testimony	14
2. The CSRT Process Is Inadequate To Investigate Whether Evidence Was Obtained By Torture Or Other Abusive Interrogation Techniques	15
3. Separation Of Powers Concerns Do Not Preclude This Court’s Inquiry Into Allegations Of Mistreatment And Into The Lawfulness Of Petitioners’ Detention Generally	21
II. PETITIONERS’ INDEFINITE PREVENTIVE DETENTION UNDER THE GOVERNMENT’S BROAD AND ELASTIC DEFINITION OF “ENEMY COMBATANT” VIOLATES DUE PROCESS.....	23
A. Preventive, Potentially Indefinite Detention Has Never Been Permitted In Petitioners' Circumstances And Preventive Detention Has Been Permitted In Other Cases Only With Significantly More Procedural Safeguards Than Those Currently Afforded Petitioners.....	26
B. Because The Definition Of “Enemy Combatant” Is Elastic And Vague, Due Process Requires Greater Procedural Safeguards Than Those Currently Afforded Petitioners.....	28
C. Greater Procedural Safeguards Will Not Interfere With Military Operations	32
CONCLUSION.....	33

FACTUAL AND PROCEDURAL BACKGROUND

Respondents have moved to dismiss the Zemiri and Al-Marri petitions on grounds previously stated by them in their brief dated October 4, 2004. In reply, Petitioners adopt and incorporate herein the Petitioners' Memorandum in Opposition to Respondents' Motion to Dismiss filed in the *In re Guantánamo Detainee Cases*¹ on Nov. 5, 2004 ("Petitioners' Consolidated Opp'n") and the Al Odah Petitioners' Reply to the Government's Response to Petitioners for Writ of Habeas Corpus and Motion to Dismiss filed in *Al Odah v. United States* (D.D.C.) (No. CV 02-0828 (CKK)) on Oct. 20, 2004 ("Al Odah Opp'n").

In this supplemental response, Petitioners focus on two additional reasons bases for the denial of Respondents' motion: first, the well-pled allegations of torture and other mistreatment preclude the dismissal of the petitions; and second, Petitioners' indefinite preventive detention under the government's broad and elastic definition of "enemy combatant" violates due process.²

Petitioner Zemiri is a prisoner at Camp Delta, Guantánamo Bay Naval Station, where he has been incarcerated for nearly three years. He is an Algerian citizen, and his wife is a citizen of Canada. Affidavit of Karina Dereshteanu, ¶ 1. The couple moved together to Afghanistan in the summer of 2001 where their first child was conceived. *Id.* at ¶¶ 3-4. Shortly after the war began and Afghanistan became a dangerous place to reside, the couple decided to leave the country. *Id.* Because of their concern that Mr. Zemiri would be harmed if he attempted to leave at the same time as his pregnant wife, his wife crossed into Pakistan and returned to Canada by herself. *Id.* at ¶ 4. Mr. Zemiri did not rejoin his wife, however, as expected. *Id.* at ¶¶ 5-6.

¹ *In re Guantánamo Cases* (D.D.C.) (Nos. 02-CV-0299 (CKK), 02-CV-0828 (CKK), 02-CV-1130 (CKK), 04-CV-1135 (ESH), 04-CV-1136 (JDB), 04-CV-1137 (RMC), 04-CV-1142 (RJL), 04-CV-1144 (RWR), 04-CV-1164 (RBW), 04-CV-1166 (RJL), 04-CV-1194 (HHK), 04-CV-1227 (RBW), 04-CV-1254 (HHK), 04-CV-1519 (JR)).

² Petitioners also contend that Respondents' motion to dismiss is procedurally improper for the reasons set forth in Al Odah Opp'n at 8-11.

Instead, Mr. Zemiri was captured by bounty hunters who sold him to the United States for \$5,000. *Id.* at ¶ 6. He was taken to Guantánamo Bay where he has been held virtually incommunicado ever since. *Id.* Mr. Zemiri has never been a member of the Taliban, Al Qaeda or any other type of terrorist or radical group. *Id.* at ¶ 3.

Petitioner Al-Marri is a prisoner at the Guantánamo Bay Naval Station, where he has been incarcerated for over three years. He is a citizen of Qatar. He has never been a member of Taliban or Al Qaeda forces, nor has he ever supported those forces. Al-Marri Petition, ¶¶ 16, 20. Mr. Al-Marri has never committed any violent act against any American person or property. *Id.* at ¶ 17. He had no direct or indirect involvement in the September 11, 2001 terrorist attacks against the United States, or in any other act of terrorism. *Id.* at ¶ 18. Mr. Al-Marri has not had any military or terrorist training, nor has he at any time joined any terrorist force. *Id.* at ¶ 19. He is not, nor has he ever been, an “enemy combatant.” *Id.* at 20. Mr. Al-Marri is, and at all times has been, an innocent civilian. *Id.* at ¶14.

ARGUMENT

I. ALLEGATIONS AND REPORTS OF TORTURE AND OTHER MISTREATMENT UNDERSCORE WHY THE COMBATANT STATUS REVIEW TRIBUNALS VIOLATE DUE PROCESS AND THE HABEAS PETITIONS MUST NOT BE DISMISSED.

As discussed in Petitioners’ Consolidated Opp’n and Al-Odah Opp’n, the Combatant Status Review Tribunal (“CSRT”) process contravenes the Supreme Court’s decision in *Rasul v. Bush*, ___ U.S. ___, 124 S. Ct. 2686 (2004), and the most elementary notions of due process. The CSRTs do not afford the detainees with a fair opportunity to rebut the government’s allegations because, *inter alia*, they presume detainees are “enemy combatants,” rely on secret evidence unknown to the detainees, limit access to material witnesses, fail to provide a neutral decisionmaker, and preclude participation by the detainees’ counsel. *See* Petitioners’

Consolidated Opp'n at 28-40; Al Odah Opp'n at 24-29. The torture and other mistreatment of Guantánamo detainees, and the CSRTs' consideration of evidence obtained through such tactics, powerfully underscore why the CSRT process not only is constitutionally inadequate but also transgresses the values for which this country stands.

A. All Three Branches Of Government Recognize That Torture Is Absolutely Prohibited.

Congress, the President and the Judiciary have all recognized that torture is absolutely prohibited and contrary to values of this country. “[t]he values of this country” Remarks by Pres. Bush, June 22, 2004.³ 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.

As Congress recently reaffirmed, “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. 1811, 2068. Congress has thus 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. It has also mandated that the Secretary of Defense take immediate, concrete action to promote adherence to these principles by ensuring 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

³ Remarks Following Discussions With Prime Minister Peter Medgyessy of Hungary and an Exchange With Reporters, 40 *Weekly Comp. Pres. Doc.* 1131 (June 22, 2004). <http://www.globalsecurity.org/wmd/library/news/iraq/2004/06/iraq-040622-usia01.htm>.

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 1091(b) [of the Act].” *Id.* § 1092(a), 118 Stat. at 2069.

The War Crimes Act makes it a crime for any member of the U.S. Armed Forces or for 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. § 2241(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.⁴ The War Crimes Act, therefore, not only subjects those who commit torture to criminal liability, but also incorporates the prohibition against torture in the Geneva Conventions into U.S. criminal law.

The prohibition on torture also appears in treaties to which the United States is a party.⁵ Torture is broadly condemned 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). CAT requires

⁴ See 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.

⁵ Treaties, 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.”); *Wildenhus’s Case*, 120 U.S. 1, 17 (1887) (petitioner may enforce treaty violations on habeas).

each state party to take all necessary actions “to prevent acts of torture in any territory under its jurisdiction.” *Id.* art. 2(a). 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) (emphasis added). CAT further obligates the United States to prevent in any territory under its jurisdiction other “acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture . . . 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).⁶

Congress enacted 18 U.S.C. § 2340A to implement CAT. This statute prescribes penalties for any individual who “commits or attempts to commit torture” outside of the United States. 18 U.S.C. § 2340A(a). Congress determined that no implementing legislation with respect to torture occurring within the United States was necessary since existing laws prohibit such acts. S. Rep. No. 103-107, at 59 (1993); *see also* U.S. Dep’t of State, Initial Report of the United States of America to the U.N. Committee against Torture, U.N. Doc. 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”), which expressly prohibits “torture or . . . cruel, inhuman or degrading treatment or punishment.” G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52,

⁶ 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 and unusual 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.

art. 7, U.N. Doc. A/6316 (1966).⁷ The ICCPR does not allow derogation from this prohibition under any circumstances. *Id.* art. 4(2).

The President and his designees have publicly 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, 2004,⁸ *see also* Statement Pres. Bush, 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 alienable human right.”) (emphasis added).⁹ As the then-Deputy Solicitor General assured the Supreme Court last spring, “the United States is going to honor its treaty obligations” under “conventions that prohibit torture.” Transcript of Oral Argument, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, at 41 (Apr. 28, 2004) (Statement of Paul Clement). Since then, the Department of Justice has reaffirmed that “[t]orture is abhorrent both to American law and values and to international norms.” U.S. Dep’t of Justice, Office of Legal Counsel, “Memorandum for James B. Comey, Deputy Attorney General,” Dec. 30, 2004, at 1 (hereinafter “December 2004 OLC Memorandum”).¹⁰ Even more recently, White House Counsel Alberto Gonzales, nominated by the President for the position of Attorney General of the United States, testified that “[the President] has made clear that America

⁷ As in the case of 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 Convention on Civil and Political Rights, 138 Cong. Rec. S4781-01 (1992).

⁸ Remarks Following Discussions With Prime Minister Peter Medgyessy of Hungary and an Exchange With Reporters, 40 *Weekly Comp. Pres. Doc.* 1131 (June 25, 2004).

⁹ Statement by the President on United Nations International Day in Support of Victims of Torture, 40 *Weekly Comp. Pres.* 1167 (July 6, 2004).

¹⁰ Available at <http://www.aifl.org/lac/dagmemo.pdf>.

stands against and will not tolerate torture under any circumstances.” Transcript of Senate Judiciary Confirmation Hearing, Jan. 6, 2005.¹¹

The federal courts have likewise concluded that torture is unambiguously prohibited under domestic and international law. *See, e.g., 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). Accordingly, courts have held that an individual may not be deprived of life or liberty based upon evidence obtained through torture or other coercive interrogation tactics. *See infra* Section I.C.

B. Detention Based On Evidence Obtained Through Torture And Other Mistreatment Was Prohibited At Common Law.

The writ of habeas corpus is “antecedent to statute, . . . throwing its root deep into the genius of our common law,” and forms “an integral part of our common-law heritage.” *Rasul*, 124 S. Ct. at 2692 (internal citations omitted). The prohibition against torture has the same deep roots in our history. The leading English jurists considered torture to be wholly contrary to the common law. *See, e.g.,* 4 William Blackstone, *Commentaries* *320 (“[T]he trial by rack is utterly unknown to the law of England. . . .”); Edward Coke, *The Third Part of the Institutes of the Laws of England* 35 (“[T]here is no law to warrant tortures in [England].”) (London, W. Clarke & Sons 1817) (1644). The Framers of our Constitution likewise abhorred torture, which they viewed as a mechanism of royal despotism. *See, e.g.,* 3 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 447-48 (1836) (“What has distinguished our ancestors? -- That they would not admit of tortures, or cruel and barbarous punishment”) (quoting Patrick Henry); *see also* Joseph Story, *Commentaries on the Constitution of the United States* § 931, at 662-63 (5th ed. 1891) (“[The Self-Incrimination

¹¹Available at <http://www.washingtonpost.com/wp-dyn/articles/A53883-2005Jan6.html>.

Clause] is but an affirmance of a common-law privilege. But it is of inestimable value [since it] is well known that, in some countries, not only are criminals compelled to give evidence against themselves, but are subjected to the rack or torture in order to procure a confession of guilt.”). In short, as the government states, “centuries of Anglo-American law” repudiate the use of torture. December 2004 OLC Memorandum, at 1 (emphasis added).

The CSRTs’ reliance on evidence obtained through torture and other mistreatment not only violates the Constitution, *see infra* Section I.C., but is unlawful under 28 U.S.C. § 2241(c)(1). Even before the Bill of Rights was adopted, federal courts were empowered to inquire into the legality of detention by issuing writs of habeas corpus. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 82 (codified at 28 U.S.C. § 2241(c)(1)); *Rasul*, 124 S. Ct. at 2692. In exercising this historic jurisdiction, courts have been guided by the common law understanding of due process. *See, e.g., Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830) (Marshall, C.J.) (habeas court historically “enforce[d] the common law”); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93-94 (1807) (Marshall, C.J.) (“for the meaning of the term habeas corpus, resort may unquestionably be had to the common law”). Indeed, the establishment of habeas corpus as the preeminent safeguard against unlawful executive detention and the common law prohibition against torture were historically linked. For example, the Habeas Corpus Act of 1641, which mandated an expeditious judicial inquiry into the legality of detention, 16 Car. 1, c. 10, § 6 (1641), also eliminated the notoriously abusive Star Chamber, and restricted the authority of the King’s Privy Council, which had used secret imprisonment and torture to protect the state. *Id.* § 3; John H. Langbein, *Torture and the Law of Proof* 90, 135-36 (1976). It is incomprehensible that, in ensuring the exercise of the “great and efficacious writ,” 3 William Blackstone, *Commentaries* *130, the Framers would have authorized a court to sanction any loss of liberty -- let alone

prolonged and indefinite detention -- based upon evidence obtained through torture.¹² The Supreme Court did not hold that the Guantánamo detainees “are entitled to invoke the federal courts’ authority” under the habeas statute, *Rasul*, 124 S. Ct. at 2696, only for the federal courts to then sanction their detention based upon evidence obtained in violation of the most basic notions of due process in the common law tradition.

C. The Constitution Forbids the Use of Statements Taken Involuntarily or under Other Abusive Conditions of Interrogation.

Evidence obtained through use of threats or coercion also violates due process under the Constitution. *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.”); *Williams v. United States*, 341 U.S. 97, 102 (1951) (confessions wrung by “force and violence . . . violate some of the most fundamental, basic, and well-established constitutional rights”); *Brown v. Mississippi*, 297 U.S. 278, 282, 286 (1936) (conviction based on statements obtained by, *inter alia*, whipping suspects with a leather strap with buckles “was a clear denial of due process”). Thus, the courts vigilantly guard against any use of such statements to deprive individuals of life or liberty. *See, e.g., Haynes v. Washington*, 373 U.S. 503, 514 (1963) (“We cannot blind ourselves to what experience unmistakably teaches: that . . . secret and incommunicado detention and interrogation . . . are devices adapted and used to extort confessions from suspects.”).

The prohibition on using evidence obtained through abusive interrogation tactics is “deeply embedded” in the nation’s system of justice. *Miller*, 474 U.S. at 109; *see also, e.g.,*

¹² Indeed, it is precisely in countries that do not recognize the right to habeas corpus that torture and other “[a]buses of basic human rights routinely occur.” Elizabeth A. Faulkner, “*The Right to Habeas Corpus: Only in the Other Americas*,” 9 Am. U. J. Int’l L. & Pol’y 653, 654 (1994).

Brooks v. Florida, 389 U.S. 413, 415 (1967) (involuntary confession requires reversal of conviction); *Beecher v. Alabama*, 408 U.S. 234, 237 (1972) (“conviction tainted by a [coerced] confession” cannot stand); *Payne v. Arkansas*, 356 U.S. 560, 561 (1958) (due process forbids use of statements obtained by physical or mental coercion); *Ashcraft v. Tennessee*, 322 U.S. 143, 160 (1944) (“a confession obtained during or shortly after the confessor has been subjected to brutality, torture, beating, starvation, or physical pain of any kind is prima facie ‘involuntary,’” and must be suppressed). No claim by the government that such interrogation techniques are “necessary to uphold our laws” can justify their use. *Chambers v. Florida*, 309 U.S. 227, 240-41 (1940).

Moreover, evidence obtained by torture and other coercive tactics must be suppressed *regardless* of its purported “reliability” because such tactics are “revolting to the sense of justice.” *Brown*, 297 U.S. at 286; *see also Lyons v. Oklahoma*, 322 U.S. 596, 605 (1944) (“[D]eclarations procured by torture are not premises from which a civilized forum will infer guilt.”). As the Supreme Court has cautioned, “The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness,” but also on “the deep-rooted feeling . . . that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.” *Spano v. New York*, 360 U.S. 315, 320-21 (1959); *see also Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961) (conviction following admission of involuntary confession cannot stand, regardless of confession’s purported trustworthiness); *cf. Chavez v. Martinez*, 538 U.S. 760, 773 (2003) (plurality opinion) (torture or other abuse that results in a confession is constitutionally impermissible even if the confession is not used at trial). The consequences of using evidence obtained in violation of these basic constitutional principles transcend questions of guilt or

innocence and the protected rights of the individuals themselves, as they taint “our legal system of law and justice” and “breed disrespect for law, as well as for those charged with its enforcement.” *Haynes*, 317 U.S. at 519. The Judiciary’s enforcement of the prohibition against use of coerced statements thus affirms “the strongly felt attitude of our society that important human values are sacrificed where an agency of the government . . . wrings a confession out of an accused against his will.” *Blackburn v. Alabama*, 361 U.S. 199, 206-07 (1960).

D. Recent Disclosures Confirm the Torture and Mistreatment of the Guantánamo Detainees.

Like other Guantánamo detainees, Mr. Zemiri and Mr. Al-Marri allege they have been subjected to unlawful interrogation and mistreatment. Zemiri Pet. ¶¶ 35-36; Al-Marri Pet. ¶¶ 24-26. The abusive tactics approved for use at Guantánamo by the Department of Defense have previously been described to this Court, as have accounts of military guards, intelligence agents, and others indicating that the government’s treatment of detainees constituted torture. Petitioners’ Consolidated Opp’n at 3-5; Al Odah Opp’n at 3-5. These allegations must be taken as true. *See, e.g., Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 770 (1993).

Recently released FBI documents obtained from the government under the Freedom of Information Act verify the use of torture and other mistreatment at Guantánamo.¹³ These documents are described in further detail in the Guantánamo petitioners’ recent motion seeking discovery. *See* Petitioners’ Motion for Leave to Take Discovery and for Preservation Order,

¹³ The FBI records were obtained by the plaintiffs in *ACLU v. Dep’t of Defense*, Civ. Action No. 04-4151 (AKH) (S.D.N.Y., filed June 2, 2004). In ordering the government to expedite release of documents in that case, the district court emphasized that they pertained to matters of “significant public interest” and were important to providing the “accountability of government” required under the Act. *ACLU v. Dep’t of Defense*, 339 F. Supp. 2d 501, 504 (S.D.N.Y. 2004). The court further stated that “[i]f the documents are more of an embarrassment than a secret, the public should know of our government’s treatment of individuals captured and held abroad” because of the “oppression and abuse” that can result from “an unchecked system of detention.” *Id.* at 504-05 (quoting *Hamdi*, 124 S. Ct. 2647).

filed Jan. 5, 2005, at 2-4. According to these records, detainees in interrogation rooms were left chained “hand and foot in a fetal position on the floor, with no chair, food or water,” for periods of “18, 24 hours or more,” with the result that detainees had “urinated or defecated on themselves.” *Id.* at 3 & Ex. D.¹⁴ A female interrogator, renowned for leaving detainees “curling into a fetal position on the floor and crying in pain,” ordered a soldier to place a curtain over the two-way mirror between the interrogation room she was using and an observation room while she grabbed the genitals of a detainee who was shackled with his hands cuffed to the waist and bent his thumbs back, causing him to grimace in pain and pull away and against the restraints. *Id.* & Ex. C at 1-2. One detainee was intimidated by military personnel who used dogs “in an aggressive manner” and was completely isolated for a period of three months in a cell constantly flooded with light, at the end of which he showed signs of “extreme psychological trauma,” such as talking to non-existent people and crouching in the corner of his cell covered by a sheet for hours on end. *Id.* & Ex. C at 2. FBI agents have thus far participated in the interview of at least 747 detainees at Guantánamo. *Id.* & Ex. A. For several years, the agency’s Behavioral Analysis Unit objected to and complained to the military commander at Guantánamo about the military’s interrogation tactics. *Id.* One FBI observer described the interrogation techniques he witnessed being employed by military personnel, government contractors, and other individuals as “aggressive” and “personally very upsetting.” *id.* at 3-4 & Ex. E, while another agent described the tactics of the military officials at Guantánamo as “torture techniques.” *See* Michael Isikoff & Mark Hosenball, “Has the Government Come Clean?” *Newsweek*, Jan. 6, 2005.¹⁵

¹⁴ These exhibits refer to those attached to Petitioners’ Motion for Leave to Take Discovery and for Preservation Order.

¹⁵ Military intelligence officials and interrogators have described how one detainee, Mohamed al-Kahtani, was given a tranquilizer, put in sensory deprivation garb with blackened goggles, and placed aboard a plane that was supposedly taking him to the Middle East. *See* Neil A. Lewis,

In addition, confidential reports by the International Committee of the Red Cross (“ICRC”) state that the U.S. military intentionally engaged in psychological and physical coercion against the Guantánamo prisoners that was “tantamount to torture.” Neil A. Lewis, “Red Cross Finds Detainee Abuse in Guantánamo,” *N.Y. Times*, Nov. 30, 2004, at A1. The *New England Journal of Medicine* recently concluded that doctors unlawfully helped intelligence officers carry out “transparently coercive” interrogations at Guantánamo and found “probable cause” for suspecting they participated in torture. M. Gregg Bloche & Jonathan H. Marks, “When Doctors Go To War,” 352 *New England J. Medicine* 3, 5 (2005). And, only last month, the Department of Justice repudiated its prior definition of torture, effectively confirming that, for over the last two years, the Bush Administration has been operating under an overly restrictive -- and unlawful -- definition of the term. *See generally* December 2004 OLC Memorandum.

Despite the mounting evidence of egregious abuses committed by the United States officials at Guantánamo, the government persists in arguing that the Court should dismiss the habeas petitions without even an evidentiary hearing. These arguments are not simply without merit, but flout the Supreme Court’s decision in *Rasul* and the most basic notions of American justice. The motion to dismiss must be denied.

“Fresh Details Emerge on Harsh Methods at Guantánamo,” *N.Y. Times*, Jan. 1, 2005. The plane, however, landed back at Guantánamo, at which point Mr. al-Kahtani was placed in an isolation cell and subjected to harsh interrogation procedures which he was encouraged to believe were being conducted by Egyptian national security operatives. *Id.* Mr. al-Kahtani’s refusal to cooperate with military officials at Guantánamo prompted Defense Secretary Donald H. Rumsfeld to approve in December 2002 sixteen interrogation techniques, in addition to the seventeen methods contained in the Army Field Manual. *Id.*

E. CSRTs Fail To Prevent Reliance On Evidence Obtained Through Torture And Other Mistreatment.

In arguing that “[a]llegations of mistreatment cannot salvage” petitioners’ due process claims, *see* Response to Petition for Writ of Habeas Corpus and Motion to Dismiss or For Judgment as a Matter of Law and Supporting Memorandum (“Response”) at 2,¹⁶ the government misconstrues both the CSRT process and the law. First, the government says it “abhors torture,” Response at 2 n.2, but effectively acknowledges, without ever having the candor to state directly, that the CSRTs rely on such evidence where they believe it to be reliable. Second, the CSRT process is inadequate to investigate whether evidence was obtained by torture or other abusive interrogation techniques. Indeed, the process seems to have been crafted precisely to prevent those abuses from ever seeing the light of day. Third, separation of powers concerns do not preclude this Court’s meaningful inquiry into the allegations of mistreatment and the lawfulness of petitioners’ detention generally.

1. The CSRTs May Receive and Rely on Evidence Derived From Coerced Testimony.

Although the government says it “abhors torture,” Response at 2 n.2, but it does not deny the CSRTs can and have not relied on evidence obtained by torture. Nor does the government aver that it abhors other forms of cruel, inhuman or degrading treatment, or that the CSRTs do not rely on evidence obtained by such treatment. Instead, the government asserts that CSRT members should know that “statements obtained by severe pain and suffering *can* be unreliable,” Response at 4 (emphasis added), and points to purported “safeguards” in the CSRT procedures “to account for the reliability and provenance of evidence.” *Id.* at 3-4.

¹⁶ Unless otherwise indicated, citations to the government’s Response refer to its responses to both the Zemiri and Al-Marri petitions.

The government, moreover, has elsewhere stated that the CSRT may rely on evidence obtained by torture, as long as it believes the evidence is “reliable”:

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. . . . 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 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.

Oral Argument Transcript, Dec. 2, 2004, *Khalid v. Bush*, 04-CV-1142 (RJL); *Boumediene v. Bush*, 04-CV-1166 (RJL), at 84:7-84:22 (hereinafter Dec. 2, 2004 Transcript).

As described above, all three branches of government have consistently stated that torture is unlawful and that steps must be taken to prevent its use. Torture was prohibited at common law, and is strictly forbidden under the Constitution, laws, and treaties of the United States. Evidence obtained through torture and other abusive interrogation tactics can never be used to deprive an individual of liberty even if that evidence is somehow thought to be “reliable.” The law could not be clearer, and the CSRTs, which allow prolonged detention based upon such evidence, are unmistakably in violation of it.

2. The CSRT Process Is Inadequate To Investigate Whether Evidence Was Obtained By Torture Or Other Abusive Interrogation Techniques.

The government also argues that the CSRT process contains sufficient “safeguards to account for the reliability and provenance of evidence, including allegations that evidence was derived coercively.” Response at 2-3. That proposition is patently false.

CSRT members presume that the government’s evidence is “genuine and accurate.” CSRT Implementation Memorandum Encl. (1) ¶ G(11), attached as Exhibit B to Response.

Moreover, that presumption itself is based upon “multiple layers of review by officers of the Department of Defense” which contain no apparent safeguard to prevent reliance on evidence obtained through torture and other mistreatment. *See* Order Establishing Combatant Status Review Tribunal ¶ a.

The government points to the CSRT Recorder’s obligation to “search government files for, and provide to the CSRT any ‘evidence to suggest the detainee should not be designated as an enemy combatant.’” Response at 3 (quoting CSRT Implementation Memorandum Encl. (2) ¶ B(1)). However, this provision, even if dutifully followed by the Recorder, does nothing to uncover abusive interrogation techniques. To the contrary, the provision indicates that the Recorder’s primary and overarching “duty” is to present evidence “sufficient *to support* the detainee’s classification as an enemy combatant.” CSRT Implementation Memorandum Encl. (2) ¶ B(1) (emphasis added). Also, in contrast to judicial proceedings, the Recorder has no obligation to disclose exculpatory evidence, *Brady v. Maryland*, 373 U.S. 83 (1963), including evidence that the detainee could have used to impeach an adverse witness. *See Giglio v. United States*, 405 U.S. 150, 154 (1972); *United States v. Bagley*, 473 U.S. 667, 676 (1985). Nor is the detainee provided with access to counsel who would be duty-bound to investigate his client’s allegations of abuse. *See generally, e.g., Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994) (“A lawyer’s first duty is zealously to represent his or her client.”). Furthermore, even a well-intentioned Recorder confines his inquiry under the CSRT procedures to the government evidence -- evidence limited to that which supports an “enemy combatant” finding -- and is neither instructed nor empowered to inquire as to how that evidence was obtained.¹⁷ Indeed, the

¹⁷ The government’s response that the tribunal consists of officers not “involved in the apprehension, detention, interrogation, or previous determination of status of the detainee,” likewise provides no assurance of a CSRT’s reliability. Order Establishing Combatant Status

government says it is unsure whether the CSRT has any duty to investigate a detainee's allegation that he had been tortured. *See* Dec. 2, 2004 Transcript, at 85:14-85:20.¹⁸

The oath taken by CSRT members, Response at 3-4, further highlights concerns about the integrity and reliability of the CSRT process. That oath does not forbid reliance on evidence procured through torture or other mistreatment, and does not require adherence to the Constitution and laws of the United States. CSRT Implementation Memorandum Encl. (8), at 2. The government asserts that the instructions in the oath “adjure CSRT members to take appropriate account of the ‘common sense’ notion that statements obtained by severe pain and suffering can be unreliable.” Response at 4. But, the notion that any tribunal can exercise its “common sense” judgment about whether statements procured through torture are sufficiently “reliable” is contrary to constitutional principles. *See supra* Section I.C. Moreover, the oath actually contains no such caution but rather underscores that CSRT members are free to take account of any evidence they deem relevant and to give that evidence whatever weight they deem appropriate. Specifically, CSRT members vow only to make findings “according to the best of [their] understanding of the rules, regulations, and laws governing this proceeding,” and guided by their “concept of justice.” *Id.* (emphasis added). The oath is not a safeguard against but, rather, an invitation for abuse.

Review Tribunal ¶ e, attached to Response as Exhibit A. At most, this guarantees only that the tribunal members themselves did not engage in torture or other abusive interrogation tactics, and does nothing to prevent their reliance -- whether or not intentional -- upon information obtained through such tactics.

¹⁸ The government asserts in its response that “Tribunal members inquired as to certain statements [Petitioner Al-Marri] made while feeling ‘pressured.’” Al-Marri Response at 4 n.4 (final sentence of footnote) (citation omitted). The government has since represented to Mr. Al-Marri’s counsel that this entire sentence was inadvertently included in the Response and should be struck, and will so request in its reply brief. Mr. Al-Marri further notes that, on its face, the CSRT record contains no indication that the tribunal inquired at all into as to whether he had made any statements under pressure.

The detainee's limited right to testify and present his case with the assistance of a Personal Representative, Response at 3, is likewise woefully inadequate. The tribunal can rely on secret evidence never presented to the detainees and exclude the detainee from the proceedings where it "would compromise national security." Order Establishing Combatant Status Review Tribunal ¶ (g)(4), attached as Exhibit A to Response. Detainees are not permitted to see and confront unclassified information, and thereby are prevented from probing whether that evidence was obtained through torture or other mistreatment.¹⁹ Also, detainees may call witnesses only if the government determines, in its unreviewable discretion, that those witnesses are "reasonably available." *Id.* ¶ (g)(8). And there is no requirement in the CSRT process that confessions be admitted only if "made freely, voluntarily and without compulsion or inducement of any sort." *Haynes*, 373 U.S. at 513 (internal citation omitted).

These limits on the detainees' ability to see and confront the witnesses and evidence against them is contrary to one of the most fundamental notions of this country's jurisprudence. As Justice Scalia recently observed, "[i]t is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine." *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 1363 (2004) (citation omitted); *see also Jenkins v. McKeithen*, 395 U.S. 411, 428 (1969) ("[T]he right to confront and cross-examine witnesses is a fundamental aspect of due process."). Our system of justice is premised upon the fundamental belief that cross-examination is "the greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149, 158 (1970) (internal citation omitted). Here, however, the government denies the detainees' the right to confront the evidence against

¹⁹ Like other detainees, Mr. Zemiri and Mr. al-Marri were confirmed to be "enemy combatants" based upon such classified evidence. Al-Marri Unclassified Summary of Basis for Tribunal Decision, Enclosure (1) at 3 of 4; Zemiri Unclassified Summary of Basis for Tribunal Decision, Enclosure (1) at 1 of 3.

them while at the same time allowing the CSRTs to rely on evidence obtained through torture, and thereby subject them to indefinite and potentially lifelong confinement.²⁰ This flouts the most basic principles upon which this nation and its Constitution were founded.

Indeed, there are already numerous examples demonstrating the CSRTs' inability to meaningfully inquire into allegations of torture and other abusive interrogation techniques. For example, during his CSRT proceeding, Petitioner Feroz Abassi requested that the tribunal consider his medical records to document mistreatment by his captors. The CSRT, however, determined the records were not relevant and denied his request. Instead, allegations were forwarded to the CSRT director for "appropriate action." Respondents' Factual Return to Petition for Writ of Habeas Corpus by Petitioner Feroz Abassi, Unclassified CSRT Record, Summary of Basis of for Tribunal Decision for Mr. Feroz Abassi, at 3. Petitioner Mamdouh Habib's Personal Representative told the CSRT that statements Mr. Habib had made were "[g]iven under duress and torture," that he reported his torture to the ICRC, and that "would tell interrogators what they wanted to hear because he was in fear." Respondents' Factual Return to Petition for Writ of Habeas Corpus by Petitioner Mamdouh Habib, Unclassified CSRT Record, Enclosure (1) at 1. The Personal Representative explained to the tribunal that Mr. Habib said he

²⁰ The government argues that the CSRTs are modeled on the tribunal procedures provided prisoners of war under Article 5 of the Geneva Convention. Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss or for Judgment as a Matter of Law and Memorandum in Support, *Rasul v. Bush* (D.D.C.) (Nos. 02-229, 02-0828, 02-1130, 04-1135, 04-1136, 04-1137, 04-1144, 04-1164, 04-1194, 04-1227, 04-1254), filed Oct. 4, 2004, at 32. This argument is both irrelevant and incorrect. First, Article 5 tribunals are intended to be implemented on the spot or as soon as practicable to determine the status of detainees in the first instance. Second, Article 5 tribunals operate under a legal framework in which interrogation is strictly limited. Specifically, Army Regulation 190-8, which implements Article 5, forbids "the use of physical or mental torture or any coercion to compel prisoners to provide information" and further states that "[p]risoners may not be threatened, insulted, or exposed to unpleasant or disparate treatment of any kind because of their refusal to answer questions." Army Regulation 190-8, "Enemy Prisoners of War, Retained Personnel, Civilian Internees, and other Detainees," at 2-1(a)(1)(d) (emphasis added), attached to Response as Exhibit C.

could not provide the ICRC with the names of his torturers since their name tags were taped over. *Id.* Enclosure (3) at 1. While these allegations resulted in a referral to an outside inquiry,²¹ they prompted no inquiry by the CSRT panel that predictably confirmed Mr. Habib as an “enemy combatant.” Other petitioners have likewise been confirmed “enemy combatants” in the face of explicit allegations of torture at the hand of their captors and without any apparent independent inquiry by the CSRT. *See, e.g.*, 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 (“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.”); Respondents’ Factual Return to Petition for Writ of Habeas Corpus by Petitioner Bishar Al-Rawi, Unclassified CSRT Record, Enclosure (3) at 24 of 27 (“In Bagram [Airbase], I provide[d] information only after I was subjected to sleep deprivation and various threats were made against me.”); July 12, 2004 Letter from Petitioner Moazzam Begg (“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 . . .”).

The government’s proclaimed abhorrence of torture, Response at 2 n.2, regrettably provides little assurance. Just last month, the Department of Justice repudiated as overly narrow the definition of torture in effect since at least August 2002. Torture, it now acknowledges, is not limited to “excruciating and agonizing pain” or pain “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.” December 2004 OLC Memorandum at 2, 8. The government also previously

²¹ Petitioner Habib’s allegations of torture were referred by the tribunal to the CSRT Assistant Legal Advisor; the OARDEC Liaison to the Criminal Investigation Task Force and JTF-GTMO was also notified of the matter. *Id.*

maintained that the federal criminal prohibition against torture did not apply to interrogation undertaken pursuant to the President's exercise of his commander-in-chief power under Article II. U.S. Dep't of Justice, Office of Legal Counsel, "Memorandum for Alberto R. Gonzales Counsel to the President," dated Aug. 1, 2002, at 30, 35.²² This analysis was not "eliminated" until the issuance of the superceding December 2004 OLC Memorandum, which called the analysis "unnecessary" and "inconsistent with the President's unequivocal directive that United States personnel not engage in torture." December 2004 OLC Memorandum at 2. Yet, evidence to sustain "enemy combatant" determinations was obtained during this over two-year period in which the Executive Branch believed it could engage in torture with impunity, and this evidence may be relied upon by the CSRT. In sum, the government's stated abhorrence of torture does nothing to ensure that the CSRTs satisfy even the most rudimentary notions of due process.

3. Separation Of Powers Concerns Do Not Preclude This Court's Inquiry Into Allegations Of Mistreatment And Into The Lawfulness Of Petitioners' Detention Generally.

The government cannot salvage the CSRT process by invoking the separation of powers. Response, at 4-6. It contends that "the Executive has a unique institutional capacity to determine" the reliability of evidence supporting an "enemy combatant" determination and that "the judiciary lacks any corresponding institutional competence, experience, or accountability." Response at 5.²³ It further cautions this Court against "second-guessing the judgment of the military commanders." *Id.* at 5.

²² Available at <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf>

²³ In support of this sweeping vision of executive authority to supplant the exercise the traditional judicial function of examining the sufficiency and reliability of evidence, the government cites *Curran v. Laird*, 420 F.2d 122, 130 (D.C. Cir. 1969) (en banc), a case involving a suit by a union regarding the method and rates of cargo shipment under the Cargo Preference Act. *Id.* at 124-25. It provides no support for the proposition advanced here -- that

The government, however, invoked the same arguments to the Supreme Court in *Rasul*, and the Court squarely rejected them. *Rasul*, 124 S. Ct. at 2696. There, the government contended that the “separation of powers . . . strongly counsel[s]” against finding that the federal courts could review the legality of the petitioners’ detention on habeas. *Rasul v. Bush*, Brief for the Respondents, 2004 WL 425739, at *18 (Mar. 3, 2004), and warned of the “profound separation of powers difficulties occasioned by an exercise of judicial jurisdiction.” *Id.* at *37. The Court nevertheless held that the Guantánamo detainees “are entitled to invoke the federal authority” under the habeas statute and to challenge the legality of their detention in a habeas proceeding. *Rasul*, 124 S. Ct. at 2696. It further “recognized the federal courts’ power to review applications for habeas relief . . . in wartime as well as in times of peace.” *Id.* at 2692-93; *see also Hamdi v. Rumsfeld*, ___ U.S. ___, 124 S. Ct. 2633, 2650 (2004) (“[A] state of war . . . is not a blank check for the President. . . .”). The Supreme Court, moreover, refused to accept this argument even in the face of the government’s assurance that the United States does not engage in torture or other abusive interrogation practices. Transcript of Oral Argument, *Hamdi v. Rumsfeld*, at 41 (“I wouldn’t want there to be any misunderstanding about this. It’s also the judgment of those involved in this process that the last thing you want to do is torture somebody or try to do something along those lines.”) (Statement of Paul Clement).

Since this nation was founded, federal courts have long inquired into the legality of detention under the habeas statute and provided a vital check on executive power that the government’s arguments ignore and endanger. *Hamdi*, 124 S. Ct. at 2650 (“[U]nless 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 an important check on the

this Court has no authority to conduct a meaningful inquiry into the legality of detention even based upon evidence obtained through torture.

Executive's discretion in the realm of detentions."); *INS v. St. Cyr*, 533 U.S. 289, 301 (2001) ("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."). In exercising this historic habeas jurisdiction, courts have also enforced the common law and constitutional prohibition against depriving any individual of his liberty based upon evidence obtained by torture or coercion. *See supra* Section I. B & C. The government's separation of powers argument should be rejected, and, under *Rasul* and centuries of Anglo-American jurisprudence, this Court must conduct a meaningful inquiry into the legality of the petitioners' detention.

II. PETITIONERS' INDEFINITE PREVENTIVE DETENTION UNDER THE GOVERNMENT'S BROAD AND ELASTIC DEFINITION OF "ENEMY COMBATANT" VIOLATES DUE PROCESS.

The government, relying upon well-settled war powers precedent, shrugs off Petitioners' habeas claims with the conclusory assertion that the government can and must detain enemy combatants. The government explains that it is "axiomatic" that the enemy may be captured and detained. *See* Response at 1, Exhibit 1 at 10.

The rationale and justification for detention of "enemy combatants," of course, is to prevent them from returning to the battlefield. "The 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 (citing Naqvi, "Doubtful Prisoner-of-War Status," 84 *Int'l Rev. Red Cross* 571, 572 (2002)). *Hamdi* confirmed that the capture and detention of combatants is "merely a temporary

detention which is devoid of all penal character.” *Id.* The Court noted that, in time, the detainee must be “exchanged, repatriated, or otherwise released.” *Id.*²⁴

The government, in a breathtaking expansion of the caselaw, nonetheless maintains that anyone whom the military believes to be “associated” with terrorists may be taken into custody – anywhere on the face of the planet – and detained indefinitely until and unless the Executive Branch should order their release. The cases relied upon by the government do not support this extreme position and have no application to Petitioners.²⁵ Rather, those cases have been stretched so far beyond the factual context in which they arose that the government’s position would give the military carte blanche to arrest and detain anyone who is believed to be “associated” with terrorism in some undefined manner. Moreover, according to the government, such action would be virtually unreviewable except within the Executive Branch itself. This position is not only wholly unsupported by legal precedent, but runs the risk of reducing our country’s judicial system to the Executive Branch’s handmaiden.

Petitioners in the consolidated cases are far removed from the field of battle and many have been detained in excess of three years. Unlike the situation presented in World War II, there is a very real possibility that Petitioners’ detention will continue for the rest of their natural lives. Indeed, the Court in *Hamdi* warned of this possibility and stated that “if the practical circumstances of a given conflict are entirely unlike those of the conflicts that have informed the

²⁴ Indefinite detention for the purpose of interrogation is not authorized. *Hamdi*, 124 S. Ct. at 2641.

²⁵ Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss or for Judgment as a Matter of Law and Memorandum in Support, *Rasul v. Bush* (D.D.C.) (Nos. 02-229, 02-0828, 02-1130, 04-1135, 04-1136, 04-1137, 04-1144, 04-1164, 04-1194, 04-1227, 04-1254), filed Oct. 4, 2004, at 8-19 (citing, *e.g.*, *Ex parte Quirin*, 317 U.S. 1 (1942), *Johnson v. Eisentrager*, 339 U.S. 763 (1950), *In re Territo*, 156 F.2d 142 (9th Cir. 1946)).

development of the law of war, that understanding [that detentions will end in a few years, not a few generations] may unravel.” 124 S. Ct. at 2641.²⁶

The government’s position at this point has “unraveled” in the face of facts that have come into focus more clearly since *Hamdi* was argued last year. Senior government officials were quoted within the past two weeks as stating that the Defense Department plans to “hold hundreds of [the Guantánamo detainees] indefinitely, without trial, out of concern that they continue to pose a threat to the United States and cannot safely be sent to their home countries.” Douglas Jehl & Neil A. Lewis, “Captured Insurgents: U.S. Said to Hold More Foreigners in Iraq Fighting,” *N.Y. Times*, Jan. 8, 2005, at A1, A6. The “battlefield” discussed in the war powers cases has now been expanded by the government in space and time to cover the entire planet for the indefinite future. As the aforementioned senior administration official put it, “You’re basically keeping them off the battlefield, and unfortunately in the war on terrorism, the battlefield is everywhere.” *Id.* At oral argument in *Hamdi*, the government, when pushed by the Court on how long detention could continue under its vision of executive authority, finally acknowledged that “the courts remain open. . . . [T]here certainly is a challenge that can be brought to the length of the detention at some point.” Transcript of Oral Argument, *Hamdi v. Rumsfeld*, at 23; *cf. Moyer v. Peabody*, 212 U.S. 78, 82 (1909) (Holmes, J.) (upholding 10-week detention of individual during insurrection, but noting that “a case could be imagined in which the length of imprisonment would raise a different question”).

The likely detention of Petitioners – for all or a good portion of their natural lives – is the greatest deprivation of liberty, short of death, that our country could possibly inflict. The

²⁶ The opinion made clear that it was limiting its consideration of enemy combatants to those who “engaged in an armed conflict against the United States” in Afghanistan. *Hamdi*, 124 S. Ct. at 2640.

question thus becomes what process is due when the government seeks to deprive a person of liberty potentially for the rest of his life? Clearly, the process currently offered by the government does not come close to meeting minimal constitutional requirements of due process for a deprivation of this magnitude. *See, e.g., Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (“Freedom from imprisonment--from government custody, detention, or other forms of physical restraint--lies at the heart of the liberty that Clause protects.”).

A. Preventive, Potentially Indefinite Detention Has Never Been Permitted In Petitioners’ Circumstances And Preventive Detention Has Been Permitted In Other Cases Only With Significantly More Procedural Safeguards Than Those Currently Afforded Petitioners.

Petitioners face indefinite preventive detention based upon their perceived dangerousness to the United States. But a finding of dangerousness, standing alone, cannot justify preventive, indefinite detention. *United States v. Hendricks*, 521 U.S. 346, 358 (1997). There is no set of circumstances that would permit the government to hold Petitioners indefinitely based on their alleged dangerousness consistent with Supreme Court precedent. In the few circumstances in which the Court has allowed potentially indefinite detention for non-punitive purposes, (which circumstances are far removed from the those in which Petitioners’ find themselves), far more rigorous procedural protections have been required. *See id.* Indeed, even preventive detention for a limited time demands dramatically more due process than is provided here. *See United States v. Salerno*, 481 U.S. 739 (1987). Moreover, the government may not sidestep the constitutional requirements of criminal law by asserting that it is seeking preventive, as opposed to punitive, detention of an individual. *Hamdi*, 124 S. Ct. at 2662 (Scalia, J., dissenting) (“It is unthinkable that the Executive could render otherwise criminal grounds for detention noncriminal merely by disclaiming an intent to prosecute, or by asserting that it was

incapacitating dangerous offenders rather than punishing wrongdoing.”). This utter lack of procedural safeguards underscores the inadequacy of the CSRT process.

In *Salerno*, the Supreme Court considered whether the Bail Reform Act’s authorization of preventive detention satisfied due process. *Salerno*, 481 U.S. at 750-52. The preventive detention there applied only to arrestees who had been charged with certain serious felonies, and who were determined to be dangerous to the community if released, pending trial. In analyzing the preventive detention authorized by the Bail Reform Act, the Court balanced the government’s interest in crime prevention against the individual’s interest in liberty. *Id.* at 750. It noted that the Act narrowly focused on a specific and identifiable segment of the population – individuals who had been arrested for a specific category of extremely serious offenses, *id.* at 747 – and, significantly, that the length of detention was limited by the Speedy Trial Act. *Id.* at 750 (“Nor is the Act by any means a scattershot attempt to incapacitate those who are merely suspected of these serious crimes.”) (citing 18 U.S.C. § 3142(f)).

Most importantly, the Court discussed the significant procedural protections afforded the arrestee, which included a “full-blown adversary hearing” before a neutral judicial officer. *Id.* at 752. At the hearing, the arrestee had the right to counsel as well as the rights to testify, present evidence, and cross-examine witnesses. *Id.* Moreover, the judicial officer determining whether to order detention was guided by factors set forth “statutorily enumerated factors,” such as the offense charged, the weight of the evidence, and the danger to the community. *Id.* In addition, the burden of proof was on the government to show, by clear and convincing evidence, that there were no conditions of release that could reasonably assure the safety of the community. *Id.* at 750. Finally, if detention was ordered, the arrestee was entitled to an expedited appellate review of the detention order. *Id.* Based on the Act’s narrow focus, time limitations, and the significant

procedural protections afforded the arrestee, the Court upheld the Act's authorization of preventive detention. *Id.*; *see also Hendricks*, 521 U.S. at 352-53 (requiring similar procedural safeguards to statute permitting preventive detention of sexual predators); *Zadvydas v. Davis*, 533 U.S. 678, 690-91, 701 (2001) (citing *Salerno*, the Court construed an alien removal statute to contain time limitations to avoid the "serious constitutional problem" that would arise if the statute were construed to permit indefinite preventive detention of resident criminal aliens without significant procedural safeguards); *see also Clark v. Martinez*, 543 U.S. ___, 2005 WL 50099 (Jan. 12, 2005) (extending *Zadvydas* to limit the detention of inadmissible aliens).

The procedural safeguards required in *Salerno* stand in stark contrast to the process currently afforded Petitioners. The CSRT is not a "full-blown adversary hearing"; Petitioners do not have a right to counsel at the CSRT, they do not have the right to call witnesses or cross-examine witnesses, they do not have the right to present evidence, and the determination of enemy combatant status is not made by a neutral judicial officer. *See Order Establishing Combatant Status Review Tribunal* (July 7, 2004).

In sum, petitioners may not be detained indefinitely for non-punitive reasons because of their perceived dangerousness. Moreover, in the few settings in which any preventive detention has been allowed, much greater due process protections has been required than provided under the CSRTs.

B. Because The Definition Of "Enemy Combatant" Is Elastic And Vague, Due Process Requires Greater Procedural Safeguards Than Those Currently Afforded Petitioners.

The due process problems discussed above (indefinite deprivation of liberty with limited procedural protections) are exacerbated by the government's elastic and vague definition of "enemy combatant." The term "enemy combatant" is not defined by statute, regulation, or case

law. *Cf. Salerno*, 481 U.S. at 750 (statute contained specific definition of individuals who were subject to detention provision); *Hendricks*, 521 U.S. at 352 (same). Rather, the commonly used definition of “enemy combatant” comes from an Order of the Deputy Secretary of Defense, which defines “enemy combatant” 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.” Order Establishing Enemy Combatant Status Review Tribunal ¶ a (July 7, 2004).

The elasticity and vagueness of this definition has been recognized by the government and the courts. The Supreme Court in *Hamdi* noted that “There is some debate as to the proper scope of this term [“enemy combatants”], and the government has never provided any court with the full criteria that it uses in classifying individuals as such.” 124 S. Ct. at 2639. Similarly, during the December 1, 2004 oral argument on the government’s motion to dismiss, this Court posed a hypothetical to counsel for the government, asking whether a “little old lady in Switzerland” who writes checks to what she thinks is a charity that helps orphans in Afghanistan, but is really a front for al Qaeda activities, would qualify as an “enemy combatant.” Transcript of Motion to Dismiss Before The Honorable Joyce Hens Green, United States District Judge, *Rasul v. Bush* (Dec. 1, 2004)²⁷ at 25-26. Counsel for the government responded that the little old lady likely could qualify as an “enemy combatant” under the current definition, and further, that “it would be up to the military to make the decision” whether the little old lady was, in fact, an enemy combatant. *Id.* at 26.

²⁷ *Rasul v. Bush* (D.D.C.) (Nos. 02-229, 02-0828, 02-1130, 04-1135, 04-1136, 04-1137, 04-1144, 04-1164, 04-1194, 04-1227, 04-1254).

This elasticity and vagueness of “enemy combatant” is not limited to hypothetical situations, but is also evidenced by the factual returns. The returns, which purport to provide the factual basis for the determination that a detainee is an enemy combatant, often make the conclusory assertion that a petitioner is “associated” with al Qaeda based upon “findings” such as the presence of forged passports, travel to Afghanistan, association with unspecified “Islamic extremists,” and domestic conspiracies to conduct terrorism.

The elastic and vague definition of enemy combatant, and its application to Petitioners in the CSRT, raises two issues. First, the government’s admittedly boundless definition of the term “enemy combatant” is an affront to traditional notions of minimum due process. Elastic and vague definitions of prohibited behavior are doubly offensive to due process “because they violate the two essential values of fair warning and non-discriminatory enforcement.” *Garner v. White*, 726 F.2d 1274, 1276 (8th Cir. 1984); *see also Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1925) (no statute may be “so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application”). Statutes that fail to provide fair warning and to prevent non-discriminatory enforcement have been struck down as void for vagueness. *See, e.g., Papachristou v. City of Jacksonville*, 405 U.S. 156, 163 (1972) (city vagrancy ordinance found to be void for vagueness both because it failed to give the person of ordinary intelligence fair notice that its contemplated conduct was forbidden by the ordinance and because it encouraged arbitrary and erratic arrests and convictions).

Second, to the extent that the factual returns allege that the detainee is associated with domestic, as opposed to international or foreign acts of terror, the sufficiency of those allegations may and should be treated as traditional criminal allegations and adjudicated by the courts. *See Reid v. Covert*, 354 U.S. 1, 21 (1957) (“Under the grand design of the Constitution civilian

courts are the normal repositories of power to try persons charged with crimes against the United States. . . . By way of contrast the jurisdiction of military tribunals is a very limited and extraordinary jurisdiction derived from the cryptic language in Art. I, §. 8, and, at most, was intended to be only a narrow exception to the normal and preferred method of trial in courts of law.”); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 23 (1955) (“Determining the scope of the constitutional power of Congress to authorize trial by court-martial presents another instance calling for limitation to ‘the least possible power adequate to the end proposed.’”) (citation omitted); *cf. Ex parte Quirin*, 317 U.S. 1, 21-22, 29 (1942) (holding that Constitution did not prohibit Congress from vesting military tribunal with jurisdiction to try the petitioners for alleged acts of sabotage during World War II, where Congress had declared war on Germany, and where the petitioners were members of the German military and had received orders and compensation from German High Command to destroy war industries in United States). Mr. Zemiri, for example, was found to be an “enemy combatant” by the CSRT on the basis, *inter alia*, of his alleged support of terroristic acts in the United States. *See* Unclassified Return. The commission of an act of terror within the United States does not render an otherwise traditional crime an act of war, nor does it remove the individual alleged to have committed the offense from the sphere of the criminal justice system. *See id.* Notably, allegations of domestic terrorism in the returns are often developed by the FBI, rather than the military. The sufficiency of such allegations may and should be adjudicated by the courts consistent with the historic role of both the courts and the military. *Id.*

In this global war on terrorism, citizens of the world, including little old ladies in Switzerland, must be given reasonable notice of that which is prohibited so they can govern their conduct accordingly. In turn, the meaning of the term “enemy combatant” must be made explicit

so as not to delegate “basic policy matters to policeman, judges, and juries [or the military] for resolution on an ad hoc and subjective basis.” *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). The vagueness of the term “enemy combatant” renders any process invalid.

C. Greater Procedural Safeguards Will Not Interfere With Military Operations.

More significant procedural safeguards than those currently afforded the detainees will not result in a disruption of the military’s operations. Petitioners, confined at Guantánamo Bay in excess of three years, are far removed geographically from the hostilities in Afghanistan, and are far removed temporally from the time of their initial capture. It is difficult to see how affording petitioners greater procedural safeguards, three years after their initial detention and within the secure facility at Camp Delta, would cause any disruption in the military’s operations.

This is not a situation where petitioners are being detained during the suppression of an insurrection or pending the ceasefire of a declared war, or to prevent them from returning to a demarcated field of battle. On the contrary, petitioners have already been detained over three years, where any formal ceasefire is unlikely, and where the field of battle encompasses the entire planet. Their detention, designated “preventive” by the government, and accomplished under a vague and elastic definition of “enemy combatant,” is currently lacking virtually all of the procedural safeguards that courts have required in upholding such detention. Petitioners’ indefinite preventive detention therefore fails to satisfy the constitutional requirements of due process.

CONCLUSION

For the foregoing reasons, the Court should deny Respondents' motion to dismiss.

Respectfully submitted,

Dated: January 13, 2005

/s/ John W. Lundquist
John W. Lundquist (MN # 65286)
James E. Dorsey (MN # 137893)
Debra A. Schneider (MN #313105)
Nicole M. Moen (MN #329435)
FREDRIKSON & BYRON, P.A.
200 South Sixth Street, Suite 4000
Minneapolis, MN 55402
Tel: (612) 492-7000
Fax: (612) 492-7077

Attorneys for Petitioner Ahcene Zemiri

*Representing Petitioner without compensation
pursuant to L. Cv. R. 83.2(g)*

Dated: January 13, 2005

/s/
Lawrence S. Lustberg
Mark A. Berman
Jonathan L. Hafetz
Gibbons, Del Deo, Dolan,
Griffinger & Vecchione
One Riverfront Plaza
Newark, NJ 07102
(973) 596-4500

Attorneys for Petitioner Jarallah Al-Marri

#3064217\8