IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LAKHDAR BOUMEDIENE; ABASSIA BOUADJMI, as Next Friend of Lakhdar Boumediene; MOHAMMED NECHLA, BADRA BAOUCHE, as Next Friend of Mohammed Nechla, *Petitioners*, — vs. — GEORGE WALKER BUSH, President of the United States of America; DONALD RUMSFELD, Secretary of the Defense; GENERAL JAY HOOD, Commander, Joint Task Force; COLONEL NELSON J. CANNON, Commander, Camp Delta; *in their individual and official capacities,* *Respondents*.	:	No. 04-1166 (RJL)

APPLICATION FOR TEMPORARY RESTRAINING ORDER

Petitioners hereby apply, pursuant to Fed. R. Civ. P. 65(b), for a temporary restraining order enjoining Respondents from subjecting them to the so-called Combatant Status Review Tribunal until such time as the Court may hear Petitioners' motion for a preliminary injunction.

As detailed in the Declaration of Douglas F. Curtis filed concurrently herewith, Petitioners have given notice and copies of this Application to Respondents.

The grounds for this Application are set forth in the Memorandum of Points and Authorities and accompanying exhibits also filed herewith.

Respectfully submitted,

WILMER CUTLER PICKERING
HALE AND DORR LLP

By: /s/

Douglas F. Curtis (D.C. Bar No. 420270)
Peggy Kuo (Bar. No. 449271), *pro hac vice* pending
Robert W. Trenchard, *pro hac vice* pending
399 Park Avenue
New York, NY 10022
(212) 230-8800

Stephen H. Oleskey, *pro hac vice* pending
Robert C. Kirsch, *pro hac vice* pending
Melissa A. Hoffer, *pro hac vice* pending
60 State Street
Boston, MA 02109
(617) 526-6000

Lead Counsel for Petitioners

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LAKHDAR BOUMEDIENE; ABASSIA BOUADJMI, as Next Friend of Lakhdar Boumediene; MOHAMMED NECHLA; BADRA BAOUCHE, as Next Friend of Mohammed Nechla, *Petitioners*,	:	
- vs. -	:	04-1166 (RJL)
GEORGE WALKER BUSH, President of the United States of America; DONALD RUMSFELD, Secretary of Defense; GENERAL JAY HOOD, Commander, Joint Task Force; COLONEL NELSON J. CANNON, Commander, Camp Delta; *in their individual and official capacities*, *Respondents*.	:	

PETITIONERS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR APPLICATION FOR INJUNCTIVE RELIEF

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, Petitioners Lakhdar Boumediene and Mohammed Nechla (collectively "Petitioners") have applied for the immediate issuance of a temporary restraining order enjoining the Respondents from commencing any and all proceedings related to the imminent Combat Status Review Tribunals ("CSRT") with respect to these Petitioners.

The CSRT proceedings began Friday in Guantanamo Bay and the Government has publicly asserted that it is making every effort to conclude them within thirty days by using three "teams" conducting twenty-four tribunals a week. *See* Special Dep't of Defense Briefing (July 20, 2004), available at http://www.defenselink.mil/ transcripts/2004/tr20040730-1064.html (visited Aug. 2, 2004). These Petitioners may therefore be put before a CSRT at any time, and as early as Monday, August 2. Counsel has had no opportunity to consult with Petitioners to give

them untainted advice concerning the risks of voluntarily agreeing to appear and thereby to make potentially damaging statements before the CSRT or to their so-called "personal representatives" (commissioned military officers under no obligation to keep their conversations with Petitioners confidential). The CSRT proceedings could therefore result in significant compromise and contamination of the Petitioners' rights to fair and adequate habeas corpus proceedings in this Court, as recently provided by the United States Supreme Court in *Rasul v. Bush*.

Immediately upon learning that CSRTs had been initiated against some detainees, counsel for Petitioners contacted Respondents' attorneys seeking assurances that Petitioners would not be subjected to the CSRT until, at a minimum, counsel was given an opportunity to consult with Petitioners in an unmonitored setting, evaluate their mental and physical condition, and discuss with them their legal rights and obligations. *See* Ex. A (July 30, 2004 Letter from Douglas Curtis, Esq., to David Salmons, Esq.). Because Respondents' counsel refused to provide such assurances, Petitioners are compelled to seek emergency relief from this Court. For the reasons set forth in this Memorandum, Petitioners are likely to prevail on their habeas claims in this Court, and their Application for immediate issuance of a temporary restraining order should be granted.

I. Background

A. Petitioners

Petitioners Boumediene and Nechla are Algerian-born Bosnian-citizens currently being detained at the Unites States Naval Station in Guantanamo Bay, Cuba ("Guantanamo"). In the fall of 2001, they were taken into custody in Bosnia-Herzegovina, by Bosnian-Herzegovinian authorities, on order of the Bosnia-Herzegovina Federation Supreme Court in connection with allegations that they were planning to target the United Kingdom and United States Embassies in Bosnia-Herzegovina. *See generally, Boudellaa v. Bosnia and Herzegovina*, Nos. CH/02/8679;

CH/02/8689; CH/02/8690; CH/02/8691, H.R. Chamber for Bosnia and Herzegovina (Oct. 11, 2002) ("H.R. Chamber Decision"), attached hereto as Exhibit B.

After being held by Bosnian authorities for three months, the Bosnian Supreme Court, on the recommendation of the Bosnian federal prosecutor, ordered their release (along with four others also taken into custody in connection with the allegations[1]), stating:

> [The] Office of the Federal [sic] prosecutor has with document no. KT-115/01 from 17 January 2002 informed [the] investigative judge that [his] opinion is that there are no further reasons or circumstances based upon which this measure for ensuring [the] presence of [the] accused in criminal procedure was ordered. Therefore [,] the measure of the detention can be terminated to all accused persons and they can be released from detention. Reviewing [the] suggestion of [the] Deputy Federal prosecutor and [the] status of [the] investigative case, [the] investigative judge agreed with this suggestion and *since the reasons based upon which detention was ordered and extended, article 189, para. 1 and 2 of the Law of Criminal Procedure, do not exist any more*, it has been decided as in declaration of this decision.

Decision and Order of the Supreme Court of the Federation of Bosnia and Herzegovina, No. Ki-1001/01 (Sarajevo, Jan. 17, 2002) (J. Eterovic) (emphasis added), attached hereto as Exhibit E.

Despite the ruling of the Supreme Court, on January 18, 2002, the Detainees were taken into custody immediately after their release by the Bosnia-Herzegovina Federation at the urging of the United States, and then handed over to the United States. *See* H.R. Chamber Decision at ¶¶ 53–55. They were then transported to Guantanamo, where they have been held for two and one-half years. No charges have been brought against them.

In September 2002, the Bosnia-Herzegovina Human Rights Chamber Court heard the applications of the Petitioners claiming that their expulsion from the country violated the

---

[1] Counsel for Petitioners has informed the Government that they intend to amend the Petition to add the four other Bosnian men detained in connection with this matter.

European Convention on Human Rights.[2] It also affirmed that there was insufficient evidence to require their continued detention. Chamber Court Decision at ¶ 230.

Petitioners have filed a petition for habeas corpus before this Court. To prevail on their Petition, petitioners must show that their custody at Guantanamo violates the "Constitution, or laws, or treaties of the United States." 28 U.S.C. § 2241. As the Supreme Court recently held in *Rasul v. Bush*, "[p]etitioners' 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.'" 124 S. Ct. 2686, 2698 n.15 (2004). Petitioners here are highly likely to succeed on the merits of their habeas petition, because they can establish each of the factors the Supreme Court has identified as constituting *per se* violations of the kind that would entitle a detainee to relief. *See id.*

Based on all available information, the Petitioners were not involved in any way in the United States' military campaign in Afghanistan. There is nothing to suggest they were involved in any activities related to the attacks September 11, 2001. Bosnia's highest court has ruled that there was no evidence to support their continued detention, and ordered them released. They are not unlawful enemy combatants under *Hamdi*. *See Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2639

---

[2] Specifically, they alleged that their expulsion violation violated Articles 1 (providing procedural safeguards with respect to expulsion of aliens); 3 (prohibiting expulsion of nationals); 5 (right to liberty and security); 8 (right to respect for private and family life; and that their delivery into U.S. custody amounted to potential violations of Articles 1 (prohibition of death penalty); 3 (prohibition of torture); and 6 (right to a fair trial). *See* J. David Yeager, *The Human Rights Chamber for Bosnia and Herzegovina: A Case Study in Transitional Justice*, 14 Int'l Legal Persp. 44, 51 (2004). That court found, *inter alia*, that Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina had violated Article 1, Protocols 6 and 7 to the Convention by (i) failing to seek assurance from the United States that the death penalty would not be imposed and (ii) failing to provide the required procedural protections relating to expulsion of aliens. *See id.*

(2004) (accepting Government's proffered definition of enemy combatants as individuals who were "part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in armed conflict against the United States"). Petitioners' detention is therefore unlawful. Because they cannot plausibly be deemed "unlawful enemy combatants," any military commission empanelled to try them pursuant to the President's Military Order of November 13, 2001 would perforce lack jurisdiction.

B. **The United States Government's Actions Giving Rise To This Case**

This case arises from the unprecedented terrorist attacks against the United States on September 11, 2001. On September 18, 2001, a Joint Resolution of Congress authorized President Bush to use force against the "nations, organizations, or persons" that "planned, authorized, committed, or aided the terrorist attacks on September 11, 2001, or [that] harbored such organizations or persons." Authorization for Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (Sept. 18, 2001) ("AUMF"). Three weeks later, on October 7, 2001, the United States initiated a military campaign against the Taliban government of Afghanistan, which had harbored and aided the al Qaeda terrorist network.

In conjunction with that effort, six weeks later President Bush issued Military Order of November 13, 2001, which purported to authorize indefinite detention without due process of law (the "Military Order"). The Military Order authorizes Respondent Secretary of Defense Donald Rumsfeld to detain any person that the President has "reason to believe":

> i. [I]s or was a member of the organization known as al Qaeda;
> ii. [H]as engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
> iii. [H]as knowingly harbored one or more individuals described in subparagraphs (i) and (ii).

Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001). The President must make this determination in writing. *Id.*

In January 2002, the President began transferring persons captured in Afghanistan and elsewhere (the "Detainees") to Guantanamo. None of the Detainees were charged with crimes, provided access to counsel, or informed why they were being detained. *See Rasul*, 124 S. Ct. at 2691. The Government prohibited the Detainees from communicating with their Consulates and their families in their home countries, refused to release the names and nationalities of the Detainees. At its peak, it has been estimated that as many as 680 Detainees were held at Guantanamo. Press reports indicate that there are approximately 590 Detainees imprisoned there as of July 2004. *See* Jane Sutton, *First hearings for Guantanamo prisoners*, Reuters, July 31, 2004.

Press reports also indicate that the Department of Defense ("DoD") itself, which administers Guantanamo, believes that a substantial percentage of the Detainees are either completely innocent of any involvement with the Taliban or al Qaeda, or are only minimally involved: "In September 2002 . . . a top-secret study by the Central Intelligence Agency raised questions about [the Detainees] significance, suggesting that many of the accused terrorists appeared to be low-level recruits who went to Afghanistan to support the Taliban or even innocent men swept up in the chaos of the war, current and former officials who read the assessment said." Tim Golden & Don Van Natta, Jr., *The Reach of War: U.S. Said to Overstate Value of Guantanamo Detainees*, N.Y. Times, June 21, 2004.

C. **Conditions of Confinement and Methods of Interrogation**

Detainees at Guantanamo are held in seven-by-eight foot cells made of steel mesh painted lime green. *See* Jeffery Toobin, *Inside the Wire: Can an Air Force colonel help the*

detainees at Guantanamo?, The New Yorker, Feb. 8, 2004, at 36; Mike Kelly, *Hard Time in a Hard Place*, The Record (N.J.), March 7, 2004, at A1. Each cell has a steel bunk, a steel sink near the floor, and a steel hole in the floor for a toilet. *See* David Rose, *Operation Take Away My Freedom: Inside Guantanamo Bay on Trial*, Vanity Fair, Jan. 2004. The only items allowed prisoners are a cup, salt, a blanket, sheets, a prison uniform, a mattress, prayer beads, a skull cap, a rubber mat, and a copy of the Koran. Guards pass the cells every thirty seconds, there is no air conditioning, and the lights stay on all night. *See id.* Detainees are let out of their cells in handcuffs and leg-irons only for a 30-minute exercise period five days a week in a yard where tarpaulins block their view of the sea, followed by ten minute shower. *See id.*; Kelly, *Hard Time*.

All of the detainees, since their arrival, have undergone unceasing interrogation. In the words of General Geoffrey D. Miller, commander of the Guantanamo task-force, the detention operations at Guantanamo "are not about law enforcement, or rehabilitation, or punishment. We are here for intelligence." Toobin, *Inside the Wire*. According to Miller, some detainees are interrogated by teams of two to five questioners for up to *sixteen hours* a day. *Id.* The interrogations are "incentives-based" and can include the granting or withholding of items such as prayer oil, beads, and rugs. The biggest incentive to cooperate, however, is the possibility of being transferred to what military personnel refer to as "Camp Four," where detainees are allowed greater freedom of movement and group meals. *Id.*; Kelly, *Hard Time*.

It has also been impossible to learn exactly what interrogation methods have been used on which detainees, again because the Government has refused to allow any access by counsel. However, in an April 16, 2003 memorandum Secretary of Defense Donald Rumsfeld authorized 26 specific interrogation techniques for use at Guantanamo, including stern methods prohibited

by the Army Field Manual.[3] *See* Memorandum from Secretary of Defense Donald Rumsfeld to Commander, U.S. Southern Command, dated Apr. 16, 2003 ("April 16, 2003 Rumsfeld Memo"); Associated Press, *Administration lawyers concluded President has legal authority to order torture*, June 8, 2004.

The Army's own summary of its investigation into the abuse of prisoners at Abu Ghraib in Iraq noted that one reason for the abuses in Iraq was that interrogators there had mistakenly used interrogation methods that had only been approved for use on the "unlawful combatants" detained at Guantanamo. *See* Department of the Army Inspector General, Detainee Operations Inspection 39–40 (July 21, 2004) (noting that, relative to Abu Ghraib, "different standards" applied to Guantanamo); Editorial, *An Army Whitewash*, Washington Post, July 24, 2004, at A20. Consistent with this report, former detainees at Guantanamo have reported that, in the course of their interrogations, they were shackled by interrogators for hours, were stripped naked, and were subjected to dogs, strobe lights, loud music and freezing temperatures. *See* Severin Carrell, *Foreign Office investigates claims of abuse of Britons at Camp Delta*, The Independent (U.K.), August 1, 2004; Laure Bretton, *Frenchmen Say Guantanamo Detention Was Like Hell*, Reuters, July 30, 2004; Elise Labott & Bill Mears, *Scrutiny turns to Gitmo detainees*, CNN.com, May 13, 2004.

These conditions are specifically designed to induce mental instability in order to increase the detainees' value as a source of information. In the words of John R. VanNatta, warden of an maximum security prison in Indiana who was placed in charge of Camp Delta in

---

[3] The otherwise prohibited methods include dietary manipulation, environmental manipulation (exposure to uncomfortable temperatures), questioning for up to twenty hours at a time for up to three days, and isolation for up to thirty days. The other approved methods, as referred to in Secretary Rumsfeld's April 16, 2003 memorandum, include "Direct," "Incentive/Removal of Incentive," "Emotional Love," "Emotional Hate," "Fear Up Harsh," "Fear Up Mild," "Reduced Fear," "Pride and Ego Up," "Pride and Ego Down," "Futility," "We Know All," "Establish Your Identity," "Repetition Approach," "File and Dossier," "Mutt and Jeff," "Rapid Fire," "Silence," "Change of Scenery Up," and "Change of Scenery Down." *See* April 16, 2003 Rumsfeld Memo.

November 2002: "If you have no idea what is going to happen to you, that's extremely stressful. . . . But if the mission is to collect intelligence and gather information that is beneficial to our side, then despair and depression may be a good thing." Scott Higham, et al., *Guantanamo – A Holding Cell in the War on Terror*, Washington Post, May 2, 2004, at A1.

Unsurprisingly, the harsh conditions and severe interrogation methods at Camp Delta have had a catastrophic effect on Detainees' mental health. The Pentagon asked Daryl Matthews, a professor of forensic psychiatry, to spend a week at Guantanamo assessing Detainees' mental health. He reported that, for the Detainees "[t]he stressors are incredible: never knowing if you'll get out, or when you'll get out; being sealed off from the community; not having access to legal counsel." Rose, *Operation Take Away My Freedom, supra.* According to military authorities, thirty-two Detainees had attempted suicide as of the end of September 2003. *See id.* In the last six months of 2003, there were also forty other suicide attempts that were officially classified by military medical personnel at Guantanamo as "manipulative self-injurious behavior," or "S.I.B." *Id.*[4] Indeed, since the elaborate incentive system of interrogation at Guantanamo is designed to elicit confessions, it is difficult to imagine that the Detainees are in any position to competently represent their interests. As Dr. Matthews stated in a report on one Detainee: "The conditions of confinement make Mr. Hamdan particularly susceptible to mental coercion and false confession." Higham, et al., *Guantanamo*. Even the International Committee of the Red Cross has quietly noted that it "has observed a worrying deterioration in the mental health of a large number of [Detainees]." International Committee of the Red Cross, *Guantanamo Bay: Overview of the ICRC's Work for Internees*,

---

[4] Dr. Matthews noted that manipulative self-injurious behavior "is not a psychiatric classification" and that "it is dangerous to try to divide 'serious' attempts at suicide from mere gestures, and a psychiatrist needs to make a proper diagnosis in each and every case." Rose, *Operation Take Away My Freedom.*

available at http://www.icrc.org/ Web/Eng/siteeng0.nsf/iwpList74/951C74F20 D2A2148C1256D8D002CA8DC (last visited July 26, 2004).

D. **The Supreme Court Decisions in *Hamdi* and *Rasul***

On June 28, 2004, the Supreme Court confirmed the rights of foreign national detainees, like Petitioners, to challenge the legality of their detention in federal court. *See Rasul v. Bush*, 124 S. Ct. 2686 (2004). *Rasul* held that federal district courts have jurisdiction to consider petitions for writs of habeas corpus brought pursuant to 28 U.S.C. § 2241 by foreign nationals captured abroad in connection with the conflict in Afghanistan, and held at Guantanamo. On that same day, the Court also decided *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004). At issue in *Hamdi* was whether Congress had authorized Executive detention of a United States citizen determined to be an enemy combatant – defined in *Hamdi* as an individual who was "part of or supporting forces hostile the United States or coalition partners in Afghanistan and who engaged in armed conflict against the United States." *Id.* at 2639 (internal quotations omitted). Holding that Congress had properly authorized Hamdi's detention, the Court then held that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive certain due process protections, specifically (i) notice of the factual basis for his classification; and (ii) a fair opportunity to rebut the Government's factual assertions before a neutral decision maker. *See id* at 2648.

E. **Combat Status Review Tribunal**

In response to the Supreme Court decisions above, Deputy Secretary of Defense Paul Wolfowitz issued an order on July 7, 2004 establishing the CSRT for the purpose of reviewing the enemy combatant status of foreign nationals detained at Guantanamo, and which purported to incorporate procedures sufficient to satisfy the due process requirement set forth in *Hamdi*. *See*

Order Establishing Combatant Status Review Tribunal (July 7, 2004) ("Wolfowitz Order"), attached hereto as Exhibit C; *see also* Defense Department Background Briefing on Combatant Status Review Tribunal (July 7, 2004), available at http: //www.dod.mil/ transcripts/2004/tr20040707-0981.html (visited July 26, 2004). Thus, although conceding the clear import of the Supreme Court's ruling in *Hamdi* vis-à-vis foreign nationals detained at Guantanamo, DoD's response makes a mockery of anything approaching what any American court would recognize as "due process."

The Wolfowitz Order sets forth the form and procedure of the CSRT. It first defines "Enemy Combatant" as:

> [A]n individual who was part of or supporting Taliban or al Qaeda forces, or associated forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

Wolfowitz Order ¶ (a). The Order further states, "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." *Id.* No explanation is provided as to how this pre-judgment is compatible with the ostensible function of the CSRTs.

The Order also sets forth the procedures that the CSRT are to use. Each detainee will be assigned a "Personal Representative." Wolfowitz Order ¶ (c). This Personal Representative will be neither a civilian lawyer not a military lawyer. Instead, the Representative will be a military officer. The Order itself is silent as to whether the Representative will be free to communicate the content of his communications with the detainee, but the DoD has taken the public position that the Representative would be free to share anything the Detainee told him with the Tribunal members. *See* Secretary of the Navy England Briefing on Combatant Status Review Tribunal

(July 9, 2004) (available at http:// www.dod.mil/transcripts/2004/tr20040709-0986.html (last visited July 26, 2004)) ("There will not a be a confidentiality agreement. . . . .This is a fact-based analysis. We want all of the facts to come forward. So we don't want client privilege where some data is not discussed."). The Representative will have access to classified information that he cannot share with the detainee he purportedly represents, and can participate in the CSRT's discussions even in the absence of the Detainee. *See* Wolfowitz Order ¶¶ (c), (g)(4). The Detainee has some limited authority to call witnesses, but this power is strictly circumscribed by the authority of the Tribunal members. *See id.* ¶¶ (g)(4), (8), (9) (establishing the panel's discretionary control over the procedures afforded the Detainee). The Tribunal panel is not bound by any rules of evidence, but may consider any information it wishes. *Id.* ¶ (g)(9). Although Detainees may not be forced to testify, *id.* ¶ (g)(11), they have no guarantee that their refusal to testify will not be held against them, and they will be "reviewed" *in absentia* if they do not participate. *See* Ex. D (Notice to Detainees) ("If you choose not to attend, the Tribunal will be held in your absence.").

The Wolfowitz Order also expressly contemplates that the CSRT will compile a factual record based on their investigations. *See* Wolfowitz Order ¶¶ (g),(h). The Order does not address whether the Government will seek to introduce this record – made without the Detainee having any access to counsel and only limited opportunity to challenge the evidence against him – in any future collateral proceedings, but nothing in the Wolfowitz Order would limit the Government from doing exactly that.[5]

[5] The Government has also taken the position before Judge Walton in a related case that anything said by a Detainee during a CSRT will be used against the Detainee in any subsequent proceeding (presumably both Military Commissions and habeas corpus review).

Although the Wolfowitz Order is unclear on this point, representatives of the DoD have repeatedly suggested that the DoD intends to claim that the CSRT effectively supplants the Article III jurisdiction that *Rasul* recognized, and fully satisfies the requirements of the Due Process Clause. For example, in a briefing held on June 8, 2004, Principal Deputy Assistant Secretary of Defense Lawrence Di Rita characterized the CSRT as "provid[ing] the process that the Supreme Court said was needed," "highly responsive to the Supreme Court's ruling," and "utterly faithful to the Supreme Court decision." Defense Department Operational Briefing (July 8, 2004) (available at http:// www.dod.mil/ transcripts/2004/tr20040708-0984.html (visited July 26, 2004)). Although Mr. Di Rita did not state unequivocally that the Government believes that the CSRT effectively replace habeas review of the detentions, he did say, "It is believed by those who are charged with the responsibility of responding to the Supreme Court ruling that these are highly responsive *and that they are sufficient*." *Id.* at 4 (emphasis added). A more forceful expression of this position was provided by an anonymous Senior Justice Department Official in a background briefing the previous day, who said:

> [T]he Supreme Court has not specifically defined any rights for these particular detainees at Guantanamo. It's only held that there is jurisdiction to entertain a habeas petition. But yes, we would be in a position to argue that whatever rights to process they have, have been satisfied and a fair opportunity for them to be heard and to have a fact-finding process determining the legality of their detention has been provided and that the process is sufficient.

Defense Department Background Briefing (July 7, 2004), at 12. This description of the relationship between the Status Tribunals and the Article III judiciary's jurisdiction clearly envisions that a habeas court's only role would be to examine whether a detainee has been given whatever process the Status Tribunal affords, with no fact-finding or independent inquiry into the legality of the detention.

II. The Legal Standard for a Temporary Restraining Order

The Court should grant Petitioners' instant application for a temporary restraining order because Petitioners can show that (i) there is a substantial likelihood they will succeed on the merits of their underlying petition for habeas corpus relief; (ii) they will suffer irreparable injury if the specific injunctive relief sought here is not granted; (iii) granting an injunction would not substantially injure other interested parties; and (iv) the public interest would be furthered by granting the injunction. *See Al-Fayed v. CIA*, 254 F.3d 300, 303 & n.2 (D.C. Cir. 2001) (noting "the same factors apply in evaluating requests for preliminary injunctions and temporary restraining orders"); *Serono Laboratories, Inc. v. Shalala*, 158 F.3d 1313, 1317–18 (D.C. Cir. 1998); *Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060, 1066 (D.C. Cir. 1998).

III. Argument

Petitioners seek to enjoin the CSRT in order to guard the right to a fair and adequate habeas corpus review in this Court, the right to which was recognized by the Supreme Court in *Rasul v. Bush*, 124 S. Ct. 2686 (2004). The Government should not be permitted, *ex post facto*, to make a record that seeks to justify the continued detention of Petitioners as "enemy combatants" after they have been held on precisely this basis for two-and-a-half years without any process, charges or access to counsel. The CSRT present a substantial risk of both (a) creating an erroneous finding as to Petitioners' status, and thus prolonging their detention indefinitely, and (b) prejudicing Petitioners' right to effective federal habeas review and should be enjoined from proceeding.

A. Petitioners Are Highly Likely to Succeed On The Merits Of Their Ultimate Claims

To prevail on their underlying Petition, petitioners will ultimately need to show that their custody at Guantanamo violates the Constitution, or laws, or treaties of the United States. 28

U.S.C. § 2241. As the Supreme Court recently held in *Rasul*, "[p]etitioners' 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." 124 S. Ct. at 2698 n.15. Petitioners likely will succeed on the merits of their habeas claim, since they can establish each of the factors the Supreme Court has held would constitute *per se* violations of the kind that would entitle them to relief on their habeas petition. *See id.*

1. *Respondents Lack Jurisdiction to Try Petitioners Before Any Military Commission Convened Pursuant to the President's Military Order of November 13, 2001*

Any defense of the detention of Petitioners turns, fundamentally, on a claim to authority by the United States to try these Petitioners before a military commission. But because these Petitioners were never involved in any scheme related to the attacks of September 11, and were not seized from anything remotely linked to a battlefield, there is no basis to assert this brand of military jurisdiction over them.

As noted above, Congress's September 18, 2001 AUMF granted to the President the far-reaching – but not limitless – authority to "use all necessary and appropriate force against those . . . persons he determines *planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.*" Pub. L. 104-40, 15 Stat. 224 (Sept. 18, 2001) (emphasis added).

The President's November 13, 2001 Military Order invoked the authority of the Constitution and laws of the United States, and expressly, the AUMF and 10 U.S.C. §§ 821 and 836. The Military Order was made pursuant to

> The authority vested in [George W. Bush] as President and as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the Authorization for the Use of Military Force Joint Resolution (Public Law 107-40, 115 Stat. 224) and sections 821 and 836 of title 10, United States Code.

Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001).

The reach of the Military Order must therefore be understood to be bounded by the scope of those laws, and must in the end be consistent with them. *See* Jennifer Elsea, CRS Report RL31191, *Terrorism and the Law of War: Trying Terrorists as War Criminals before Military Commissions*, at 31 (updated Dec. 11, 2001) ("CRS Report").

10 U.S.C. § 821 provides for concurrent jurisdiction among courts martial and military commissions, provost courts, and other military tribunals *with respect to offenses that may be tried by those bodies pursuant to statute or the law of war.* *See* 10 U.S.C. § 821 (emphasis supplied). Section 821, therefore, incorporates by reference the law of war, and limits the jurisdiction of a military commission convened pursuant to it to only those offenses that by statute or the law of way may be tried by military commissions. *See* CRS Report at 31; Diane F. Orentlicher & Robert K. Golmand, *When Justice Goes to War: Prosecuting Terrorists Before Military Commissions*, 25 Harv. J.L & Pub. Pol'y 653, 655 (2002).

Military commissions exercise four categories of jurisdiction: (i) "military justice" (applicable to prosecutions of members of the U.S. armed forces); (ii) "military government" (applicable only where the United States occupies all or part of a foreign country at the end of a

war); (iii) "martial law" (applicable when civilian courts are closed due to war or other disaster and the President instructs the military to exercise judicial authority); and (iv) "law of war" (based on principles of the international laws of war and applicable to unlawful enemy combatants for wartime acts). *See* Orentlicher & Golmand, *supra*, at 655–57 & n.5.

Only the fourth type of military commission jurisdiction – "law of war" – is at issue here. *Ex parte Quirin*, a World War II-era decision, held that a military commission may properly exercise such jurisdiction to try unlawful enemy combatants. *See Ex parte Quirin*, 317 U.S. 1, 25 (1942). There, on an order of the German High Command, eight German saboteurs entered U.S. waters in submarines, and landed rubber boats on two United States beachheads in Florida and New York, bringing ashore explosives. Their mission was to destroy war industries and facilities within the United States. After landing, they removed and buried their German uniforms, and proceeded on their mission in civilian dress. *Id.* at 21. After one of the eight turned himself in to the Federal Bureau of Investigation, the other seven were captured. All were tried before a military commission and convicted. Six were executed; two were sentenced to jail terms of thirty years and life imprisonment, respectively. *See* Louis Fisher, CRS Report RL31340, *Military Tribunals: The Quirin Precedent* (March 26, 2002).

Military commission law of war jurisdiction is limited to trying individuals for unlawful acts committed *during war*. The central holding of *Ex parte Quirin* turned on the fact that the Court found the German aliens to be *unlawful enemy combatants*. To the extent the Military Order seeks to enlarge the jurisdiction of military commissions to try the Petitioners – individuals not involved in the preparation or execution of the September 11 attacks, who never set foot onto the battlefield in Afghanistan, and were taken into custody in Bosnia, by Bosnian

authorities, in connection with alleged violations of Bosnian law – it exceeds the authority granted by 10 U.S.C. § 821, and is unsupported by the precedent of *Ex parte Quirin*.

The Supreme Court's recent decision in *Hamdi* also mandates this conclusion. There, the Supreme Court, noting that the Government "has never provided any court with the full criteria that it uses in classifying individuals as [enemy combatants]," accepted the definition that such enemy combatants may be detained pursuant to the AUMF. *Id.* at 2639–40. The Petitioners do not fall within *Hamdi's* definition of "enemy combatant."

Nor are the Bosnian Petitioners enemy combatants under the expanded definition of that term set forth in the July 7, 2004, Wolfowitz Order. As set forth *supra* at page 11, the Wolfowitz Order purports to broaden the Government's evolving definition of enemy combatant well beyond that which it proffered for purposes of the *Hamdi* litigation. Nevertheless, despite the Government's attempt to cast a broader net after the fact, Petitioners are not enemy combatants, even under the Wolfowitz Order's new definition. In fact, the term "enemy combatant" has had no prior significance in the Government's own parlance. Military regulations provide for the following possible status determinations: (i) "enemy prisoner of war," (ii) "retained personnel" (such as medical, religious, or volunteer aid workers), (iii) "innocent civilian," or (iv) "civilian internee" who, for reasons of operational security, or probable cause incident to criminal investigation, should be detained. *See, e.g.,* Army Reg. 190-8, § 1-6(e) (10).

Indeed, while the word "combatant" is understood as a term of art, the specific term "enemy combatant" has no previously recognized significance under international law. The term "combatant" is widely accepted as referring only to members of the armed forces *engaged in armed conflict*. This meaning is reflected in the definition adopted by the plurality in *Hamdi*, but is inconsistent with the re-definition in the Wolfowitz Order. In interpreting the meaning of

"enemy combatant," preference should afforded the definition consistent with the United States' international law obligations. *See United States v. Yousef*, 327 F.3d 56, 92 (2d Cir. 2003) ("where legislation is susceptible to multiple interpretations, the interpretation that does not conflict with 'the law of nations' is preferred").

10 U.S.C. § 836 provides that spies shall be tried by court-marital or military commission, and punished by death if convicted. *See* 10 U.S.C. § 836. On its face, § 836 applies only to individuals charged with espionage. It does not provide any authority to try by military commission individuals alleged to have engaged in acts other than espionage. Section 836, therefore, also does not provide authority for a military commission to try Petitioners.

The AUMF expressly limits the use of force to "nations, organizations, or persons" who "planned, authorized, committed, or aided" the attacks of September 11. Indeed, the Supreme Court's decision in *Hamdi* is consistent with that interpretation of the scope of authority granted by the AUMF:

> The AUMF authorizes the President to use "all necessary and appropriate force" against "nations, organizations, or persons" associated with the Septemeber 11, 2001, terrorist attacks. There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF. We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the "necessary and appropriate force" Congress has authorized the President to use.

Hamdi, 124 S. Ct. at 2640.

To the extent the Military Order purports to authorize trial by military commission of individuals for acts that are not related to the planning or execution of the September 11 attacks,

and the resulting armed conflict in Afghanistan, it exceeds the authority granted by Congress in the AUMF. *See id.*; CRS Report at 31.

This interpretation also results in a reading of the Military Order that is internally consistent. Section 2(a)(1) of the Military Order limits the class of individuals subject to it to those who participated in certain acts "at the relevant time." Military Order § 2(a)(1). The meaning that should be ascribed to that phrase is gained by reference to other provisions in the Military Order. The findings of Section 1, focusing in large part on the threat of terrorism and the attacks of September 11, and the timing of the Order – issued just two months after September 11 – show that the phrase "at the relevant time" means the period in which a person (or nation) is or was involved with events surrounding the September 11 attacks and the conflict in Afghanistan.

This interpretation of the Military Order harmonizes it with the cited implementing authority. To construe the Military Order broadly to authorize trial by military commission of any persons subject to it for suspected acts taking place anywhere in the world, wholly unrelated to September 11, at any time, would render it inconsistent with that authority.

None of the authority upon which the Military Order is based permits the trial by military commission of the Bosnian Petitioners; their custody is without basis and unlawful.

2. *Respondents Lack Authority to Detain Petitioners.*

Even if one assumes, for purposes of this Application, that the authority to detain is reasonably related to and flows from the authority to try by military commission (a proposition that is itself subject to question), at a minimum, the scope of the authority to detain can be no greater than the authority to try individuals by military commission. Consequently, the Military Order should be read, consistent with its implementing authority, to permit at most detention of

non-citizens involved in the Septemeber 11 attacks and subsequent conflict in Afghanistan, for the duration of that conflict.

But the Unites States has construed the Military Order to provide authority to detain any person subject to it for an unlimited period of time, and without charge. That interpretation is inconsistent with the implementing authority cited in the Military Order, and was rejected by the Supreme Court in *Hamdi*:

> Certainly we agree that indefinite detention for the purposes of interrogation is not authorized [by the AUMF]. Further, we understand Congress' grant of authority for the use of 'necessary and appropriate force" *to include the authority to detain for the duration of the relevant conflict*, and our understanding is based on longstanding law-of-war principles . . . . The United States may detain, for the duration of the hostilities, individuals legitimately determined to be Taliban combatants who engaged in armed conflict against the United States.

124 S. Ct. at 2641-2 (internal quotations omitted) (emphasis supplied).

As set forth above, the Bosnians are not unlawful enemy combatants, and were not involved in the Afghanistan conflict or acts in connection with the attacks of Septemeber 11. Their continued detention is without authority, and unlawful.

B. **Petitioners Will Be Irreparably Harmed If The CSRTs Proceed As To Them.**

The prior section described why Petitioners' Habeas Corpus Petition is likely to succeed on the merits. In this section, we will demonstrate how allowing the CSRT to proceed as to them will irreparably jeopardize the Petitioners' ability to avail themselves of the full reach of constitutional due process rights they were recently held to be entitled to. Although the CSRT purports to provide a meaningful hearing – and its conclusions might later be argued to have binding legal effect, precluding further habeas review – in fact the CSRT's timing, structure, setting, and procedures are so profoundly flawed as to make a mockery of the very concept of due process. Indeed, the CSRT's "process" fails to meet even minimal standards of fairness. It does not permit representation through counsel; it fails to deliver a meaningful opportunity to

present and rebut facts; and, it is not overseen by impartial decision-makers. These defects create a real danger that the CSRT will command Petitioners' detention to continue indefinitely; the violation of such elementary precepts underlying due process will itself work a serious and irreparable injury on Petitioners.

Petitioners strongly disagree with the Government's suggestions that the CSRT procedures conform to the guidance provided by *Hamdi*. However, Petitioners concur that it is appropriate for this Court to look to the Supreme Court's decision in *Hamdi* for guidance concerning the due process standards to which Petitioners are entitled. In *Hamdi*, the Supreme Court held that accused enemy combatants are entitled to "fair opportunity to rebut the Government's factual assertions before a neutral decision maker." *Hamdi*, 124 S. Ct. at 2648; *see also Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for Southern Cal.*, 508 U.S. 602, 617 (1993) ("due process requires a 'neutral and detached judge in the first instance'" (quoting *Ward v. Monroeville*, 409 U.S. 57, 61-62 (1972)). Moreover, the plain language of the habeas corpus statute requires, at minimum, an opportunity for a prisoner to present and rebut facts. *Hamdi*, 124 S. Ct. at 2648; 28 U.S.C. §§ 2243, 2246–2248.

The following is a non-exhaustive list of the procedural flaws of the CSRT. Each one is a constitutional violation; any one would suffice to support an injunction.

(a) The Presumption of Guilt

Just as "it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime," *McFarland v. Am. Sugar Rfg. Co.*, 241 U.S. 79, 86 (1916), so should the executive be barred from simply declaring an individual guilty or presumptively guilty of a crime. Yet that is precisely what the Wolfowitz Order purports to do.

The stated purpose of the CSRT is to determine whether each detainee should *continue* to be classified as an enemy combatant – a classification that already has formed the purported basis for their detention for the past two and one-half years. Wolfowitz Order at ¶ (i). Remarkably, the Wolfowitz Order announces that "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." Wolfowitz Order at ¶ (a). The ostensible "multiple levels of review" cannot substitute for a hearing before an impartial adjudicator with certain elementary procedural safeguards. Indeed, they constitute nothing better than multiple levels of rubber-stamping by the DoD. As the Supreme Court stated in *Hamdi*, however, "an interrogation by one's captor, however effective an intelligence-gathering tool, hardly constitutes a constitutionally adequate fact finding before a neutral decision maker." *Hamdi*, 124 S. Ct. at 2651. The "multiple levels of review" inevitably function to create a presumption of correct classification by the DoD.

(b) Partiality of Decision-Maker

In *Hamdi*, Justice O' Connor noted that while the unique circumstances surrounding the detention of "enemy combatants" might make the extension of a full battery of procedural rights untenable, military operations would not be threatened by "a basic system of independent review," inclusive of the opportunity to be heard by "an impartial adjudicator." *Hamdi*, 124 S. Ct. at 2650. The CSRTs fail to provide even the semblance of a neutral adjudicator.

The mere fact that the allegedly "neutral" commissioned officer have not had previous contact with the Petitioners, *see* Wolfowitz Order at ¶ (e), is insufficient to establish those officers as impartial decision-makers. As officers in the U.S Armed Forces, the CSRT members are unquestionably affiliated with, and ultimately directed by, the DoD – the very institution that made the initial determination that classified the Petitioners as enemy combatants. Moreover, the President – the Commander-in-Chief of the U.S. Armed Forces (and thus of these CSRT

members) – has made repeated public statements reaffirming his unwavering belief that the detainees at Guantanamo are "enemy combatants" who should be detained indefinitely. *See, e.g.*, Elise Ackerman, *Guantanamo inmates told of right to seek release*, The San Diego Union-Tribune, July 13, 2004; Larry Neumeister, *Court Grants Prisoners Access To Lawyers: Court Rules U.S. Military Can't Indefinitely Hold Prisoners Without Access to Lawyers, Courts*, Associated Press, Dec. 18, 2003. Accordingly, on their face, the composition of the CSRTs fail to clear the low due process hurdle of impartiality.

(c) Denial of Access to Counsel

The CSRTs elect to ignore the existence of Petitioners' counsel, refusing to permit them to take part in the proceedings and, instead, allowing the Government to choose a personal representative for Petitioners with no input from them. *See* Wolfowitz Order at ¶ (c). As provided by the Wolfowitz Order, Petitioners' "personal representative" need not be an attorney, and will not have an attorney-client relationship with Petitioners. That structure creates not only concerns as to the fairness of the CSRTs themselves, but also runs the substantial risk of poisoning future proceedings, particularly habeas review of the lawfulness of Petitioners' detention.

Absent an attorney-client privilege, the personal representative will be free to convey to the CSRT any or all information he or she learns from Petitioners – regardless whether that information is beneficial to them for purposes of the CSRT. [6]

Finally, there is no requirement that the personal representative be a lawyer – or indeed, possess any form of legal training at all. The Government's delegation of authority to a non-

[6] As Petitioners noted *supra*, the Government has publicly stated that there will be no confidential relationship between the Detainee and the Personal Representative: "There will not a be a confidentiality agreement. . . . .This is a fact-based analysis. We want all of the facts to come forward. So we don't want client privilege where some data is not discussed." Secretary of the Navy England Briefing on Combatant Status Review Tribunal (July 9, 2004) (available at http:// www.dod.mil/transcripts/2004/tr20040709-0986.html (last visited July 26, 2004)).

lawyer to essentially serve as Petitioners' counsel will not only severely prejudice Petitioners in a proceeding that the Government apparently intends to argue should have preclusive effects; it also raises serious professional ethics concerns.

(d) The Lack of Procedural Certainty

The concept of certainty is fundamental to any reasonable notion of justice – the process must be fully defined at its inception. *See, e.g., Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 161 (1951) ("[f]airness of procedure is 'due process in the primary sense.'" (Frankurter, *J.*, concurring)). Put differently, no one, particularly a party to the process, should be permitted to change the rules while the game is being played. Yet the Wolfowitz Order allows exactly this eventuality. The Wolfowitz Order provides that "this Order . . . does not[] create any right or benefit, substantive or procedural, enforceable at law, in equity or otherwise by any party against the United States . . . or any other person." Wolfowitz Order at ¶ (j).

Thus, on its face, the Wolfowitz Order disclaims that Petitioners possess any enforceable rights as participants in the CSRT. The disclaimer of paragraph (j) effectively allows the Government to disregard the requirements of the Wolfowitz Order with impunity. Moreover, the Wolfowitz Order permits the "Secretary of the Navy, with the concurrence of the General Counsel of the Department of Defense, may issue instructions to implement this Order." Wolfowitz Order at ¶ (f). Thus, Petitioners would be without recourse if the Secretary of the Navy issued implementation instructions that altered the procedure of the CSRT, even if those alterations occurred while the CSRT was in process.

(e) The Lack of an Opportunity to Confront One's Accuser

The CSRTs further tilt the playing field by failing to offer Petitioners adequate means of discovering exculpatory evidence. The Wolfowitz Order provides that detainees may gather evidence in the following way:

> The detainee shall be allowed to call witnesses if reasonably available, and to question those witnesses called by the Tribunal. The Tribunal shall determine the reasonable availability of witnesses. . . . In the cases of witnesses who are not reasonably available, written statements, preferably sworn, may be submitted and considered as evidence.

Wolfowitz Order at ¶ (g)(8).

The Wolfowitz Order offers no guidance as to how the term "reasonably available" will be determined for those witnesses who are not in the U.S. Armed Forces. It is far from clear, given the expedited schedule upon which the Government is seeking to proceed, that witnesses important to Petitioners' status determination would be permitted to come to Guantanamo (even if they were willing) if such witnesses were, for instance, foreign nationals who lacked security clearance. Additionally, Petitioners will lack any means to meaningfully challenge and rebut any statements from witnesses who are in the U.S. Armed Forces and who are not "readily available."

As a result of the CSRT's total lack of evidentiary rules, as well as the other aspects discussed above, Petitioners will more than likely be asked to rebut the unsworn statement of an anonymous tipster, foreign law enforcement official, or a soldier deemed not readily available, a statement that incriminates Petitioners based solely on hearsay. Furthermore, if any of the hearsay material in that statement were deemed classified, Petitioners would not be permitted access to the material. In effect, Petitioners would have the burden of refuting evidence they were not permitted to see, provided by an individual who they are not permitted to question (who may even be anonymous), about information that would not be permitted in evidence in courts in

the United States. Equally chilling, the statements could be from another individual in the custody of the U.S. Armed Forces and might have been obtained through coercive methods that would eviscerate the reliability of the statement.

The detainees' access to documentary evidence is equally insufficient. The Wolfowitz Order provides "[t]he personal representative shall be afforded the opportunity to review any reasonably available information, including any records generated in connection with earlier determinations or reviews." Wolfowitz Order at ¶ (c).

Again, the term "reasonably available" is left undefined and the determination of availability is left wholly to the discretion of the Government. Reports suggest that the only document to which the detainees have ready access is the Koran. Further, the wording of paragraph (c) suggests that the detainee will not necessarily be permitted to review the materials that were relevant to early determinations by the Government, even to the extent that those materials are not classified. Rather, the personal representative "*may* share any *information* with the detainee." *Id.* at ¶ (c) (emphasis supplied). As such, the detainee's rights to discovery of documents used in any prior reviews (where he had no notice, he was not allowed to participate, and he was not represented by counsel) are reduced to the right to learn second hand, from an individual who has no ethical obligations to him, about an undefined portion of the materials used to classify him as an enemy combatant – if his personal representative chooses to share that information with him. Such an arrangement does not and indeed cannot comport with even the most minimal requirements of due process.

(f) Treatment of Evidence

The Wolfowitz Order provides that the Tribunal shall use a "preponderance of evidence" standard in reaching its determination, and that "there shall be a rebuttable presumption in favor of the Government's evidence." Wolfowitz Order at ¶ (g)(12). In *Hamdi*, the Supreme Court

upheld such a standard, but only where a "fair opportunity for rebuttal were provided." *Hamdi*, 124 S. Ct. at 2649. Here, no such "fair opportunity" exists, given the lack of access to counsel and discovery, as well as the composition of the CSRT. Here, where the balance is so heavily weighted in favor of the Government and against the private interest of Petitioners, the risk of "erroneous deprivation of . . . liberty" is high. *Id.* at 2646-47.

(g) No adequate competency evaluation

A final independent and adequate reason upon which the Court could conclude that Petitioners' rights will be violated by being subjected to the CSRTs is the fact that no adequate determination of the Petitioners' competency to participate in these CSRTs has been made. There can be no question that the conditions of confinement raise serious doubts as to the Petitioners' mental competency to represent themselves, without an attorney, before the CSRTs. In the words of the Supreme Court, "[t]he mentally incompetent defendant, though physically present in the courtroom, is in reality afforded no opportunity to defend himself." *Drope v. Missouri,* 420 U.S. 162, 171 (1975) (internal quotations omitted). Accordingly, it has long been recognized that adequate competency determination procedures are a fundamental element of the procedural due process under the Constitution. *Pate v. Robinson*, 383 U.S. 375, 378 (1966).

Of course, one major component of the due process competency standard ordinarily applied by federal courts – "whether [a defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding," *Dusky v. United States*, 362 U.S. 402, 402 (1960) (internal quotations omitted) – purportedly (and unlawfully) does not apply here since the CSRTs deny the Petitioners the right to counsel. Thus, the relevant competency standard to be applied in this context is whether Petitioners have sufficient present ability to

present their own defense *pro se*.[7] Given the conditions of interrogation and confinement, serious doubts abound whether Petitioners are competent to do so. This Court should therefore, at a minimum, order that Petitioners' mental competency to be evaluated by an independent psychiatric professional before the CSRTs are allowed to proceed. *See Drope*, 420 U.S. at 180 (court must order competency hearing when there is any doubt as to criminal defendant's competency); *Pate*, 383 U.S. at 385 (same); *see also Campbell v. McGruder*, 580 F.2d 521, 531 (D.C. Cir. 1978) ("detention . . . in the important interval directly preceding trial . . . cannot be permitted to negatively affect the outcome of the criminal process").

The fact, according to media reports, that most detainees are held in isolation in their cells twenty-three hours a day, and even longer periods of isolation have been authorized as an interrogation method, *see* Rose, *Operation Take Away My Freedom, supra*; April 16, 2003 Rumsfeld Memo, cast sufficient doubt on Petitioners' competence to require an independent competency determination. Numerous federal courts have recognized that solitary confinement can severely impair the mental health of prison inmates. *See In re Medley*, 134 U.S. 160, 168 (1890) ("A considerable number of the prisoners fell, even after a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane . . . ."); *Hal Davenport v. DeRobertis*, 844 F.2d 1310, 1313 (7th Cir. 1988) ("[I]solating a human being from other human beings year after year or even month after month can cause substantial psychological damage, even if the isolation is not total."); *Madrid v. Gomez*, 889 F. Supp. 1146, 1230 (N.D. Cal. 1995) ("Social science and clinical literature have consistently reported that when human beings are subjected to social isolation and reduced environmental stimulation, they may deteriorate mentally and in some cases develop psychiatric

[7] *See* Wolfowitz Order ¶¶ (g)(8), (10) (giving detainee the right to call and question witnesses, to testify or otherwise address the Tribunal, and to submit documentary evidence on his own behalf).

disturbances."); *Ruiz v. Estelle*, 503 F. Supp. 1265, 1360 (S.D. Tex. 1980) ("the conditions of solitary confinement occasioned severely negative and pernicious psychological effects on some inmates"); *Dillard v. Pitchess*, 399 F. Supp. 1225, 1235 (C.D. Cal. 1975) (finding physical and psychological effects of solitary confinement to constitute cruel and unusual punishment).[8]

Petitioners have shown that the CSRT will be unconstitutional; therefore, no further demonstration of irreparable harm is required. The threatened deprivation of a constitutional right or protection is *itself* an irreparable harm sufficient to warrant injunction. *See, e.g., Elrod v. Burns,* 427 U.S. 347, 373 (1976) ("[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"); *United States v. Ferrara*, Civ.A. No. 92-2869 (NHJ), 1993 WL 405477, *1 (D.D.C. Feb. 8, 1993) (agreeing with Government that likely constitutional violation in allowing state bar AUSA disciplinary proceedings to go forward constituted irreparable harm).[9] Where constitutional rights are likely to be violated by challenged governmental action, those actions should be enjoined on the grounds that monetary damages after the fact cannot adequately ameliorate a preventable, foreseeable injury to core constitutional values. *See Gutierrez Mun. Court of the S.E. Judicial Dist., of L.A.*, 838 F.2d 1031, 1045 (9th Cir. 1988) (enforcement of "English only" law challenged as unconstitutional constituted irreparable harm because monetary damages were "inadequate compensation" for the deprivation of a constitutional right).

---

[8] Consistent with these judicial findings, psychiatric researchers have documented that solitary confinement can induce perceptual changes (including perceptual distortion and hallucination), severe free-floating anxiety, paranoia, and difficulties with thinking, concentration and memory. *See* Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 Am. J. Psychiatry 1450, 1452-54 (1983); *see also* Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. Rev. L. & Soc. Change 477 (1997) (providing broad survey of scientific and other literature concerning the psychological effects of solitary confinement).

[9] *See also Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984) (deprivation of 8th Amendment rights constituted irreparable injury); *Planned Parenthood of Minnesota vs. Citizens for Community Action*, 558 F.2d 861 (8th Cir. 1977) (interference with constitutionally protected abortion rights constituted irreparable harm); *McClendon v. City of Albequerque*, 272 F. Supp. 2d 1250, 1259 (D.N.M. 2003) (infringement of right to counsel constituted irreparable harm).

The harm that Petitioners here would suffer through the threatened deprivation of their constitutional rights, however, goes beyond mere abstractions. The constitutional rights blithely disregarded through the CSRT process – including Fifth Amendment due process rights and Sixth Amendment counsel rights – are fundamental protections against unlawful imprisonment. Without such protections Petitioners may, for example, be tempted to falsely admit to anti-American plots in desperate attempts to curry favor in what they believe to be their one and only chance to escape indefinite imprisonment or even death. Or Petitioners may seek to mount a defense but, in front of a biased tribunal employing constitutionally infirm rules and without assistance from counsel, simply be unable to do so effectively. *See Haitian Ctr. Council, Inc. v. McNary*, 789 F. Supp. 541, 547 (E.D.N.Y. 1992) (lack of counsel in deportation proceedings affected ability to present defense and thus created undue risk of wrongful deportations). Thus the lack of constitutional protections creates a real risk that Petitioners will wrongly be adjudicated by the CSRTs as enemy combatants.

Petitioners wrongful designation as enemy combatants will in turn cause further devastating irreparable injuries. Most obviously, Petitioners will continue to be unlawfully detained without due process, itself an irreparable harm. *See, e.g, Jolly v. Coughlin*, 76 F.3d 468, 482–83 (2d Cir. 1996) (constitutionally suspect prison rules caused irreparable harm, including unlawful confinement); *United States v. Bogle*, 855 F.2d 707, 710–11 (11th Cir. 1988) ("unnecessary deprivation of liberty clearly constitutes irreparable harm"). Moreover, once adjudicated as enemy combatants, the conditions of their detention will most likely become more restrictive and severe, the government having, through an inadequate process, satisfied itself of that they are unlawful enemy combatants to whom (in the Government's view) the full protections of the Geneva Convention and United States law do not apply. *See Ashkenazi v. Att.*

Gen. of the United States, 246 F. Supp. 2d 1, 9–10 (D.D.C. 2003) (unlawful increase in severity of confinement irreparable harm).

The consequences flowing from an unconstitutional adjudication that Petitioners are enemy combatants will not be limited to those caused by the United States military alone. The labeling of Petitioners as enemy combatants by the United States military will likely lead their home countries to treat them as such and take actions against them, and possible their families and businesses.

Finally, the mere stigma of being labeled an enemy combatant is itself an irreparable harm. Petitioners may be wrongfully tarnished with a label and status that indicates that they are enemies of the United States and linked to enemy plots to harm this country and its citizens. Indeed, the stigma from other disparaging or inflammatory status determinations – including those less prejudicial than a determination that one is an enemy combatant – have been held to cause irreparable harm warranting injunctive relief. *See, e.g., McVeigh v. Cohen,* 983 F. Supp. 215 (D.D.C. 1998) (enjoining military proceedings on the grounds that unwarranted dishonorable discharge would cause stigma); *Axelrod v. Phillips Academy*, 36 F. Supp. 2d 46, 50 (D. Mass. 1999) (enjoining disciplinary proceedings against student to avoid irreparable harm from "stigma of expulsion"); *Doe v. Pataki*, 919 F. Supp. 691, 698 (S.D.N.Y. 1996) (stigma associated with being publicly labeled a sex offender under potentially unconstitutional law warranted injunctive relief); *National Rural Elec. Co-op Ass'n v. National Agr. Chemical Ass'n*, 1992 WL 477020 (D.D.C. Nov. 25, 1992) (enjoining trademark violation to prevent trademark owner from wrongfully bearing the stigma of being an environmental polluter); *cf. Sullivan v. Murphy*, 478 F.2d 938, 962 (D.C. Cir. 1973) (stigma of wrongful arrests in political protests required that arrest records be expunged).

C. **Granting an Injunction Will Not Substantially Injure Other Interested Parties.**

Although there are serious questions to be raised as to the propriety of the CSRT as it is applied across the entire population of Guantanamo detainees, that question is not presented here. The present application does not seek a declaration of legal infirmity with respect to the CSRT. It focuses, instead, on the CSRT proceeding *now*, as to *these Petitioners*, who are represented by counsel and who have been prohibited from meeting with counsel, and who, by virtue of the nature of their original detention, have unique arguments relating to the DoD's legal authority to hold them as enemy combatants. It is difficult to conceive of an injury to any party – or any legitimate public interest – by insisting that the proceedings await an opportunity of counsel to meet in an unmonitored setting with their clients, for an evaluation of their mental competency to be evaluated, before rushing them before the CSRT.

Further, the DoD has publicly stated that the CSRT do not replace the "Dangerousness Review" procedure established in March of this year. *See Combatant Status Review Tribunal Order Issued*, Defense Department News Release No. 651-04 (July 7, 2004). Whether the CSRT go forward or not, nothing prevents the Government from assessing whether it is no longer in the nation's interest to hold any given detainee, nor from deciding to return a detainee to his home country. Similarly, were the CSRT process to be stayed, nothing would prevent the Government from proceeding with the Military Commission trials, where jurisdiction is proper. The CSRT are an independent prong of the Government's management of Guantanamo, and conflict with only one thing: The Article III Courts' habeas jurisdiction, as recognized by the Supreme Court in *Rasul*.

D. **Granting a Preliminary Injunction Serves the Public Interest By Requiring Public Officials to Comply With the Law, Preserving International Comity, Preventing Unreasonable Detention, and Checking Executive Power.**

Indefinitely suspending the CSRTs serves the public interest because these CSRTs fall egregiously short of the due process standards required where the federal courts have jurisdiction. Where the law at issue is not itself unconstitutional, "there is a strong public interest in meticulous compliance with the law by public officials." *Fund for Animals, Inc. v. Espy*, 814 F. Supp. 142, 152 (D.D.C. 1993); *See also Fund for Animals, Inc. v. Clark*, 27 F. Supp. 2d 8, 15 (D.D.C. 1998). The Constitution obligates the President, and by implication any of his executive appointees, to "take care that the Laws be faithfully executed." U.S. Const., art. II, § 3; *see also Espy*, 814 F. Supp. at 152 (Article II of the Constitution's "take care" clause "declares a prime public interest").

Confidence that the United States stands for "the rule of law" has been shattered by the Abu Ghraib prison scandals and allegations of abuse in other detention facilities around the world, all of which create the impression that the United States is bent on creating extralegal "black holes" that allow it to avoid the application of its own laws, as well as normative international standards. Holding CSRTs that lower the standard of proof to "preponderance of the evidence" and requiring Petitioners, who have been held for over two and one-half years and subjected to coercive interrogation techniques, to represent themselves without counsel will not restore that confidence, nor does it comply with the law. *See Art-Metal USA v. Solomon*, 473 F. Supp. 1, 8 (D.D.C. 1978) ("[O]ur system of laws does not operate on the principle of the Queen in Alice in Wonderland 'Sentence first verdict afterwards.'")

The public interest represented by Government officials upholding the Constitution and complying with international law must of course be balanced against "the greatest of all public

interests, that of national security." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 164 (1951). But in striking the balance among competing interests, "the relevant considerations must be fairly, which means coolly, weighed" with due regard to the fact that a court "is sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government." *Id.* at 164. Petitioners have been in the United States's custody since January 2002. They were not picked up on the battlefield in Afghanistan. *See* Petition for a Writ of Habeas Corpus ¶¶ 18, 20. Any information they might offer at this point is highly likely to be stale. It has also undoubtedly been rendered suspect by the coercive interrogation tactics used at Guantanamo. Furthermore, Petitioners claim to be innocent of any hostile actions toward the United States. *Id.* at ¶¶ 13, 23. In view of the length of time involved and the possibility of misidentification, the balance shifts. The harm to Petitioners is immense; the threat to national security unclear. Where the Government does not make a showing that a particular detainee is a risk to security, and thus should be charged with a particular crime, the public interest lies in protecting his liberty interest. *See Seretse-Khama v. Ashcroft*, 215 F. Supp. 2d 37, 54 (D.D.C. 2002) ("In light of the INS's unduly prolonged detention of petitioner, and absent any showing that petitioner presents a clear risk of flight or threat to the safety to the community, there is little doubt that the public interest would be better served here by protecting the petitioner's liberty interest.").

IV. Conclusion

The clear import of *Rasul* is that Petitioners are entitled to a robust habeas corpus review in federal court. As Justice Stevens observed, the protections of habeas corpus are strongest when its serves its original purpose of reviewing executive detention. *Rasul*, 124 S. Ct. at 2692. The right to notice, the right to place trust in one's counsel, and the right to a full and fair factual inquiry before an impartial adjudicator are the hallmarks of the writ of habeas corpus that

developed at common law and were entrenched in statute and the Constitution. Now that the Supreme Court has recognized Petitioners' right to bring habeas petitions, this Court could – and should – ensure that this right does not become an empty promise, compromised by the rushed and cynical efforts by the DoD to place a band-aid over one of the most shameful and extended violations of United States law, international standards, and common human decency.

The Court should enjoin the CSRT proceedings so that the Petitioners' right to counsel is not compromised and their ability to effectively present and rebut facts is not tainted.

Dated: New York, New York
August 2, 2004

Respectfully submitted,

WILMER CUTLER PICKERING
HALE AND DORR LLP

By: /s/

Douglas F. Curtis (D.C. Bar No. 420270)
Peggy Kuo (Bar. No. 449271), *pro hac vice* pending
Robert W. Trenchard, *pro hac vice* pending
399 Park Avenue
New York, NY 10022
(212) 230-8800

Stephen H. Oleskey, *pro hac vice* pending
Robert C. Kirsch, *pro hac vice* pending
Melissa A. Hoffer, *pro hac vice* pending
60 State Street
Boston, MA 02109
(617) 526-6000

Lead Counsel for Petitioners