IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FAWZI KHALID ABDULLAH FAHAD AL ODAH, *et al.*,	)	
Plaintiffs,	)	
v.	)	**No. CV 02-0828 (CKK)**
UNITED STATES OF AMERICA, *et al.*,	)	
Defendants.	)	

AL ODAH PETITIONERS' REPLY TO THE GOVERNMENT'S "RESPONSE TO PETITIONS FOR WRIT OF HABEAS CORPUS AND MOTION TO DISMISS"

INTRODUCTION

On June 28 of this year, after more than two years of litigation, the Supreme Court ruled in this case. It emphatically rejected the government's arguments that, because these petitioners are aliens held at the Guantanamo Naval Base in Cuba, they have no cognizable rights and no access to the U.S. courts. The Supreme Court held that these petitioners, "[a]liens held at the [Guantanamo] base, no less than American citizens, are entitled to invoke the federal courts' authority" under the habeas statute to test the lawfulness of their detentions and to pursue their other claims for relief in U.S. courts. *Rasul v. Bush*, 124 S. Ct. 2686, 2696 (2004).

The Court rejected the government's argument that Guantanamo is an area beyond the reach of U.S. law, explicitly ruling that it is "within the 'territorial jurisdiction' of the United States." *Id.* The Court also unequivocally rejected the government's argument that petitioners have no constitutional, statutory, or treaty-based rights that could be vindicated in federal court, declaring instead that petitioners' allegations that they are innocent civilians detained without due process or access to counsel "unquestionably" describe detention in violation of the Constitution, laws, or treaties of the United States. *Id.* at 2698 n.15. The Court further held that

the courts' obligation to determine the legality of petitioners' detentions is unaffected by the government's invocation of the President's war powers, as the courts have the obligation to determine the legality of "Executive detention in wartime as well as in times of peace." *Id.* at 2693.

The Supreme Court left open what further proceedings might be necessary on remand in this case, but only "after respondents make their response to the merits of petitioners' claims." *Id.* at 2699. The Court remanded the case "for the District Court to consider in the first instance the merits of petitioners' claims." *Id.*

Despite the almost four months that have passed since the Supreme Court issued that ruling, and despite the order of this Court that it do so by October 4, the government still has not responded to the merits of petitioners' claims that they are innocent civilians detained by mistake and without due process of law. After holding these men *incommunicado* without access to their families or counsel for more than 1,000 days, the government has still not explained why it continues to deprive them of their liberty.

Instead of responding on the merits, the government has again filed a motion to dismiss the case arguing, again, that, because petitioners are aliens held outside the United States, they have no rights to vindicate in the U.S. courts, and because it is wartime, the courts should defer to the government's actions. That motion is simply outrageous. It is filed in direct violation of the federal rules, and it simply rehashes the same arguments that were made before, and rejected by the Supreme Court. The government's conduct is akin to the actions taken decades ago by several states in massive resistance to the Supreme Court's desegregation ruling in *Brown v. Board of Education.* The actions of the federal government here, no less than those of the states there, ignore the ruling of the Supreme Court of the United States.

The government's motion to dismiss should be summarily rejected and, because it was improperly filed, it should be stricken from the record.

Too much time has passed and still the government has not addressed the merits of petitioners' claims. No further delay should be tolerated or sanctioned by this Court. As the Supreme Court held, the government must respond to the *merits* of petitioners' claims. After almost three years in detention, these men must be given their day in court.

STATEMENT OF FACTS

Plaintiffs have been imprisoned at the Guantanamo Bay Naval Base since January 2002. They have been held incommunicado without access to their families or counsel or to the courts. They allege that they are innocent of any wrongdoing, have not participated in terrorism or any hostile acts against the United States, and were wrongly taken into custody by Pakistani and Afghani tribes people who were paid substantial financial bounties for every Arab they turned in.

While they have been at Guantanamo, petitioners have apparently been subjected to constant interrogation. The government has acknowledged using interrogation techniques specifically designed to break the detainees' will and make them feel helpless and completely dependent on their captors. *See* Pentagon Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations, 65 (Apr. 4, 2003).[1] Interrogation techniques approved for use at Guantanamo by the most senior lawyer in the Department of Defense include isolation for up to 30 days, 28-hour interrogations, extreme and prolonged stress positions, sleep deprivation, sensory assaults, removal of clothing, hooding, and the use of dogs to create anxiety just short of terror. *See* Action Memo from William J. Haynes II, General Counsel, Department of Defense, to Secretary

[1] All of the government memoranda cited in this paragraph are available at http://www.washingtonpost.com/wp-dyn/articles/A62516-2004Jun22.html.

of Defense (Nov. 27, 2002); Pentagon Working Group Report at 62-65. At least 17 interrogation techniques authorized for use at Guantanamo go beyond those permitted by the Army Interrogation Manual. *See* Memorandum from the Secretary of Defense to the Commander, U.S. Southern Command (April 16, 2004); Action Memo from William J. Haynes II, General Counsel, Department of Defense to Secretary of Defense (December 2, 2002).[2]

According to recent reports, the government's treatment of the detainees at Guantanamo has crossed the line into torture. Citing interviews with "several people who worked in the prison, . . . military guards, intelligence agents and others," one article described a "regular procedure" at Guantanamo as involving:

> making uncooperative prisoners strip to their underpants, having them sit in a chair while shackled hand and foot to a bolt in the floor, and forcing them to endure strobe lights and screamingly loud rock and rap music played through two close loudspeakers, while the air conditioning was turned up to maximum levels. . . . Such sessions could last up to 14 hours with breaks.

Neil A. Lewis, *Broad Use Cited of Harsh Tactics at Base in Cuba*, New York Times, A1 (Oct. 17, 2004). According to an official who witnessed such treatment, the effect of this procedure on the detainees was that "It fried them." *Id.* Another person familiar with the procedure said that

[2] In approving these interrogation techniques, the government apparently relied on the legal conclusions of the White House Counsel, the Department of Justice, and the Department of Defense. *See* Memorandum from Jay S. Bybee, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense (January 22, 2002) (concluding that the Geneva Conventions do not apply to the conflict in Afghanistan and that U.S. officials cannot be charged with war crimes for interrogation methods used on al Qaida or Taliban detainees; further concluding that the President's constitutional authority to manage a military campaign relieves him of strictures posed by anti-torture laws); Memorandum from U.S. Department of Justice, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002) (concluding that "for an act to constitute torture … it must inflict pain that is difficult to endure … [it] must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. For purely mental pain or suffering to amount to torture … it must result in significant psychological harm of significant duration, e.g. lasting months or even years").

after being subjected to this treatment the detainees "were very wobbly. They came back to their cells and were just completely out of it." *Id.*

It has also become clear that many of those held at Guantanamo have no connection to terrorism. Brigadier General Martin Lucenti was quoted in the Financial Times stating that "[o]f the 550 [detainees] that we have, I would say most of them, the majority of them, will either be released or transferred to their own countries. . . . Most of these guys weren't fighting. They were running."[3] While the government has sought to retreat from General Lucenti's statement, his statement is consistent with other recently quoted remarks by an active duty intelligence officer at Guantanamo, who agreed that "the United States is holding dozens of prisoners at the U.S. Navy Base at Guantanamo who have no meaningful connection to al-Qaida or the Taliban and is denying them access to legal representation. . . . There are a a large number of people at Guantanamo who shouldn't be there."[4] General Lucenti's comments are also consistent with numerous statements made by Department of Defense officials since petitioners were first detained at Guantanamo.[5]

---

[3] *See* Mark Huband, *US Officer Predicts Guantanamo Releases*, Financial Times, (Oct. 4, 2004), available *at* http://news.ft.com/cms/s/192851d2-163b-11d9-b835-00000e2511c8.html; John Mintz, *Most at Guantanamo to Be Freed or Sent Home, Officer Says*, Washington Post, A16 (Oct. 6, 2004).

[4] Samara Kalk Derby, *How Expert Gets Detainees to Talk*, The Capital Times & Wisconsin State Journal, 1A (Aug. 16, 2004).

[5] *See* Tim Golden and Don Van Natta, Jr., *U.S. Said to Overstate Value of Guantanamo Detainees*, *N.Y. Times*, Jun. 21, 2004 (stating that "[o]fficials of the Department of Defense now acknowledge that the military's initial screening of the prisoners for possible shipment to Guantanamo was flawed"); *id.* (citing a 2002 report by a "senior CIA analyst" that concluded that "a substantial number of the detainees appeared to be either low-level militants . . . or simply innocents in the wrong place at the wrong time"); *Frontline: Son of Al Qaeda* (PBS television broadcast, Apr. 11, 2004), transcript available at http://www.pbs.org/wgbh/pages/frontline/shows/khadr/interviews/khadr.html (quoting CIA operative who had spent a year undercover at Guantanamo as estimating that "only like 10 percent of the people that are really dangerous, that should be there and the rest are people that don't have anything to do with it, don't even, don't even understand what they're doing here").

And, while the government has repeatedly asserted that Guantanamo enables the military to gather vital intelligence, that assertion has been called into question by senior military officials, including

Despite the length of their imprisonment, and the number and methods of interrogations to which they have been subjected, none of the petitioners has ever been designated by the government under the President's Military Order as a person whom the government has "reason to believe" was involved with terrorism or other hostile acts against the United States. None has been charged with any crime.

Petitioners filed this case on May 1, 2002, invoking the court's jurisdiction under 28 U.S.C.§ 1331 and 1350, among other statutory bases, and asserting causes of action under the Administrative Procedure Act, the Alien Torts Statute and the general federal habeas corpus statute. The government moved to dismiss arguing, primarily on the basis of *Johnson v. Eisentrager*, 339 U.S. 763 (1950), that as aliens detained outside the sovereign territory of the United States, the plaintiffs have no cognizable rights and no access to the U.S. courts to contest their detentions. This Court granted that motion on July 30, 2002, and the Court of Appeals affirmed on March 11, 2003.

The Supreme Court granted certiorari and, on June 28, 2004, reversed. *Rasul v. Bush*, 124 S. Ct. 2686 (2004). The Court held that the *Eisentrager* decision was not controlling and that these plaintiffs, "[a]liens held at the [Guantanamo] Base, no less than American citizens, are entitled to invoke the federal courts' authority under" the habeas statute. *Id.* at 2696.

Steve Rodriguez, the Head of Interrogations at Guantanamo. *See Peter Jennings Reporting: Guantanamo*, (ABC television broadcast, June 25, 2004) (quoting Mr. Rodriguez as stating that only "20, 30, 40, maybe even 50 [of the Guantanamo detainees] are providing critical information today"); *id.* (quoting Lt. Col. Anthony Christino as stating that there is a continuing intelligence value . . . for [s]omewhere around a few dozen, a score at the most" of the Guantanamo detainees). *See* http://abcnews.go.com/2020/2020_guantanamo_040625_1.html.

I. THE GOVERNMENT'S MOTION TO DISMISS VIOLATES THIS COURT'S ORDER, THE SUPREME COURT'S EXPRESS INSTRUCTIONS IN *RASUL*, AND THE FEDERAL RULES

As the Supreme Court understood, petitioners allege that they are innocent civilians detained indefinitely by mistake, without adequate process, without access to counsel, and without charges.[6] In rejecting the government's motion to dismiss for lack of jurisdiction, the Supreme Court remanded the case to this Court "to consider in the first instance the merits of petitioners' claims." *Rasul*, 124 S. Ct. at 2699. The government has filed a document labeled a "response," but it does not actually respond to the merits of petitioners' claims. Instead, the government continues to argue, as it has for the last two and a half years, that petitioners have no rights and therefore are entitled to no relief, regardless whether they are wholly innocent. In failing to respond to petitioners' claims, the government flouts the Supreme Court's express instruction in this case that upon remand the government respondents must "make their response to the *merits* of petitioners' claims." *Id.* (emphasis added).

The government attempts to justify its failure to respond to petitioners' claims of innocence by misquoting the *Rasul* decision, declaring that "the Court expressly declined to address '*whether* and what further proceedings' would be appropriate after remand." *See* Gov't Mot. at 1 (quoting 124 S. Ct. at 2699) (emphasis supplied by the government). The government misleadingly leaves out a critical part of that sentence. The full sentence makes clear the government's obligation to respond to the merits of petitioners' claims: "Whether and what further proceedings may become necessary *after respondents make their response to the merits of petitioners' claims* are matters that we need not address now." 124 S. Ct. at 2699.

---

[6] *See Rasul*, 124 S. Ct. at 2691 ("All alleged that none of the petitioners has ever been a combatant against the United States or has ever engaged in any terrorist acts. They also alleged that none has been charged with any wrongdoing, permitted to consult with counsel, or provided access to the courts or any other tribunal."); *id.* at 2698 n.15.

The government's motion is also in direct violation of this Court's September 20 order that it file a "responsive pleading." It is well-established that a motion to dismiss is not a "responsive pleading." *See Miles v. Department of Army*, 881 F.2d 777, 781 (9th Cir. 1989) ("[A] motion to dismiss the complaint is not a responsive pleading."); *Glenn v. First Nat'l Bank in Grand Junction*, 868 F.2d 368, 370 (10th Cir.1989) (same); *Zaidi v. Ehrlich*, 732 F.2d 1218, 1219 (5th Cir. 1984) ("The term "responsive pleading" should be defined by reference to the definition of 'pleading' in Rule 7(a), which includes neither a motion to dismiss nor a motion for summary judgment."); *Kroger Co. v. Adkins Transfer Co.*, 408 F.2d 813 (6th Cir. 1969); *see generally* 6 Charles A. Wright, *et al.*, Federal Practice & Procedure § 1475.

The government's order is also inconsistent with the Rules Governing Habeas Cases. The order to file a "responsive pleading" flows out of Rule 5, in which Congress directed that when a court orders the government to respond to a habeas petition, the government "shall respond to the allegations of the petition."[7] Rule 5 requires the government to present in one filing the legal basis for the petitioner's detention. As the Advisory Committee Notes indicate, the Rule was adopted specifically to prevent "a series of delaying motions such as motions to dismiss," precisely what the government now attempts. The Rule seeks to prevent habeas proceedings from dragging on through a series of piecemeal motions.

Without express leave of court, a motion to dismiss is emphatically not an appropriate response to a habeas petition, as the Supreme Court has held:

---

[7] Although the Habeas Rules directly govern only habeas petitions brought by state prisoners under Section 2254, the rules may be applied in other habeas cases at the discretion of the district court. *See* Rule 1(b). When it has suited its purposes (such as opposing discovery), the government has asserted that these cases should proceed under the Habeas Rules. *See, e.g.,* Memorandum of Points and Authorities in Support of Respondents' Motion to Quash Petitioners' Notice of Deposition and Fed. R. Civ. P. 34 Request at 4 n.1; Respondents' Opposition to Petitioners' Motion to Compel Responsive Pleading and Return Forthwith at 9-11.

> Respondent's conception . . . seems to have been that a Rule 12(b)(6) motion is an appropriate motion in a habeas corpus proceeding, and that upon denial of such a motion, the case should proceed through answer, discover, and trial. This view is erroneous. . . . The custodian's response to a habeas corpus petition is not like a motion to dismiss.

Browder v. Director, Dept. of Corrections, 434 U.S. 257, 269 n.14 (1978).[8]

The government's motion reflects a basic misunderstanding of habeas procedures, under which the government believes that it should be accorded numerous opportunities to challenge various aspects of the petition without ever addressing the merits of petitioners' claims. The government first moved to dismiss for lack of jurisdiction; now the government seeks dismissal based on the alleged failure to state a claim; and, once this motion too is denied, the government undoubtedly will attempt to file additional motions in further attempts to put off petitioners' day in court. The prospect that anyone could be imprisoned without legal justification, however, strikes at the heart of the rule of law, and as a result, habeas procedures are designed to be far more streamlined than those provided by the Federal Rules of Civil Procedure.[9] For this reason,

---

[8] *See also Ukawabutu v. Morton*, 997 F. Supp. 605, 609 (D.N.J. 1998) ("[U]nless the Court grants a respondent's request for leave to file a motion to dismiss, the answer should respond in an appropriate manner to the factual allegations of the petition *and* should set forth legal arguments in support of respondent's position, both the reasons why the petition should be dismissed and the reasons why the petition should be denied on the merits.") (emphasis in original); *Chavez v. Morgan*, 932 F. Supp. 1152, 1153 (E.D. Wisc. 1996) ("The appropriate response is an 'answer' which responds to each allegation contained in the petition."); *White v. Cockrell*, 2001 WL 1335779 (N.D. Tex. Oct. 19, 2001) (denying answer because "[i]t does not answer the petition in substance as required by Rule 5 . . . It simply asserts a defense that respondent deemed appropriate."); *United States ex rel. Emerson v. Warden, Pontiac Correctional Center*, 1994 WL 11054 (N.D. Ill. Mar. 29, 1994); *United States ex rel. Martin v. Chrans*, 1986 WL 7076 *2 (N.D. Ill., June 11, 1986) ("After a respondent answers . . . [w]e simply proceed to rule on the petition."); *see also Purdy v. Bennett*, 214 F. Supp.2d 348, 352-353 (S.D.N.Y. 2002) (holding that under Habeas Rule 4 a district court may grant leave to file a motion to dismiss).

[9] *See, e.g., Preiser v. Rodriguez*, 411 U.S. 475, 495 (1973) ("[T]he federal habeas statute provides for a swift, flexible, and summary determination of his claim."); *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968) (The "province [of habeas corpus jurisdiction], shaped to guarantee the most fundamental of all rights, is to provide an effective and speedy instrument by which judicial inquiry may be had into the legality of the detention of a person."); *Stack v. Boyle*, 342 U.S. 1, 4 (1952) ("Relief in this type of case must be speedy if it is to be effective.").

Congress directed that the government must ordinarily file a response to a habeas petition within three days. *See* 28 U.S.C. § 2243. Yet, almost three years after petitioners have been imprisoned, and two and a half years after petitioners filed their petition, the government has yet to offer any justification for the detentions.

The government's motion is also in direct violation of the Federal Civil Rules of Procedure.[10] Under Fed. R. Civ. P. 12(g), a party must consolidate all motions to dismiss in a single pre-answer motion and may not file successive pre-answer motions to dismiss. More than two years ago, the government filed a pre-answer motion, in which it moved to dismiss this action for lack of jurisdiction. That motion has been denied. The government has no right to delay these proceedings further by filing another pre-answer motion to dismiss. As with Rule 5 of the Habeas Rules, Rule 12 of the Civil Rules was adopted to prevent exactly the sort of delay the government clearly seeks here. *See* Wright, Miller, et al., Federal Practice & Procedure § 1384 ("Rule 12 was drafted by the Advisory Committee to prevent the dilatory motion practice fostered by common law procedure and many of the codes under which numerous pretrial motions could be made, many of them in sequence—a course of conduct that was pursued often for the sole purpose of delay.").[11]

[10] Under Fed. R. Civ. P. 81(a), the Civil Rules apply to habeas proceedings to the extent not inconsistent with the habeas statute.

[11] Under Fed. R. Civ. P. 12(h)(2), the government has not waived the alleged failure to state a claim as a defense, but it may not file a second pre-answer motion to dismiss on that basis. *See* Wright, Miller, et al., Federal Practice & Procedure § 1392 ("[I]f a party makes a preliminary motion under Rule 12 and fails to include one of the Rule 12(h)(2) objections, she has not waived it, even though, under Rule 12(g), the party may not assert the defense by a second pre-answer motion.").

In short, the government's "response" is no response at all.[12] It violates this Court's order, the Supreme Court's express instructions in this case, and the federal rules governing both habeas and civil actions.[13]

II. THE SUPREME COURT HAS ALREADY REJECTED THE GOVERNMENT'S ARGUMENT THAT PETITIONERS LACK RIGHTS COGNIZABLE THROUGH HABEAS

Even if the government's motion to dismiss were proper and an appropriate response to petitioners' claims, which it clearly is not, that motion must be denied because it merely rehashes arguments already rejected by the Supreme Court. The government makes in essence two arguments. First, it argues that the President's constitutional war powers include a grant of plenary authority to detain "enemy combatants," to determine the scope of that category, to concoct whatever process he sees fit for determining who falls within that category, and to apply that process entirely free of judicial constraints, while the courts have little or no authority to review the President's decisions regarding enemy combatants. *See* Gov't Mot. 6-19. Second, the government argues that, regardless of whether petitioners are innocent and no matter how the government treats them, petitioners have no rights under the Constitution, treaties, or laws of the

---

[12] For these reasons, petitioners are filing a separate motion to strike the government's improperly filed motion to dismiss.

[13] Separate from its purported "response" to the petitions, the government has submitted "factual returns" for a number of petitioners, which purport to provide a factual basis for the government's designation of petitioners as "enemy combatants." Although the government's "response" to the petitions is improper and inadequate because it seeks to dismiss plaintiffs' claims without reaching their merits, the factual returns at least address (in some limited measure) the basis for plaintiffs' detention. Plaintiffs submit that the proper focus of the habeas proceeding should be on the adequacy of those factual returns. At present, plaintiffs note that the evidence purportedly supporting the factual returns cannot support petitioners' detention as that evidence is based exclusively on the Combatant Status Review Tribunals ("CSRTs"), discussed below, which were established by the government almost three years after detaining petititioners and which, inter alia, prevent detainees from confronting the evidence against them, do not allow the detainees legal representation, are not heard by impartial decisionmakers, and which allow the introduction of confessions that result from physical coercion. In any event, once the obstacles the government has established to prevent petitioners' counsel from discovering the facts are

United States that could be vindicated through a petition for habeas corpus, or otherwise, because petitioners are aliens detained at Guantanamo, an area outside the sovereign territory of the United States. *See id.* at 19-75. These are precisely the arguments the government made—and lost—before the Supreme Court.

A. The Supreme Court Made Clear That This Court Has the Authority in Wartime as Well as in Times of Peace to Determine the Legality of the Executive's Detention of Individuals Who Claim to Be Wholly Innocent of Wrongdoing

The government asks this Court to dismiss, arguing that judicial review of petitioners' claim that they are innocent civilians would constitute "an unprecedented judicial intervention into the conduct of war operations," *id.* at 1, that "any role that the courts have in reviewing the substantive bases for the Commander in Chief's exercise of this authority to determine the combatant status of detainees is extremely circumscribed," *id.* at 7, and "with respect to certain issues presented, would be proscribed altogether," *id.* at 8. These are the same arguments the government made in the Supreme Court, in which it asserted that "[e]xercising jurisdiction over habeas actions filed on behalf of the Guantanamo detainees would directly interfere with the Executive conduct of the military campaign against al Qaeda and its supporters." Brief for Respondents in *Rasul v. Bush*, S. Ct. Nos. 03-334 and 03-343, at 42.

The Supreme Court rejected those arguments, unpersuaded by the government's apocalyptic vision of the harms that would result from judicial review of the legality of the detentions at Guantanamo. Instead, the Supreme Court "recognized the federal courts' power to review applications for habeas relief in a wide variety of cases involving Executive detention, in wartime as well as in times of peace." 124 S. Ct. at 2692-2693.

---

resolved, such as the government's attempt to monitor petitioners' communications with counsel, petitioners will respond to the factual returns in an appropriate manner.

In doing so, the Supreme Court reaffirmed that our Constitution, drafted with a great war fresh in mind, was not written to exempt executive action from court oversight in times of crisis. As Chief Judge Cranch explained almost two hundred years ago:

> [W]hen the public mind is agitated, when wars, and rumors of wars, plots, conspiracies and treasons excite or alarm, it is the duty of a court to be peculiarly watchful. . . . The Constitution was made for times of commotion. In the calm of peace and prosperity, there is seldom great injustice. Dangerous precedents occur in dangerous times. It then becomes the duty of the judiciary calmly to poise the scales of justice, unmoved by the arm of power, undistributed by the clamor of the multitude.[14]

The Supreme Court has consistently followed that principle, emphasizing that "even the war power does not remove constitutional limitations safeguarding essential liberties."[15] Individual liberties remain fully protected in wartime because "[i]t would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile."[16] Accordingly, the war power, like all other constitutional powers cannot be exercised in derogation of other constitutional provisions, and "the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of . . power which can be brought within its ambit."[17] Even if the indefinite imprisonment of

---

[14] *United States v. Bollman*, 24 F. Cas. 1189, 1192 (C.C.D.C. 1807) (Cranch, C.J., dissenting).

[15] *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934); *see also Ex parte Milligan*, 71 U.S. 2, 121 (1866) ("No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of [the Constitution's] provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism.").

[16] *United States v. Robel*, 389 U.S. 258, 264 (1967).

[17] *Id.* at 263. Throughout our nation's history the Executive has argued, as the government again argues here, that the exercise of war powers is subject to little or no judicial scrutiny, and the Court has consistently rejected those arguments. The Supreme Court has thus held that principles of separation of powers do not give the executive unreviewable authority to punish desertion by soldiers on the field of battle, *Trop v. Dulles*, 356 U.S. 86 (1958); to maintain steel production during wartime, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); to punish acts of sabotage by alien enemies, *Ex parte Quirin*, 317 U.S. 1 (1942); to seize enemy property, *Brown v. United States*, 12 U.S. (8 Cranch) 110

petitioners, far from the battlefield, may properly be characterized as an exercise of the President's war powers, an assertion this Court need not address, the exercise of that power is plainly subject to searching judicial review, as the Supreme Court has long held that "[w]hat are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions."[18]

This Court need not resolve the question of the appropriate standard of review in order to deny the government's motion. As the Supreme Court has now unequivocally held, petitioners "unquestionably" have alleged that they are in custody "in violation of the Constitution or law or treaties of the United States," 124 S. Ct. at 2698 n.15. After almost three years in prison without judicial review, it is time for this Court to proceed to a factual review of petitioners' allegations.

B. The Supreme Court Expressly Held That These Petitioners Have "Unquestionably" Stated a Claim Under the Habeas Statute for Violation of the Constitution or Laws or Treaties of the United States.

The government spends the next 56 pages of its motion to dismiss arguing that, although the Supreme Court may have decided that the federal courts have jurisdiction to consider petitioner's claims, because petitioners are aliens held outside the United States, they have no cognizable rights under the Constitution, laws or treaties of the United States, and their claims must therefore be dismissed. These, again, are exactly the arguments the government made to the Supreme Court.[19]

(1814); to annex territory seized by military conquest, *Fleming v. Page*, 50 U.S. (9 How.) 603 (1850); to impose internments on resident aliens and U.S. citizens, *Korematsu v. United States*, 323 U.S. 214 (1944); to exercise court martial authority over former servicemen, *Toth v. Quarles*, 350 U.S. 11 (1955); and to impose punishment on military dependants abroad, *Reid v. Covert*, 354 U.S 1 (1957); to declare martial law and try civilians, *Ex parte Milligan*, 71 U.S. 2 (1866).

[18] *Sterling v. Constantin*, 287 U.S. 378, 401 (1932).

[19] *See* Brief for Respondents in *Rasul v. Bush*, S. Ct. Nos. 03-0334 and 03-343 ("Respondents' S. Ct. Br.") at 19-20, 26, 34-36, 38-40.

All the rhetoric, strained logic and rehashing of old arguments with which the government regales this Court for 56 pages are answered by a single sentence in the Supreme Court's opinion:

> Petitioners' allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—*unquestionably describe "custody in violation of the Constitution or laws or treaties of the United States.*"

Rasul, 124 S. Ct. at 2698 n.15 (quoting 28 U. S. C. §2241(c)(3)) (emphasis added).

In that one sentence, the Supreme Court made clear that *the petitioners in this case* have stated a claim for relief that must be considered on the merits. That statement ends the analysis. The Supreme Court has decided the issue.

The government argues that it may disregard that statement by the Supreme Court because it is mere dictum. There are two answers to that:

First, it is not dictum. The government had argued that the petitioners have no cognizable rights under the Constitution or laws or treaties of the United States as a basis for its argument that the federal courts had no jurisdiction.[20] The Supreme Court's statement in

---

[20] *See* Respondents' S. Ct. Br. at 19-20, 26-34-36, 38-40. In attempting to argue that *Rasul* addresses only a technical question of jurisdiction unrelated to petitioners' ability to state cognizable claims, the government expresses a fundamental misunderstanding of the nature of habeas jurisdiction. Under 28 U.S.C. § 2241(c)(3), federal courts have jurisdiction to consider a habeas claim only if the petitioner alleges a violation—that "[h]e is in custody in violation of the Constitution or laws or treaties of the United States." It is well-recognized that the requirement that a habeas petitioner properly allege that he is held in custody in violation of the Constitution, laws, or treaties of the United States is a matter of subject matter jurisdiction under Section 2241(c)(3). *See, e.g., Maleng v. Cook*, 490 U.S. 488, 490 ("The federal habeas statute gives the United States district court jurisdiction to entertain petitions for habeas relief only from persons who are 'in custody in violation of the Constitution or laws or treaties of the United States.'"); *Latu v. Ashcroft*, 375 F.3d 1012, 1019 (10th Cir. 2004) (holding that because petitioner "cannot allege a constitutional or legal right . . . [h]e therefore cannot satisfy the requirement of stating that he is being held in violation of the federal laws or Constitution . . ., and the district court had no jurisdiction to review his claim.") (collecting cases); *Cain v. Petrovsky*, 798 F.2d 1194, 1195 (8th Cir.

footnote 15 of its opinion, that petitioners' allegations "unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States,'" was a necessary response to that argument. In rejecting the government's argument, the Supreme Court held that jurisdiction exists and that petitioners' allegations, if established, would entitle them to habeas relief. They have "unquestionably" stated a claim.

Second, even if the statement in footnote 15 of the Supreme Court's opinion were dictum—as the government argued *ad nauseam* below regarding *Eisentrager*—it is "firm and considered dicta that binds this court." *See Al Odah v. United States*, 321 F.3d 1134, 1141 (D.C. Cir. 2003) (quoting *Harbury v. Deutch*, 233 F.3d 596, 604 (D.C.Cir.2000)). The Supreme Court spoke directly to the issue – and it did so, because the government asked it to. The government's disregard of that clear and well-considered statement shows utter disregard for the Supreme Court of the United States.[21]

1986) ("This Court does not have jurisdiction under 28 U.S.C. § 2241 or any other statute to issue a writ of habeas corpus for violation of state law."); *see generally* 1 Randy Hertz and James S. Liebman, Federal Habeas Corpus Practice and Procedure §§ 8.1, 9.1-9.2 (2001).

[21] This Court need not consider the arguments that the government seeks to relitigate, as those arguments were rejected by the Supreme Court, and for good reason. For instance, as it argued below, the government makes the irrelevant argument that petitioners have failed to state a claim under international law. *See* Gov't Mot. at 67-72. Petitioners, however, did not bring any claims under international law. Instead, petitioners brought a claim under 28 U.S.C. § 2241(c)(3), which provides a cause of action to anyone detained by the United States "in violation of . . . treaties." The Third Geneva Convention, ratified by the United States nearly 50 years ago, is indisputably a treaty and therefore the supreme law of the land, which a U.S. court may employ as a rule of decision to determine petitioners' rights on a habeas petition. The government's argument that the Geneva Convention is not self-executing is entirely wide of the mark because Section 2241(c)(3) unequivocally establishes petitioners' cause of action for detention in violation of "treaties" of the United States. To construe that provision as the government suggests would read out of the plain language of Section 2241(c)(3) the protections afforded by Congress in ratifying the Geneva Convention. In any event, Article 5 of the Geneva Convention, upon which petitioners principally rely, is self-executing because "no domestic legislation is required to give the Convention the force of law in the United States." *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984). In enacting the Geneva Convention, the Senate carefully determined which provisions required implementing legislation and concluded that Article 5 did not. *See* S. Rep. No. 84-9, at 30 (1955); *see generally* Amicus Curiae Brief of Experts on the Law of War, filed in *Hamdi v. Rumsfeld*, S. Ct. No. 03-0696, at 16-20.

C. The Supreme Court Made Clear that Guantanamo Is Not Outside the Protection of U.S. Law

Incredibly, the government argues once again that, because it has chosen to imprison the petitioners at Guantanamo, they have no cognizable rights under the Constitution, laws or treaties of the United States, and they therefore cannot pursue habeas or other claims in the U.S. courts, regardless of whether they are innocent civilians and regardless of whether the government has tortured them or otherwise acted outside the constraints governing civilized nations. *See* Gov't. Br. 19-30. Relying once again on *Johnson v. Eisentrager* and its progeny, the government contends that constitutional rights may be asserted only by aliens held in territories "over which the United States is sovereign" or over which the U.S. courts exercise "territorial jurisdiction."[22] Because Cuba retains "ultimate" and technical sovereignty over Guantanamo under a 1903 lease agreement, the government contends that the aliens it chooses to hold there can assert no constitutional or other rights in the federal courts.

The government continues to argue that this Court lacks jurisdiction over petitioners' claims under the Alien Tort Statute. *See* Gov't Mot. at 54-65. *Rasul*, however, expressly holds that this Court has jurisdiction over those claims. *See* 124 S. Ct. at 2698-2699. The government further argues that this Court should refrain from adjudicating petitioners' claims under the Alien Tort Statute because it would interfere with the government's conduct of foreign policy. *Id*. at 65-72. This argument should carry no weight in light of *Rasul*'s holding that the courts have an obligation to adjudicate petitioners' claims in times of war as in times of peace. 124 S. Ct. at 2692-2693.

The government further maintains that petitioners cannot challenge the government's failure to comply with Army Regulation 190-8. *See* Gov't Mot. at 72-75. Of course, *Rasul* holds that this Court has federal question jurisdiction under 28 U.S.C. § 1331 to consider petitioners' claims under the Administrative Procedure Act. The APA, in turn, establishes that judicial review is available to "any person suffering legal wrong because of agency action." 5 U.S.C. § 702. Such "legal wrong" undoubtedly may include the failure to comply with regulations, such as Army Regulation 190-8. *See* Brief for Petitioners, *Al Odah v. United States*, S. Ct. Nos. 03-334 and 03-343, at 13-15, 21-23.

[22] Gov't. Br. at 21, citing *Johnson v. Eisentrager,* 339 U.S. at 778.

This, of course, was the principal argument advanced by the government below,[23] and it was squarely rejected by the Supreme Court of the United States. Whatever validity *Eisentrager* and its progeny may have elsewhere, the Supreme Court made clear that they have no applicability to these petitioners held at Guantanamo Bay.

The government justifies its continued reliance on *Eisentrager* by contending that the Supreme Court in this case overturned only the statutory predicate of that decision but not its constitutional holding. The government is correct that the Supreme Court in this case did find that the statutory predicate of *Eisentrager* had been overruled. But the Court went further. It found that the factual bases for the entire *Eisentrager* decision, including its constitutional holding, are inapplicable to the present case. As the Court explained, *Eisentrager's* holding that the petitioners in that case did not have a constitutional entitlement to habeas corpus was based on a number of key facts: the petitioners there were admitted enemy aliens, captured outside the United States, were tried and convicted of war crimes by a military commission outside the United States, and at all times were imprisoned outside the United States. *See Eisentrager*, 339 U.S. at 777. In *Rasul*, the Supreme Court examined what it characterized as *Eisentrager*'s "constitutional" holding — not merely, as the government asserts, the statutory basis for the decision—and concluded that the reasons for that holding do not apply to the these petitioners at Guantanamo:

> Petitioners in these cases differ from the *Eisentrager* detainees in important respects: They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.

---

[23] *See* Respondents' S. Ct. Br., *e.g.*, at 19-20, 26.

124 S. Ct. at 2693. Accordingly, *Rasul* holds that petitioners in this case are in a fundamentally different position from the petitioners in *Eisentrager* and, as a result, the factors that led the *Eisentrager* Court to conclude that the petitioners in that case had established no constitutional right to habeas are not present here. *Id.*

With respect to Guantanamo, the Supreme Court expressly rejected the government's assertion, repeated here, that notions of technical sovereignty place Guantanamo beyond the reach of U.S. law. As the Court stated:

> Whatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application to the operation of the habeas statute with respect to persons detained within "the territorial jurisdiction" of the United States …. By the express terms of its agreement with Cuba, the United States exercises "complete jurisdiction and control" over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses.

124 S. Ct. at 2696.

Justice Kennedy addressed the issue in some depth in his concurring opinion:

> Guantanamo Bay is in every practical respect a United States territory…. [The] Lease [with Cuba] is no ordinary lease. Its term is indefinite and at the discretion of the United States. What matters is the unchallenged and indefinite control that the United States has long exercised over Guantanamo Bay. From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the "implied protection" of the United States to it.

124 S. Ct. at 2700. Indeed, as Justice Souter noted during oral argument, even the iguanas at Guantanamo are protected by U.S. law. *See Rasul v. Bush*, Nos. 03-334 & 03-343, Apr. 20, 2004, Oral Argument Tr. at 52. The human prisoners there are entitled to at least as much.

All the arguments the government makes that aliens outside the United States are not entitled to the protections of the Constitution, laws, or treaties of the United States – whatever

validity they might have elsewhere – have no applicability to these petitioners held at Guantanamo. The Supreme Court made clear that these petitioners, held in a place that "is in every practical respect a United States territory," are entitled to the protections of American law.

D. Petitioners' Right to Habeas Relief Does Not Depend on Violations of the Constitution, Laws, or Treaties of the Untied States

The government has missed another fundamental point about the writ of habeas corpus and the Supreme Court's holding in this case. The petitioners' habeas claims do not require them to establish that their imprisonment violates the Constitution or laws or treaties of the United States. See Gov't Mot. at 19-75. Rather, because they are clearly "in custody under or by color of the authority of the United States," the government must come forward and demonstrate that it has deprived them of their liberty in accordance with law.

It is true that one provision of the habeas statute—Section 2241(c)(3)—authorizes the federal courts to issue writs of habeas corpus to prisoners held "in violation of the Constitution, or laws or treaties of the Untied States." That provision was enacted in 1867. As discussed above, the Supreme Court has expressly held that petitioners have stated claims under that provision. But the original habeas provision found in Section 2241(c)(1) authorizes the federal courts to issue the writ of habeas corpus to any prisoner "in custody, under or by color of the authority of the United States…." That provision was enacted in 1789 as Section 14 of the First Judiciary Act, prior to the adoption of the Bill of Rights. As the Supreme Court emphasized in *Rasul*, the protection embodied in that provision is not only antecedent to the Bill of Rights but "antecedent to statute… throwing its root deep into the genius of our common law. . . . . [It] became an 'integral part of our common-law heritage' by the time the colonies achieved independence . . . and received explicit recognition in the Constitution . . . ." 124 S. Ct. at 2692 (internal citation omitted).

Section 2241(c)(1) embodies the fundamental safeguard developed under the common law for the protection of individual liberty. It was developed to preserve the basic protections guaranteed in the Magna Carta, that no man shall be imprisoned "save by the judgment of his peers or by the law of the land." *Id.* (quoting *Shaughnessy v. United States* ex. *rel. Mezei*, 345 U.S. 296, 218-19 (1953) (Jackson, J., dissenting)).

The standard of legality embodied in Section 2241(c)(1) does not depend on establishing a violation of the Constitution, and the subsequent adoption of the Constitution by the states certainly did not diminish that basic protection of human liberty. That provision requires now, as it has in the past, for the government to come forward and justify the legality of the detentions. For almost three years now, it has dodged this basic obligation. No further delay should be tolerated.

III. THE SECRET TRIBUNALS ESTABLISHED BY THE GOVERNMENT PROVIDE NEITHER JUSTIFICATION FOR THE DETENTIONS NOR A BASIS FOR DENYING PETITIONERS THEIR RIGHT TO JUDICIAL REVIEW

The government argues in the alternative that, even if petitioners are protected by due process or any other legal protections, they have already received more than the law requires through the procedures of the "Combatant Status Review Tribunals" or "CSRTs."[24] *See* Gov't Mot. 31-42. The government's reliance on its creation of the CSRTs to supplant review by this Court is meritless.

The government undoubtedly adopted the CSRT procedures in the hope that it might preclude judicial review of petitioners' allegations. Yet the CSRTs provide no basis for this Court to abjure its obligation of examining petitioners' allegation that they are innocent civilians

[24] The government's plan to conduct the CSRTs was announced on July 7, 2004, more than two and a half years after petitioners were imprisoned, in an order issued by Deputy Secretary of Defense Paul Wolfowitz. *See* Order Establishing Combatant Status Review Tribunal (July 7, 2004) ("Wolfowitz Order").

detained by mistake. It is important to note that the government does not attempt to support its assertion that petitioners are enemy combatants based on any determinations made by the CSRTs, as the government does not cite to any determinations by the CSRTs or any evidence presented at the CSRTs. Indeed, there is no evidence that the CSRT procedures have even been applied to all of the petitioners. Rather than relying on the CSRTs to establish that petitioners are enemy combatants, the government points only to the paper procedures it established for the CSRTs in the hope that these procedures would negate the need for this Court to review petitioners' status. No discovery has proceeded in this case, and the government has produced no evidence that the procedures it established for the CSRTs have been followed. These procedures cannot possibly supplant the searching review this Court is required to provide, and the Court need not give these procedures substantial consideration.

The government attempts to justify the CSRTs by arguing that they are modeled on the tribunal procedures accorded prisoners of war by Article 5 of the Geneva Convention, about which a plurality of the Court in *Hamdi* stated that there was a "possibility" that due process could be satisfied "by an appropriately authorized and properly constituted military tribunal." *See* Gov't Mot. at 32 (quoting *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2651 (2004)). Of course, an equal number of Justices in *Hamdi* disagreed with that conclusion. *See* 124 S. Ct. at 2660 (Souter and Ginsburg, JJ., concurring in part and dissenting in part); *id.*at 2672 (Scalia and Stevens, JJ., dissenting). In any event, the CSRT procedures differ from the Article 5 tribunals in a fundamental way—Article 5 tribunals are intended to be implemented on the spot or as soon as practicable in order to determine the detainees' status in the first instance. *See* Army Regulation 190-8 (implementing Article 5). That is how the United States has applied Article 5 in every war and military conflict since World War II. The Article 5 tribunals are not intended,

as here, to be implemented almost three years after the detainees have been seized and years after the government has adopted as its official position that the detainees are enemy combatants who may be detained indefinitely.

The CSRT procedures are inadequate on their face. The government seeks to establish that the CSRT procedures satisfy the due process standards articulated by the *Hamdi* plurality. *See* Gov't Mot. 31. In *Hamdi*, a plurality of the Court declared that enemy combatants must be given a "fair opportunity to rebut the government's factual assertions before a neutral decision maker." 124 S. Ct. at 2648; *see also, e.g., Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 617 (1993) ("[D]ue process requires a 'neutral and detached judge in the first instance.'") (quoting *Ward v. Monroeville*, 409 U.S. 57, 61-62 (1972)). *Hamdi* also recognized that the petitioner in that case had been accorded "unmonitored" access to his counsel and "unquestionably has the right to access to counsel in connection with the proceedings on remand." 124 S. Ct. at 2652. The CSRT procedures do not remotely satisfy the standards articulated in *Hamdi* because they do not provide a "neutral decision maker," do not give the petitioners a "fair opportunity" to rebut the government's allegations, and do not involve representation by counsel.

A. The CSRTs Do Not Involve an Impartial Decision Maker

The government has acknowledged that the purpose of the CSRTs is *not* to provide an impartial determination of whether petitioners are enemy combatants but to *confirm* the government's longstanding conclusion that petitioners are enemy combatants. As the order establishing the CSRTs declares: "Each detainee subject to this Order has been determined to be an enemy combatant through multiple levels of review by officers of the Department of Defense." Order Establishing Combatant Status Review Tribunal (July 7, 2004) ("Wolfowitz Order") ¶ (a).

Moreover, for almost three years, Executive officials at the highest levels, including Secretary of Defense Rumsfeld, have repeatedly declared it to be the official position of the United States that the detainees are enemy combatants.[25] The CSRT procedures provide for the appointment of low-ranking military officials with the task of confirming the longstanding public determinations of their superiors. *See* Wolfowitz Order ¶ e. To find that a detainee is not an enemy combatant would require these low-ranking officers to conclude that Secretary Rumsfeld and President Bush are wrong. That is not an easy or likely thing for junior officers to do.

Because the Department of Defense has long maintained that the detainees are enemy combatants, review of petitioners' status by low-ranking officers within that agency cannot conceivably be characterized as an impartial review. Moreover, final review of the decisions of the CSRT process is retained by the Secretary of Defense, who has already prejudged the outcomes.[26]

B. The CSRTs Do Not Afford Petitioners a "Fair Opportunity" to Rebut the Government's Allegations

The deficiencies of the CSRT procedures are numerous. They include:

1. The CSRT procedures allow the detainees to be confirmed as enemy combatants based on secret evidence unknown to the detainees. The Wolfowitz Order provides that the detainees may be barred from attending the hearings if, in the unreviewable judgment of military

---

[25] *See* Brief for Respondents in *Rasul v. Bush*, S. Ct. Nos. 03-334 and 03-343, at 4-7; *see also, e.g.*, Linda D. Kozaryn, *U.S Gains Custody of More Detainees*, American Forces Information Service (Jan. 28, 2002).

[26] *Cf. Gibson v. Berryhill*, 411 U.S. 564, 577 (1973) (where a state board "was incompetent by reason of bias to adjudicate the issues before it . . . [the district court] need not defer to the Board"); *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970) (administrative hearings "must be attended, not only with every element of fairness but with the very appearance of complete fairness" and as a result "[t]he test for disqualification . . . is whether a disinterested observer may conclude that the agency has in some measure adjudged the facts as well as the law in advance of hearing it").

officials, their presence would "compromise national security." Wolfowitz Order ¶ (g)(4). Detainees are only allowed to see and confront unclassified information, which may preclude the detainees from knowing such information as basis of their designation or the identity of their accusers. Accordingly, petitioners may be detained indefinitely without any opportunity to confront the witnesses and evidence against them, let alone the "fair opportunity to rebut the government's factual assertions" required by *Hamdi*. *See Jenkins v. McKeithen*, 395 U.S. 411, 428 (1969) ("We have frequently emphasized that the right to confront and cross-examine witnesses is a fundamental aspect of procedural due process.").

2. The CSRT procedures provide little or no opportunity for the detainees to present evidence or call witnesses. The Wolfowitz Order provides that the detainees are allowed to call witnesses only if the government concludes, in its unreviewable discretion, that the witnesses are "reasonably available." Wolfowitz Order ¶ (g)(8). The detainees are not allowed to call U.S. military personnel if that would, in the unreviewable judgment of the government, "affect combat or support operations." *Id.* The Wolfowitz Order provides no mechanism by which the detainees may gather any evidence not provided to them by the government.

3. The CSRT procedures employ an overly expansive definition of "enemy combatant."[27] In *Hamdi*, the Supreme Court confirmed that the government has authority to detain "an individual who . . . was part of or supporting forces hostile to the United States . . .

[27] The term "enemy combatant" was not known to domestic or foreign law until the litigation of these habeas corpus petitions and thus carries with it no generally accepted definition nor prior jurisprudence. Certainly, the term has no basis in the criminal or civil laws of the United States. Additionally, Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, which "implements international law, both customary and codified", including the Geneva Conventions, makes no mention of the term. The regulation is available at www.nimj.com/POW_AR_190-8.pdf. In fact, the categories of persons recognized under international law, as implemented by that regulation, are limited to those named in its title.

and who engaged in an armed conflict against the United States." 124 S. Ct. at 2639. In the Wolfowitz Order, the government now takes the position that it can detain any person who "was part of or supporting Taliban or al Qaeda forces, or associated forces," even persons who never engaged in armed conflict against the United States. *See* Wolfowitz Order ¶ (a). Thus, under the government's expansive definition of "enemy combatant," the government may indefinitely detain an individual who never engaged in combat in any sense. Instead, anyone who "supported" the Taliban or associated forces, even in a minor role unrelated to combat—including cooks, secretaries, taxi drivers, school teachers, and nurses—may be indefinitely detained by the United States as enemy combatants, even if they never took up arms against the United States or supported international terrorism, and even if they were coerced against their will into serving the Taliban. This definition greatly exceeds the category of belligerents who may be detained under *Hamdi* or under international law. It also conflicts with the Supreme Court's longstanding conclusion that due process does not allow imprisonment or detention based merely on membership in an anti-American organization but instead requires proof that the individual actively supported the use of violence against the United States. *See, e.g.*, *Scales v. United States*, 367 U.S. 203, 224-225 (1961); *Carlson v. Landon*, 342 U.S. 524, 541 (1952) (holding that detention of aliens could be justified only upon "evidence of membership [in the Communist Party] *plus personal activity* in supporting and extending the Party's philosophy concerning violence") (emphasis added).

4. The CSRT procedures establish a presumption of guilt. In addition to declaring that the detainees have already been determined to be enemy combatants, the CSRT procedures provide that it is the detainees' obligation to rebut the presumption in favor of the government's evidence. Wolfowitz Order ¶ (g)(12). Even if such a presumption were acceptable, the CSRT

procedures do not provide the detainees the ability to confront all the evidence against them or to present witnesses and evidence to rebut the presumption against them.

C. The CSRT Procedures Bar Participation by Detainees' Counsel

Hamdi declares that the petitioner in that case "unquestionably has the right to access to counsel in connection with the proceedings on remand," 124 S. Ct. at 2652, and *Rasul* makes clear that this ruling applies equally to the Guantanamo detainees, because they, "no less than American citizens, are entitled to invoke the federal court's authority." 124 S. Ct. at 2696. Rather than allowing the petitioners to choose counsel to assist them in the CSRT process, counsel are barred from participating in the CSRTs. Under the CSRT procedures, the military instead designates a "personal representative" purportedly to assist the detainees. The personal representatives are not lawyers and need not have any training or familiarity with the legal protections accorded to detained persons or knowledge of the law governing who lawfully may be detained during wartime. Moreover, the personal representatives do not establish a confidential relationship with the detainees and instead remain free to communicate to the CSRTs or any other military officials information they glean from the detainees.

D. As Applied, the CSRT Procedures Make a Mockery of Due Process

Confirming that the CSRTs are show trials, the government has permitted the press—but not detainees' counsel—to attend the proceedings. As a result, and in the absence of discovery, petitioners' counsel must rely on press accounts regarding the CSRTs. According to published reports, the primary evidence used by the government to establish the detainees' status comes from the detainees' forced interrogations at Guantanamo. As discussed above, approved interrogation techniques at Guantanamo include isolation for up to 30 days, 28-hour interrogations, extreme and prolonged stress positions, sleep deprivation, sensory assaults such as extreme cold, removal of clothing, hooding, and the use of dogs to create anxiety just short of

terror. Such interrogations may involve shackling the detainees to the floor for up to 14 hours, while flashing strobe lights in their faces, and playing music at extremely high volumes. Introduction of evidence derived from such interrogations alone renders the CSRT proceedings well outside the bounds of due process.

Press reports also indicate that detainees have routinely been precluded from being informed of the evidence against them. *See* Kathleen T. Rhem, American Forces Press Service, *Reporters Offered Look Inside Combatant Status Review Tribunals* (Aug. 29, 2004). For instance, at one hearing, a Saudi prisoner attempted to deny the government's allegation he had been at a certain al Qaeda training facility by asking who had made the allegation, but the CSRT panel said the information was classified and could not be shared with him. *See A Question of Status*, New York Times (Aug. 29, 2004).

Published reports also indicate that the government has concluded that detainees are not entitled to present evidence that their connection with the Taliban was insubstantial or that they were forced to work for the Taliban. For instance, according to an Associated Press report, an Afghani detainee claimed that he was forced to work for the Taliban as a cook, and he sought to call four witnesses to confirm that claim. The presiding CSRT officer denied the request, declaring: "Whether or not the detainee was forced to join the Taliban, or in what role they served in the Taliban, is not relevant." Stevenson Jacobs, *Guantanamo: Prisoner Says Taliban Forced Him to Cook*, Associated Press (Aug. 12, 2004). Another witness sought to call witnesses to support his claim that Taliban "came to my house and took me by force. I joined the Taliban by force, not by my own choice," the detainee said, through an interpreter. "Everybody in Afghanistan knows that if the government asks you, you can't say no." The CSRT panel denied the detainee's request to call witnesses, concluding that how or why a detainee joined the

Taliban is irrelevant. *See* Kathleen T. Rhem, American Forces Press Service, *Reporters Offered Look Inside Combatant Status Review Tribunals* (Aug. 29, 2004).

In sum, the CSRT procedures provide absolutely no basis for this Court to rule that petitioners have been given their due process or that petitioners' rights have been satisfied.

CONCLUSION

For almost three years now, this government has treated the law as an impediment to be avoided in its war on terrorism. Paying substantial financial bounties, it captured hundreds and hundreds of men – many of them admittedly wholly innocent – and whisked them to Guantanamo in an attempt to avoid any legal constraint on its actions. And, relying on the most strained legal reasoning that would have embarrassed the dullest first-year law student, it concluded that it could ignore its obligations under the Geneva Conventions and the Convention Against Torture, as well as our Constitution and federal law. Free from the constraints of law, it is now clear that the government subjected its prisoners to types of abusive treatment that have left a stain on the honor of our nation.

On June 28, the Supreme Court spoke and ruled that the government is answerable to the law and that these petitioners in this action have stated a claim for relief and must have their day in court. The government is now applying the same strained reasoning and pettifogging analyses to disregard the order of the Supreme Court. In doing so, the government has exceeded the bounds of legitimate advocacy.

The government has violated this Court's order, the mandate of the Supreme Court, and the federal rules by filing this motion to dismiss. And it has simply regurgitated in that motion the same arguments that it made before and that, after two years of litigation, were emphatically

rejected by the Supreme Court. The government's obvious attempts to delay and stonewall should no longer be tolerated by this Court.

Respectfully submitted,

/s/ Thomas B. Wilner
Thomas B. Wilner (D.C. Bar #173807)
Neil H. Koslowe (D.C. Bar #361792)
Kristine A. Huskey (D.C. Bar #462979)
Jared A. Goldstein (D.C. Bar #478572)
SHEARMAN & STERLING LLP
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 508-8000
Facsimile: (202) 508-8100
Attorneys for Al Odah Petitioners

Dated: October 20, 2004