IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

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

The Al Odah Petitioners' Reply to the Government's "Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss" continues their pattern of resorting to blistering rhetoric and angry bluster to cover up the gaping holes in their novel and unprecedented legal theories. In a brief that begins and ends not with legal argument but by parading the latest stories in the press (see Petrs' Mem. at 3-6, 27-29), the Al Odah Petitioners come nowhere close to tackling the many serious legal issues standing in the way of the relief they seek and raised by respondents' October 4, 2004 Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss ("Response"). In particular:

- Although they quarrel about the outer limits of the definition of "enemy combatant" and with the Government's proposed standard of judicial review, petitioners do not openly disagree with or challenge the fundamental proposition that the President's power to detain enemy combatants is constitutionally well-established and independently supported by congressional authorization. See Response at 6-19.

- Faced with multiple Supreme Court and D.C. Circuit cases squarely holding that alien enemies in circumstances like petitioners' do not enjoy rights under the U.S.

Constitution, see Response at 19-30, petitioners mainly take refuge in footnote 15 and other passing statements in Rasul v. Bush, 124 S. Ct. 2686 (2004), which, as respondents already have explained in detail, simply do not bear the weight petitioners place on them, see Response at 26-30.

- Although they lodge various criticisms of the Combatant Status Review Tribunals ("CSRTs"), petitioners do not even mention the governing case establishing the test "for balancing [] serious competing interests, and for determining the procedures that are necessary to ensure" due process, Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2646 (2004) (plurality opinion) (citing Mathews v. Eldridge, 424 U.S. 319 (1976)), let alone analyze the deficiencies they posit under some semblance of the Mathews framework. Instead, both ignoring Mathews and flying in the face of the statements of the Hamdi Plurality, petitioners appear to insist they are entitled to some form of process equating to a criminal trial.

- Petitioners relegate to a single footnote all of their alleged non-habeas claims, barely touching upon respondents' several layers of arguments as to why those claims afford no basis for relief. See Response at 53-75.

Petitioners' arguments are without merit and their petition should be dismissed for the reasons stated in the Response and herein.[1]

I. PETITIONERS STILL HAVE NOT ESTABLISHED THAT THEY POSSESS ANY CONSTITUTIONAL RIGHTS THAT THEY CAN ASSERT IN THIS PROCEEDING

In the Response, the Government explained at length that as aliens held outside the sovereign territory of the United States, petitioners have no cognizable constitutional rights. See Response at 19-30 (citing, inter alia, United States v. Verdugo-Urquidez, 494 U.S. 259 (1990), Johnson v. Eisentrager, 339 U.S. 763 (1950), and People's Mojahedin Org. of Iran v. Dep't of State, 182 F.3d 17 (D.C. Cir. 1999)). However, rather than come to grips with decades of

[1] The first section of petitioners' brief consists of arguments that the Response was procedurally improper and should be stricken. Petrs' Mem. at 7-11. Petitioners have repeated those arguments in a separately filed motion to strike (dkt. no. 122). Respondents are submitting an opposition to the motion to strike in which they address those issues, and will not address those issues in this brief.

Supreme Court jurisprudence repudiating the existence of the rights they seek to assert here, petitioners still do little more than invoke the Court's recent decision in Rasul addressing jurisdiction under 28 U.S.C. § 2441, as if that decision were a trump card allowing them conveniently to bypass all of the analytical flaws in their legal theories.

Petitioners rely primarily on footnote 15 of Rasul. In anticipation of this argument, the Government specifically addressed footnote 15 and explained in detail why it does not sub silentio overrule long-settled precedent and prejudge the merits of these cases, but instead merely conveys that the pleading requisites for jurisdiction had been met. See Response at 28-30. Yet the only rejoinder the petitioners can muster is one to an argument that the Response did not even make: they stress that footnote 15 is "not dictum" and even if it is, it is "firm and considered dicta." Petrs' Mem. at 15-16. Dictum or not, the statement in its context simply cannot be read to mean anything more than that the petitions were pleaded in a way that properly satisfied the jurisdictional prerequisites under 28 U.S.C. § 2241(c)(3), as the Government argued in the Response. Indeed, petitioners themselves appear to concede that "[i]t 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)." Petrs' Mem. at 15 n.20 (emphasis added). Of course, that petitioners allege their detention violates the Constitution does not make it so; it only brings those allegations potentially within the federal courts' jurisdiction. See Feres v. United States, 340 U.S. 135, 140-41 (1950) ("Jurisdiction is necessary to deny a claim on its merits as matter of law as much as to adjudge that liability exists . . . . [I]t remains for courts, in exercise of their jurisdiction, to determine whether any claim is recognizable in law.").

While they do not go so far as to contend that Rasul overruled Eisentrager's constitutional holding that enemy aliens at war with the United States do not enjoy Fifth Amendment rights, petitioners essentially argue that the instant case is factually distinguishable from Eisentrager. Petrs' Mem. at 17-20. They base this argument on two sentences of dictum in Rasul that posit four factual distinctions between the Eisentrager detainees and petitioners here.[2] Rasul, 124 S. Ct. at 2693. The Rasul Court stopped well short, however, of attributing outcome-determinative constitutional significance to those distinctions. Instead, the Court quickly proceeded to the statutory issue that formed the basis for its decision Id. at 2693-94. This brief detour from the only issue actually before the Rasul Court cannot reasonably be interpreted as a conclusive determination that "the factual bases for the entire Eisentrager decision, including its constitutional holding, are inapplicable to the present case." Petrs' Mem. at 18.

Indeed, there are compelling reasons why the four factual distinctions the Rasul Court paused to mention should not cause the enemy aliens here to be vested with constitutional rights that the Court held were not available to the enemy aliens in Eisentrager. At least one of the four distinctions has clearly been negated by subsequent events.[3] At least two of them do not

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[2] Statements "not essential to [the Court's] disposition of any of the issues contested" are "unquestionably dictum." Central Green Co. v. United States, 531 U.S. 425, 431 (2001). In Rasul, the Court's statutory holding based on 28 U.S.C. § 2241(c)(3) did not depend in any way on six facts noted from Eisentrager, which the Court stressed "were relevant only to the question of the prisoners' constitutional entitlement to habeas corpus," as opposed to their "statutory entitlement to habeas review." Rasul, 124 S. Ct. at 2693 (emphasis in original).

[3] See Rasul, 124 S. Ct. at 2693 ("they have never been afforded access to any tribunal"). As explained in the Response, the Government acted upon the guidance provided in Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2651 (2004) (plurality opinion), by instituting CSRTs to review the enemy combatant status of each detainee in the custody of the Defense Department. See Response at 31-33. As detailed below, see infra note 5, the CSRTs have been completed for eleven of the twelve Al Odah Petitioners.

correlate with any of the six facts that the Eisentrager Court enumerated and the Rasul Court characterized as having been "critical" in Eisentrager (although neither Eisentrager nor Rasul even implies that each of those six facts is indispensable prerequisites for the holding of Eisentrager to apply).[4] See Eisentrager, 339 U.S. at 777, cited in Rasul, 124 S. Ct. at 2693. Moreover, any suggestion that Eisentrager's constitutional holding owes its entire existence to the facts bound up in the four distinctions noted in Rasul (or, for that matter, the six facts noted originally in Eisentrager itself) simply cannot be squared with the decisions of the Supreme Court and the D.C. Circuit interpreting Eisentrager. For example, in United States v. Verdugo-Urquidez, 494 U.S. 259 (1990), the Court relied substantially on Eisentrager to support its holding that a Mexican national believed to be a leader of a drug smuggling organization – an individual who was not a national of a country at war with the United States and apparently did not admit that he had committed the acts of which he was accused – did not have Fourth Amendment rights. See id. at 269, 273-74. And in Pauling v. McElroy, 278 F.2d 252 (D.C. Cir. 1960), a case in which Japanese, French, German, Canadian, and British nationals at peacetime – litigants who do not meet any of the criteria emanating from the four noted distinctions –

[4] Whether the detainees are "nationals of countries at war with the United States" is not one of the listed "six critical facts" in Eisentrager. See Eisentrager, 339 U.S. at 777. Indeed, to treat this as a distinction of constitutional magnitude would be anomalous because it would place rogue terrorists who do not act at the behest of any State in a more favorable constitutional position compared to such nationals. Nor is whether the detainees "deny that they have engaged in" acts or plans of aggression one of the "six critical facts" in Eisentrager. Id. Indeed, nothing in Eisentrager suggests that the existence of a constitutional right for enemy aliens turns on what what admissions or denials the enemy alien happens to makes. In any event, the CSRT factual returns that are now part of the record demonstrate that at least eleven of the Al Odah Petitioners in fact either have admitted engaging in or have otherwise been found to have engaged in actions which place them within the definition of enemy combatant.

attempted to enjoin certain U.S. government nuclear tests, the D.C. Circuit cited Eisentrager for the proposition that "[t]he non-resident aliens here plainly cannot appeal to the protection of the Constitution or laws of the United States." Id. at 254 n.3. Eisentrager's progeny is thus clearly irreconcilable with the cramped reading that petitioners would give it. The constitutional holding in Eisentrager was left intact by Rasul and applies in this case.

The Rasul decision also did not prejudge the issue of whether the unique status of Guantanamo Bay justifies departing from the settled constitutional rule of Eisentrager and its progeny. The Court's holding that 28 U.S.C. § 2441 confers jurisdiction to hear challenges to the legality of detentions at Guantanamo Bay was informed by an analysis of the statute and the historical evolution of the writ of habeas corpus. Rasul, 124 S. Ct. at 2696-97. Plainly, the fact that the habeas statute's reach extends to Guantanamo does not ipso facto mean that the entire mass of U.S. constitutional and statutory law similarly extends, particularly given that, as the Supreme Court recognized and no one disputes, Guantanamo is outside the sovereign territory of the United States. See Rasul, 124 S. Ct. at 2693. Petitioners label respondents' assertion a "notion[] of technical sovereignty," Petrs' Mem. at 19, but as respondents have previously explained, the distinction between sovereignty, on the one hand, and control or jurisdiction, on the other, "flows directly from the historical origin of the Constitution as a compact between the people of the country and the Government." Response at 21-23. There is nothing technical about it.

Finally, relying on 28 U.S.C. § 2241(c)(1), petitioners argue that they can proceed in this case even without demonstrating that their detention violates any provision of the Constitution or any law of the United States. Petrs' Mem. at 20-21. It is unclear what petitioners mean by this.

If petitioners are suggesting that § 2241(c)(1) mandates that, without establishing any constitutional or statutory violation by the Government, persons determined to be enemy combatants at war with the United States must simply be released, enabling them potentially to return to terrorism as some have done, respondents submit that this contention is preposterous on its face. On the other hand, if petitioners are suggesting that the Government should not wait until after such a violation has been shown to come forward with the reasons for detention, this complaint makes no sense in the context of this case: respondents have nearly completed filing the factual returns for the Al Odah petitioners,[5] and, of course, the Response itself conveys the legal reasons for the detentions.

II. BECAUSE THEY ARE BASED NEITHER ON THE CONTROLLING LEGAL TEST NOR IN ANY KIND OF CONSTITUTIONAL CONTEXT, PETITIONERS' OBJECTIONS TO THE COMBATANT STATUS REVIEW TRIBUNALS FAIL AS A MATTER OF LAW

Petitioners level a number of criticisms at the Combatant Status Review Tribunals ("CSRTs") that, as the Government already has explained (Response at 31-42), provide all the process due in the circumstances. Petrs' Mem. at 21-29. However, petitioners fail even to acknowledge the controlling Supreme Court case or apply any semblance of the balancing test that the Hamdi Plurality stated should inform the analysis of what process is due. See Hamdi,

[5] One of the twelve factual returns due in Al Odah remains outstanding. As explained more fully in Respondents' Status Report on the Submission of Factual Returns to Petitions for Writ of Habeas Corpus, filed Oct. 22, 2004 (dkt. no. 121), the CSRT for Omar Rajab Amin has not yet been completed due to outstanding attempts to obtain documentary evidence that Mr. Amin requested be presented to the Tribunal. As respondents have informed the Court, they are working diligently to try to complete the remaining CSRTs, and file the corresponding factual returns, as expeditiously as possible. As the Court is also aware, only the unclassified portions of the factual returns have been filed thus far; material classified portions will be filed and furnished to appropriately cleared petitioners' counsel as soon as practicable following entry of a protective order.

124 S. Ct. at 2646 (citing Mathews v. Eldridge, 424 U.S. 319 (1976)). Instead, from the nature of their criticisms, it appears that petitioners would insist on the degree of process customary in a criminal case. But that proposition was soundly rejected by the Hamdi Plurality even with respect to a U.S. citizen detained as an enemy combatant – within sovereign U.S. territory, no less. See Hamdi, 124 S. Ct. at 2646 ("The District Court, agreeing with Hamdi, apparently believed that the appropriate process would approach the process that accompanies a criminal trial."), 2648 (holding that "the process apparently envisioned by the District Court" does not "strike[] the proper constitutional balance when a United States citizen is detained in the United States as an enemy combatant" because "some of the 'additional or substitute procedural safeguards' suggested by the District Court are unwarranted in light of their limited 'probable value' and the burdens they may impose on the military in such cases") (citing Mathews, 424 U.S. at 335). Petitioners' challenge to the CSRTs inexplicably culminates in their trumpeting of press accounts about particular CSRTs for random Afghan and Saudi detainees (who are not petitioners in Al Odah or, most likely, in any case before the Court), see Petrs' Mem. at 27-29, even though counsel had been furnished the (unclassified) CSRT records for ten of their own twelve petitioners days, or, in most cases, weeks prior to the date of petitioners' filing, and thus were capable of marshalling whatever arguments they could muster based on the records actually relevant to this case. We address petitioners' attacks on the CSRTs in turn.

1. Petitioners argue that the CSRTs lack impartial decision-makers, not due to personal bias or conflict of interest of tribunal members as was present in the cases upon which petitioners

rely,[6] but because they apparently believe no individual who is part of the Military is capable of being impartial. Petrs' Mem. at 23-24. However, the CSRTs were adopted in response to the Hamdi Plurality's own guidance that "the [due process] standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal." 124 S. Ct. at 2651 (emphasis added). Obviously, a military tribunal is composed of members of the Military. Moreover, as pointed out in the Response at 38-39 but wholly ignored by petitioners, the CSRT Order categorically screens out from participation on the Tribunal anyone who has been involved in the "apprehension, detention, interrogation, or previous determination of status of the detainee." CSRT Order ¶ e. Petitioners speculate that it will not be "an easy or likely thing" for "junior officers"[7] to find that an individual is not an enemy combatant, but such a finding already has occurred.[8] The Supreme Court has repeatedly declined to hold that the impartiality of a member of an administrative agency tribunal is compromised under the Due Process Clause

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[6] See Gibson v. Berryhill, 411 U.S. 564, 571 (1973) (members of state optometry board had "personal financial stake in the matter in controversy," in addition to being involved in separate litigation against the persons whose rights they were supposed to be adjudicating); Cinderella Career & Finishing Schools, Inc., 425 F.2d 583, 589-90 (1970) (chairman of Federal Trade Commission gave speech prejudging issues in cases pending before him).

[7] Petitioners betray an ignorance of the Military's command structure when they demean the members of the Tribunal as "junior" and "low-ranking" (Petrs' Mem. at 24). By definition, the senior member of the Tribunal must be an officer of grade O-6 or above, and the other two members must be officers of grade O-4 or above. See CSRT Implementation Memorandum (attached as Ex. B to Response) Encl. (1) ¶ C(1). In practice, most Tribunal members have been grade O-6 or O-5. Those grades, equivalent to the senior-most civil service paygrades for non-SES employees (GS-15 and GS-13/14, respectively) are the highest in the uniformed military other than for general officers (i.e., generals and admirals). See DoD Instruction 1000.1, Attachment 1 to Enclosure 3, available at <<http://www.dtic.mil/whs/directives/corres/html2/i10001x.htm#ca31>>.

[8] See DoD Press Release No. 923-04, dated Sept. 18, 2004, available at <<http://www.defenselink.mil/releases/2004/nr20040918-1363.html>>.

simply because he is employed by the agency whose actions the tribunal is charged with reviewing. See Response at 38-39 & n.49 (citing Withrow v. Larkin, 421 U.S. 35, 49 (1975); Wolff v. McDonnell, 418 U.S. 539, 570-71 (1974)).

2. Citing no authority other than a domestic case in a criminal context that did not involve classified information in any event,[9] petitioners claim the CSRT is constitutionally invalid because they are not allowed to see classified information. See Petrs' Mem. at 24-25. This contention is easily rejected. Petitioners' logic is astonishing both because of what it implies – that persons being detained because they are members of organizations at war with the United States should be given access to the United States' most sensitive military secrets – and because petitioners do not even attempt to respond to or distinguish the binding D.C. Circuit precedent respondents cited when they anticipated and discussed this issue. See Response at 36-37 (citing Jifry v. FAA, 370 F.3d 1174, 1184 (D.C. Cir. 2004); People's Mojahedin Org. v. Dep't of State, 327 F.3d 1238, 1242 (D.C. Cir. 2003)).

3. Petitioners complain that the CSRTs provide "little or no opportunity" for the detainees to call witnesses or present evidence, though in the next sentence they backtrack and concede that detainees are, indeed, free to call "reasonably available" witnesses to testify. Petrs' Mem. at 25. Petitioners get nowhere with this objection because it is irrelevant to their cases:

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[9] See Jenkins v. McKeithen, 395 U.S. 411, 427-28, 429 (1969) (involving hearings of state body convened to "expos[e] violations of criminal laws by specific individuals" and "exercise[] an accusatory function," and expressly limiting scope of holding to situations "where the Commission allegedly makes an actual finding that a specific individual is guilty of a crime"). As respondents have emphasized, detention of enemy combatants is not a criminal matter, see Hamdi, 124 S. Ct. at 2640 (recognizing that captivity in war in not punishment), and as noted above, the Hamdi Plurality dispensed with the notion that the panoply of criminal procedural rights should be available even to a U.S. citizen designated as an enemy combatant and held within the United States.

the CSRT factual returns filed thus far indicate that ten of the twelve Al Odah Petitioners did not request any witnesses or additional evidence in their CSRTs; one of the twelve initially requested two witnesses but later elected not to participate in the CSRT and abandoned that request even as the Tribunal was attempting to accommodate it; and in the only CSRT for an Al Odah Petitioner that remains pending, the Tribunal is attempting to fulfill the detainee's request to locate various overseas documents that he wishes to present as evidence.[10] As such, whatever dispute may arise in other cases concerning the sufficiency of the "reasonably available" standard, it simply did not affect the operation or outcome of the CSRTs for the Al Odah Petitioners. Moreover, petitioners fail to propose an alternative standard that they believe is constitutionally mandated -- the necessary starting point for a Mathews analysis. See Mathews, 424 U.S. at 335 (focus is on value and costs of "additional or substitute procedural safeguards").[11]

4. Petitioners object to what they call an "overly expansive" definition of "enemy combatant," in particular that it exceeds the Hamdi Plurality's formulation and could include individuals who supported the Taliban "in a minor role unrelated to combat." Petrs' Mem. at 25-26. As a preliminary matter, however, petitioners do not tie their complaint about the breadth of "enemy combatant" to any of their particular cases. Rather than speculate about hypothetical fact patterns that may or may not ever need to be adjudicated, respondents submit the better course is

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[10] See Factual Returns filed in Al Odah (dkt. nos. 85, 86, 92, 94, 104, 108, 109, 110, 111, 113, 124); Respondents' Status Report on the Submission of Factual Returns to Petitions for Writ of Habeas Corpus, filed Oct. 22, 2004 (dkt. no. 121).

[11] As respondents previously explained, which stands unrebutted, the standards defining the circumstances in which detainees may call witnesses and/or present evidence are identical to those in the Article 5 tribunals that the Hamdi Plurality cited approvingly, see Response at 33, and are well within the realm of what has been upheld in prior Due Process Clause jurisprudence, see id. at 38 n.48.

to address cases on their individual facts and let any development of the boundaries of the definition await particular cases actually raising those issues, along the lines of the approach actually taken in Hamdi. See Hamdi, 124 S. Ct. at 2642 n.1 ("The legal category of enemy combatant has not been elaborated upon in great detail. The permissible bounds of the category will be defined by the lower courts as subsequent cases are presented to them.").[12] In any event, respondents extensively addressed this issue with arguments and citations that petitioners do not even attempt to meet.[13] See Response at 11-13, 15-16 & nn. 15, 16. To recap, the Hamdi Plurality, as shown in the passage quoted above, made clear that its formulation of "enemy combatant" was non-exclusive and tentative and anticipated future development. Hamdi, 124 S. Ct. at 2642 n.1. The definition being used in the CSRTs is well-supported in the laws of war and federal case law alike, which universally permit the military detention of persons connected with opposing military forces, irrespective of whether they personally carry arms or instead aid the enemy in some other capacity. See authorities cited in Response at 16 & nn. 15, 16. That is

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[12] Cf. H.L. v. Matheson, 450 U.S. 398, 405-406 (1981) (litigant may not challenge statute as overbroad when her own conduct falls within core of statute); Broadrick v. Oklahoma, 413 U.S. 601, 608 (1973) ("[E]ven if the outermost boundaries of [provision] may be imprecise, any such uncertainty has little relevance here, where appellants' conduct falls squarely within the 'hard core' . . . .").

[13] Instead of looking to the laws of war that the Hamdi Plurality identified as the appropriate source of guidance, petitioners cite two peacetime cases dealing with domestic criminal prosecution or deportation of individuals associated with the Communist party. Scales v. United States, 367 U.S. 203 (1961); Carlson v. Landon, 342 U.S. 524 (1952). These cases have nothing to do with the detention of enemy combatants at war with the United States. Moreover, even if applicable, these cases defeat petitioners' logic. See Carlson, 342 U.S. at 541-42 (approving detention of someone who engaged in only "minor . . . participation in Communist activities," i.e., "attendance at closed sessions and the holding of the office of financial secretary," and dispensing with any need "to show specific acts of sabotage or incitement").

particularly important in the shadowy world of terrorist networks, where today's cook may moonlight as tonight's suicide bomber.

5. Petitioners object to the rebuttable presumption in favor of the Government's evidence, which their heading inaccurately brands a "presumption of guilt."[14] Petrs' Mem. at 26-27. However, they stop at noting that the presumption exists and do not even attempt to articulate how or why that feature should be seen as compromising the validity of the CSRTs under the Due Process Clause. The Hamdi Plurality certainly found no difficulty with a rebuttable "presumption in favor of the Government's evidence," even in a proceeding for a U.S. citizen detained within sovereign U.S. terroritory. Hamdi, 124 S. Ct. at 2649. Petitioners do not even mention what the Hamdi Plurality had to say on the subject, which ought to be the starting point of the analysis.

6. Petitioners object that the CSRTs do not allow detainees' counsel to participate. Petrs' Mem. at 27. Once again, respondents anticipated this objection and addressed it at length, see Response at 40-42, but petitioners have failed entirely to meet respondents' arguments, deal with

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[14] This characterization is inaccurate and misleading because petitioners are not detained as criminals and the CSRTs are not criminal proceedings, making terminology of "guilt" or "innocence" irrelevant and misleading. See William Winthrop, Military Law and Precedents 788 (rev. 2d ed. 1920) ("The time has long passed when 'no quarter' was the rule on the battlefield . . . . It is now recognized that 'Captivity is neither a punishment nor an act of vengeance,' but 'merely a temporary detention which is devoid of all penal character.' . . . 'A prisoner of war is no convict; his imprisonment is a simple war measure.' " (citations omitted)), quoted in Hamdi, 124 S. Ct. at 2640; see also Moyer v. Peabody, 212 U.S. 78, 84-85 (1909) ("Such arrests are not necessarily for punishment, but are by way of precaution to prevent the exercise of hostile power."). And, as petitioners concede outside their boldfaced heading, the presumption is not of a particular outcome but rather is simply one "in favor of the Government's evidence." CSRT Order ¶ g(12); see also CSRT Implementation Memorandum Encl. (1) ¶ F(11) (elaborating that the rebuttable presumption is "that the Government Evidence . . . to support a determination that the detainee is an enemy combatant, is genuine and accurate").

the cases respondents cited, or perform anything resembling the Mathews balancing test. See, e.g., Wolff v. McDonnell, 418 U.S. 539, 569-70 (1974) (holding that Due Process Clause did not require that prisoners be entitled to permitted to retain counsel in informal proceedings to revoke good-time credits). The only authority that respondents cite is a passage from Hamdi that, by its own terms, addresses nothing other than a U.S. citizen's access to counsel in federal court "proceedings on remand," 124 S. Ct. at 2652, and a passage from Rasul that does not say anything about counsel at all, 124 S. Ct. at 2696. Quite plainly, neither of these authorities touches on whether the Due Process Clause requires that counsel be allowed to participate in CSRTs. Respondents stand by their previous submission on this issue.[15]

Petitioners also lambaste respondents for even bringing up the issue of the appropriate scope of judicial review of the CSRTs. Petrs' Mem. at 12-14, and passim. With great sound and fury, they argue that respondents "exceed[] the bounds of legitimate advocacy" by "regurgitat[ing]" arguments made to the Supreme Court and supposedly rejected by the Supreme

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[15] Nothing in this Due Process Clause analysis is affected by the Court's October 20, 2004 Order and Memorandum Opinion addressing petitioners' right to unmonitored access to counsel in this federal court litigation (dkt. nos. 116, 117). After all, the Court refrained from ruling on constitutional issues and instead "resolve[d] the question of Petitioners' access to counsel by considering several statutes." Mem. Op. at 7. As construed by the Court, the statutes to which the Court looked – the federal habeas statute, 28 U.S.C. § 2241, the Criminal Justice Act,18 U.S.C. § 3006A, and the All Writs Act, 28 U.SC. § 1651 – establish that the Court has the discretion to appoint counsel for purposes of representation in pending federal court judicial proceedings. None of them, however, bear on the issue of a right under the Due Process Clause to counsel in connection with an intra-agency administrative tribunal. In its October 20 opinion, the Court did not have occasion to examine counsel participation in such non-judicial proceedings as an "additional procedural safeguard" thay may or may not be required under the Due Process Clause, and accordingly did not balance "the probable value, if any" of counsel participation against "the fairness and reliability" of the eixsting procedures and "the administrative burden and other societal costs" associated with the additional procedures. Mathews v. Eldridge, 424 U.S. 319, 343, 347 (1976); see also Hamdi, 124 S. Ct. at 2646 ("the Mathews calculus . . . contemplates a judicious balancing of these concerns").

Court in Rasul. Pets' Mem. at 29. However, petitioners fail to identify any passage in Rasul that establishes any particular standard of review, because there is none.[16] Incredibly, in construing the Supreme Court's Rasul decision, petitioners appear to rely much more heavily on the Government's own Rasul briefs (the theory being that if the Government said it, the Supreme Court must have unequivocally rejected it and held the opposite) than on the Rasul decision itself. Petrs' Mem. at 12, 14 n.19, 15 n.20, 18 n.23 (quoting Government brief to establish what the Rasul Court disagreed with and held). Of course, the fallacy in this extra-textual mode of interpretation is that courts do not necessarily reach every issue or contention briefed to them, and therefore the fact of a decision one way or the other cannot reasonably be read as a wholesale adoption or rejection of the parties' arguments. Nowhere is this principle more evident than in Rasul, where the Court rested its decision on purely statutory grounds, emphasized that "[w]hat is presently at stake is only whether the federal courts have jurisdiction," and made clear that "[w]hether 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." Rasul, 124 S. Ct. at 2699. Moreover, the Rasul decision is illuminated by the decision issued the same day in Hamdi, which acknowledged "the weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States" and that "[w]ithout a doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most

[16] Indeed, petitioners themselves appear implicitly to acknowledge that the question remains open after Rasul when they suggest that this Court need not resolve the appropriate standard of review now (Petrs' Mem. at 14).

policitcally accountable for making them." Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2647 (2004) (plurality opinion) (citing Dep't of Navy v. Egan, 484 U.S. 518, 530 (1988)).

Simply put, the Supreme Court's ruling that jurisdiction exists under 28 U.S.C. § 2241 does not prejudge any issues about the scope of judicial involvement or the standard of review in these unique cases. After all, jurisdiction is a necessary prerequisite no matter what standard of review the Court employs. Because of the profound separation-of-powers concerns at stake, extraordinary deference is appropriate and the Court should not go beyond determining whether there is "some evidence" supporting the findings of activity or status that the President, in the exercise of his powers as Commander in Chief, has determined to warrant removal of an alien from the field of battle. See Response at 43-51.[17]

III. PETITIONERS FAIL TO SUPPORT THEIR NON-HABEAS CLAIMS IN ANY MEANINGFUL WAY

Petitioners relegate their non-habeas claims to a single footnote. Petrs' Mem. at 16-17 n.21. They first rally around a claim that they did not even make in their Amended Complaint,[18]

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[17] The cases that petitioners cite in their survey of historical wartime constitutional jurisprudence do not foreclose a standard of review that takes into account these structural considerations. Petrs' Mem. at 13-14. In fact, the only one of these cases cited by petitioners that has anything to do with the Executive's treatment of captured enemy aliens actually upheld the power of the Executive to try enemy aliens in military commissions, and emphasized the narrow scope of the judicial inquiry. See Ex parte Quirin, 317 U.S. 1, 25 (1942) ("We are not here concerned with any question of the guilt or innocence of petitioners. . . . [T]he detention and trial of petitioners – ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and grave public danger – are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted.").

[18] Respondents discussed the Geneva Conventions in the Response because, in order to promote efficiency and coordinated treatment, the Response was structured as a uniform document filed in thirteen of the coordinated cases, some of which assert claims under the Geneva Conventions. See Appendix to Response (indicating which claims respondents read as

insisting that even if the Third Geneva Convention is not self-executing, the habeas statute allows them to bring a cause of action for violations of the Convention. Even if such a claim were properly before the Court in this case, respondents already pointed out (Response at 68 n.77) that petitioner's argument has been soundly rejected by the courts. See, e.g., Wang v. Ashcroft, 320 F.3d 130 (2d Cir. 2003) ("28 U.S.C. § 2241(c)(3) authorizes a district court to grant a writ of habeas corpus whenever a petitioner is 'in custody in violation of the Constitution or laws or treaties of the United States.' Unless a treaty is self-executing, however, it does not, in and of itself, create individual rights that can give rise to habeas relief."); Bannerman v. Snyder, 325 F.3d 722, 724 (6th Cir. 2003) (concluding that "the reference to 'treaties of the United States' in § 2241 cannot be construed as an implementation of non-self-executing provisions of treaties so as to render them judicially enforceable under § 2241"); Wesson v. U.S. Penitentiary Beaumont, 305 F.3d 343, 348 (5th Cir. 2002) (holding that detainee's "claim of a violation of the International Covenant on Civil and Political Rights fails because the treaty is not self-executing and Congress has not enacted implementing legislation. Thus, habeas relief is not available for such a violation."); United States v. Warden, FMC Rochester, 286 F.3d 1059, 1063 (8th Cir. 2002) (rejecting § 2241 claim alleging violations of treaty on ground that it "does not bind federal courts because the treaty is not self-executing and Congress has yet to enact implementing legislation").[19]

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having been raised in which cases). For their part, the Al Odah Petitioners did not even mention the Geneva Conventions (upon which they now purport to "principally rely") in their Amended Complaint, except in passing in the factual context of describing a determination the President made (¶ 33).

[19] Petitioners also boldly state that Article 5 of the Third Geneva Convention is self-executing (Petrs' Mem. at 16 n.21), supporting their argument with a quotation from a Supreme

Petitioners' only answer to respondents' defenses to their Alien Tort Statute ("ATS") claims is to invoke the Supreme Court's Rasul decision. Petrs' Mem. at 17 n.21. But all that the Rasul Court said on the subject was that the Court's precedents do not "categorically exclude[] aliens detained in military custody outside the United States from the privilege of litigation," and that "[t]he fact that petitioners in these cases are being held in military custody is immaterial to the question of the District Court's jurisdiction over their nonhabeas statutory claims." Rasul, 124 S. Ct. at 2698-99 (internal quotation marks omitted). Obviously, just because a litigant's status does not cause him to be "categorically excluded" from bringing a claim does not necessarily mean that he will prevail on that claim, or even that the claim can survive a motion to dismiss, or even that there is no other potential jurisdictional problem with the claim. As respondents previously argued, the ATS does not waive sovereign immunity, the Administrative Procedure Act's ("APA") waiver of sovereign immunity does not save the ATS claim, and petitioners have failed to state a cognizable claim under the ATS in any event. Response at 53-66. The Rasul Court did not have any of these matters before it, and did not rule on them. And petitioners have now failed entirely to discuss them.

Finally, petitioners argue that they can maintain an APA claim for alleged violations of Army Regulation 190-8, though, again, they did not even mention the latter in their Amended Complaint. Petrs' Mem. at 17 n.21. But respondents anticipated exactly this claim in the Response, pointing out that the APA provides neither a cause of action nor a waiver of sovereign

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Court case that refers to "the Convention." Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984). What they misleadingly omit in their quotation, however, is that "the Convention" to which the Trans World Airlines Court was referring was the Warsaw Convention (dealing with air carriers' liability for lost cargo), not one of the Geneva Conventions. Id. at 246-47.

immunity in these circumstances because the implementation of the Geneva Conventions is "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), because the APA exempts "dispute[s] over military strategy" including "in the aftermath of [] battle," Doe v. Sullivan, 938 F.2d 1370, 1380 (D.C. Cir. 1980), and for various other reasons. Response at 74-75. Once again, respondents offer only silence on these points.

CONCLUSION

For the reasons stated above and in the Response, respondents respectfully request that their motions to dismiss or for judgment of law be granted, that writs of habeas corpus not issue, and that all relief requested by petitioners be denied.

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