RECORD OF TRIAL

COVER SHEET

IN THE
MILITARY COMMISSION
CASE OF

UNITED STATES

V.

OMAR AHMED KHADR

ALSO KNOWN AS:

AKHBAR FARHAD
AKHBAR FARNAD

NO. 050008

VOLUME VI OF ___ TOTAL VOLUMES

SELECTED FILINGS--*U.S. V. KHADR*
DISTRICT COURT & DETAINEE
TREATMENT ACT LITIGATION

United States v. Omar Ahmed Khadr, NO. 050008

INDEX OF VOLUMES

A more detailed index for each volume is included at the front of the particular volume concerned. An electronic copy of the redacted version of this record of trial is available at http://www.defenselink.mil/news/commissions.html.

Some volumes have not been numbered on the covers. The numerical order for the volumes of the record of trial, as listed below, as well as the total number of volumes will change as litigation progresses and additional documents are added.

After trial is completed, the Presiding Officer will authenticate the final session transcript and exhibits, and the Appointing Authority will certify the records as administratively complete. The volumes of the record of trial will receive their final numbering just prior to the Appointing Authority's administrative certification.

VOLUME NUMBER	SUBSTANCE OF CONTENTS
I*	Military Commission Primary References (Congressional Authorizations for Use of Force; Detainee Treatment Act; UCMJ articles; President's Military Order; Military Commission Orders; DoD Directive; Military Commission Instructions; Appointing Authority Regulations; Presiding Officer Memoranda—includes DoD rescinded publications)
II*	Supreme Court Decisions: *Rasul v. Bush*, 542 U.S. 466 (2004); *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *In re Yamashita*, 327 U.S. 1 (1946); *Ex Parte Quirin*, 317 U.S. 1 (1942); *Ex Parte Milligan*, 71 U.S. 2 (1866)
III*	DoD Decisions on Commissions including Appointing Authority orders and decisions, Chief Clerk of Commissions documents
IV*	Federal Litigation in *Hamdan v. Rumsfeld*, at U.S. Supreme Court and D.C. Circuit
V*	Federal Litigation at U.S. District Courts Not Filed by Counsel in *United States v. Khadr*
VI*	Selected filings and U.S. District Court decisions in *United States v. Khadr*
VII*	Transcript (Jan. 11 and 12, 2006 sessions)

* Interim volume numbers. Final numbers to be added when trial is completed.

United States v. Omar Ahmed Khadr, NO. 050008

INDEX OF VOLUMES

VOLUME NUMBER	SUBSTANCE OF CONTENTS
VIII†	Review Exhibits 1-53 (Jan. 11 and 12, 2006 sessions)
IX†	Review Exhibits 54-64 (Jan. 11 and 12, 2006 sessions)

† Interim volume numbers. Final numbers to be added when trial is completed.

SELECTED FILINGS IN U.S. DISTRICT COURT, DECISIONS OF U.S. DISTRICT COURT, AND DETAINEE TREATMENT ACT FILINGS AT THE D.C. CIRCUIT COURT

PUBLISHED DECISIONS OF DISTRICT OF COLUMBIA DISTRICT COURT PERTAINING TO THE ACCUSED 1

***O.K. v. Bush*, 344 F. Supp. 2d 44 (D.D.C. Oct. 26, 2004)** 1

***O.K. v. Bush*, 377 F. Supp. 2d 102 (D.D.C. July 12, 2005)** 26

SELECTED DISTRICT COURT FILINGS 48

138 Judicial Order, Habeas Discovery is Stayed (Oct. 27, 2005) (4 pages) 48

143-1 Petitioner's Motion for Leave to File Supplemental Petition (Dec. 15, 2005) (6 pages) 52

144 Respondent's Response to Petitioner's Motion for Leave to File Supplemental Petition (Dec. 16, 2005) 58

145-1 Petitioner's Supplemental Petition for Writ of Habeas Corpus, and Complaint for Declaratory and Injunctive Relief (Dec. 19, 2005) (35 pages) [Includes 8 Counts asserting relief from trial by military Commission is necessary] 60

146 Notice of Motion to Stay Commission (Dec. 23, 2005) (1 page) 95

147-1 Petitioner's Motion to Stay Commission (Dec. 29, 2005) (12 pages) 96

147-2 Commission Scheduling (Redacted Version) (Dec. 29, 2005) (1 page) 108

147-3 Response to Order to Show Cause Regarding Respondent's Motion to Dismiss from *Hicks v.* 109

SELECTED FILINGS IN U.S. DISTRICT COURT, DECISIONS OF U.S. DISTRICT COURT, AND DETAINEE TREATMENT ACT FILINGS AT THE D.C. CIRCUIT COURT

Bush **(filed Dec. 29, 2005) (3 pages)**

147-4 Motion for Abeyance from *Hamdan v. Rumsfeld* Original dated (May 14, 2004), (filed Dec. 29, 2005) (11 pages) **112**

147-5 Proposed Order to Stay Commission Proceeding (Dec. 29, 2005) (1 page) **123**

148 District Court Orders Briefing Schedule and Directs Parties to Address Detainee Treatment Act, H.R. 2863 (Dec. 30, 2005) (3 pages) **124**

149-1 Government Motion to Dismiss Petitioner's Habeas Case along with Many other Habeas Cases Because Of Detainee Treatment Act (Jan. 4, 2006) (11 pages) **127**

149-2 H.R. 2863 Detainee Treatment Act (Jan. 4, 2006) (7 pages) **138**

150 Jointly Proposed Order to Dismiss (Jan. 5, 2006) (1 page) **145**

150-1 Joint Motion to Vacate the Court's Order of Dec. 30, 2005, and Petitioner's unopposed Motion to Defer the Court's Consideration of the Detainee Treatment Act (Jan. 5, 2006) (4 pages) **146**

150-2 Letter from Mr. Robert M. Loeb, DoJ Civil Division to the D.C. Circuit Court (Jan. 5, 2006) (6 pages) **150**

150-3 D.C. Circuit Court Order Directing Filing within 14 days of Briefs on the Detainee Treatment Act (Jan. 5, 2006) (2 pages) **156**

151 Petitioner Withdraws Motion to Stay Commission (Jan. 5, 2006) (1 page) **158**

SELECTED FILINGS IN U.S. DISTRICT COURT, DECISIONS OF U.S. DISTRICT COURT, AND DETAINEE TREATMENT ACT FILINGS AT THE D.C. CIRCUIT COURT

FILINGS OF PARTIES AT D.C. CIRCUIT CONCERNING THE DETAINEE TREATMENT ACT, H.R. 2863 159

Government's Brief (Jan. 18, 2006) (20 pages) 159

Petitioners' Briefs (Jan. 25, 2006) (96 pages) 179

*344 F. Supp. 2d 44, *; 2004 U.S. Dist. LEXIS 21567, **

O.K., et al., Petitioners, v. GEORGE W. **BUSH,** et al., Respondents.

Civil Action No. 04-CV-01136 (JDB)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

344 F. Supp. 2d 44; 2004 U.S. Dist. LEXIS 21567

October 26, 2004, Decided

SUBSEQUENT HISTORY: Injunction denied by, Injunction denied by O. K. v. **Bush,** 2005 U.S. Dist. LEXIS 13758 (D.D.C., July 12, 2005)

DISPOSITION: Petitioners' emergency motion to compel government to allow an independent medical evaluation and to produce medical records denied.

CASE SUMMARY

PROCEDURAL POSTURE: Petitioners, a detainee and his grandmother, filed an emergency motion to compel respondent government to allow an independent medical evaluation and to produce the detainee's medical records.

OVERVIEW: The detainee, an 18-year-old Canadian citizen, was being held in the United States (U.S.) Naval Base in Guantanmo Bay, Cuba. He was arrested by U.S. forces in Afghanistan when he was 15. His grandmother filed a petition for a writ of habeas corpus on his behalf challenging his detention. Petitioners sought the emergency motion seeking an independent medical evaluation of the detainee and production of his medical records, arguing that such relief was necessary to ensure his ability to understand the charges against him, if and when they are brought, and his ability to participate in his defense. The court denied the motion, holding that because no criminal charges had been brought against the detainee, it was not evident why a determination of mental competence was an emergency at the present time. Nor were petitioners entitled to guarantee the detainee's competence for the ongoing habeas proceedings. Even if the court had found that the detainee had a right to a mental competence determination before his status was reviewed by a military combatant status review tribunal, petitioners failed to submit evidence that raised a reasonable or bona fide doubt as to his mental competence.

OUTCOME: Petitioners' emergency motion was denied.

CORE TERMS: detainee, emergency, mental competence, medical care, prisoner, mental competency, detention, grandmother, medical evaluation, writ of habeas corpus, bona fide, confinement, authority to issue, presently, habeas petition, competency, newspaper, detained, ongoing, deliberate indifference, mental

incompetence, motion to compel, incompetence, incompetent, competence, prison, legal rights, next friend, legal right, combatant

LexisNexis(R) Headnotes ♦ Hide Headnotes

Criminal Law & Procedure > Pretrial Motions > Competency to Stand Trial

HN1 The determination of competency is limited to the time of a criminal trial. Prior to the commencement of any criminal proceedings, and after the completion of those proceedings, an assessment of mental competence is irrelevant except insofar as it bears indirectly on the defendant's capacity at the time of trial to understand the proceedings. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Habeas Corpus > Habeas Corpus Procedure

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Due Process

Criminal Law & Procedure > Pretrial Motions > Competency to Stand Trial

HN2 The Due Process Clauses of the Fifth and Fourteenth Amendments prohibit the prosecution of a criminal defendant who is not mentally competent to stand trial. To protect this right, a criminal defendant is entitled to a hearing on mental competency whenever there is sufficient evidence of incompetency. However, these constitutional guarantees do not apply outside of criminal proceedings. So, for example, courts have refused to recognize a right to a hearing on the defendant's mental competence in the context of deportation proceedings or naturalization proceedings. In these settings, a next friend or a guardian may step in to represent the interests of an incompetent defendant. However, the proceeding is not stayed until such time as the detainee is competent. The same is true of habeas proceedings. The United States Supreme Court has expressly held that a habeas action may proceed through a "next friend" even when a prisoner's mental incompetence would render him incapable of bringing the action on his own behalf. Therefore, the prohibition on the prosecution of an incompetent defendant, and the accompanying right to a determination of mental competence, cannot be said to extend to habeas proceedings. More Like This Headnote

Criminal Law & Procedure > Habeas Corpus > Habeas Corpus Procedure

Criminal Law & Procedure > Pretrial Motions > Competency to Stand Trial

HN3 Unlike in the criminal setting, where a defendant is subjected to a proceeding to determine his guilt at risk of his liberty, a habeas proceeding is brought by the petitioner in an attempt to obtain release. Mental incompetence may bar imposing the penalty of incarceration, but it should not preclude lifting that penalty. More Like This Headnote

Criminal Law & Procedure > Pretrial Motions > Competency to Stand Trial

HN4 To be competent to stand trial, a criminal defendant must demonstrate an ability to consult with his lawyer with a reasonable degree of rational understanding and a rational as well as factual understanding of the proceedings against him. However, a court will order a mental examination of the defendant, or a hearing on

the mental competence of a defendant to stand trial, only if there is reasonable cause to believe he is incompetent to understand the proceedings or assist in his own defense. Where the evidence fails to raise a bona fide doubt as to the defendant's mental competency, a court will not order an independent mental evaluation. More Like This Headnote

Constitutional Law > Civil Rights Enforcement > Prisoners > Medical Treatment

HN5 The United States Supreme Court has emphasized on several occasions that a claim of deficient medical care will not be cognizable under the Constitution unless a prisoner can show a level of dereliction so grave that it amounts to a deliberate indifference to the prisoner's serious medical needs. A prisoner challenging his medical care must be prepared to show that officials were knowingly and unreasonably disregarding an objectively intolerable risk of harm to the prisoners' health or safety. More Like This Headnote

Constitutional Law > Cruel & Unusual Punishment

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Due Process

Constitutional Law > Civil Rights Enforcement > Prisoners > Medical Treatment

HN6 The deliberate indifference standard was developed to assess the claims of prisoners under the Eighth Amendment. The standard of care for a pre-trial detainee who has not yet been convicted, however, is governed by the Due Process Clause of the Fifth and Fourteenth Amendments rather than by the Eighth Amendment. Although the United States Supreme Court has said that the due process rights of pre-trial detainees are at least as great as the Eighth Amendment rights of a convicted prisoner, most courts have applied the deliberate indifference standard in both settings. More Like This Headnote

Constitutional Law > Civil Rights Enforcement > Prisoners > Medical Treatment

HN7 The deliberate indifference standard means that courts will not intervene upon allegations of mere negligence mistake or difference of opinion. Absent a showing of misconduct that rises to the level of deliberate indifference, courts will not sit as boards of review over the medical decisions of prison officials, and they will not second-guess the adequacy of a particular course of treatment. In particular, a prisoner has no discrete right to outside or independent medical treatment. More Like This Headnote

Constitutional Law > Civil Rights Enforcement > Prisoners > Medical Treatment

HN8 To be sure, a court will not hesitate to intervene if a prisoner can identify a dereliction of duty so grave that it violates the prisoner's constitutional rights (or any other rights the prisoner might possess). However, to make this showing, a prisoner will generally have to combine two things: a claim under either the Constitution or some other source of legal rights that allows petitioner to challenge the conditions of confinement, together with sufficiently competent evidence of mistreatment to support the claim. More Like This Headnote

COUNSEL: **[**1]** For OMAR **KHADR,** Detainee, Camp Delta, Petitioner: Eric M. Freedman, New York, NY. Muneer I. Ahmad, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, Washington, DC. Richard J. Wilson, Washington, DC.

For FATMAH ELSAMNAH, a Next Friend of Omar **Khadr,** Petitioner: Eric M. Freedman, New York, NY. Richard J. Wilson, Washington, DC.

For GEORGE W. **BUSH,** President of the United States, DONALD RUMSFELD, Secretary, United States Department of Defense, JAY HOOD, Army Brig. Gen., NELSON J. CANNON, Army Col., all sued in their official capacity, Respondents: Lisa Ann Olson, U.S. DEPARTMENT OF JUSTICE, Washington, DC. Preeya M. Noronha, U.S. DEPARTMENT OF JUSTICE, Washington, DC. Robert J. Katerberg, U.S. DEPARTMENT OF JUSTICE, Washington, DC. Terry Marcus Henry, U.S. DEPARTMENT OF JUSTICE, CIVIL DIVISION, Washington, DC.

CHARLES B. GITTINGS, JR., Movant, Pro se, Manson, WA.

JUDGES: JOHN D. BATES, United States District Judge.

OPINIONBY: JOHN D. BATES

OPINION: [*47] ***MEMORANDUM OPINION***

Petitioner O.K. is an eighteen-year old Canadian citizen who has been held by the United States since the age of fifteen in a detention facility at the United States Naval Base in Guantanamo Bay, Cuba. n1 His grandmother has filed a petition for a writ of habeas corpus on his behalf as his **[**2]** next friend challenging the fact of his confinement and the conditions in which he is detained. On September 21, 2004, pursuant to a Resolution of the Executive Session of this Court, the case was transferred to Senior Judge Joyce Hens Green for coordination and management with the other habeas petitions filed in this Court by more than 60 detainees at Guantanamo. The case was retained by this Court for all other purposes.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - -

n1 Although petitioner is no longer a minor, he was one when he filed his petition for a writ of habeas corpus, and the Court will accordingly refer to him by his initials, consistent with the Local Rules of this Court. See L. Civ. R. 5.4(f)(2); First Amended Petition for Writ of Habeas Corpus ("Petition") P 13.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Presently before this Court is petitioners' emergency motion to compel the government to allow an independent medical evaluation and to produce the medical records of petitioner. Petitioners argue that he is in poor and deteriorating physical and mental health, and that the Court **[**3]** has the authority to issue an order under its inherent authority or the All Writs Act, 28 U.S.C. § 1651(a), to ensure that petitioner understands any charges that are filed against him and can participate meaningfully in his defense. The United States counters that the relief sought by

petitioners would trespass on the separation of powers; that the Court lacks authority to issue such an order under the All Writs Act because an independent medical review or the production of medical information is not necessary to preserve the Court's jurisdiction; that the order is an inappropriate exercise of any authority the Court might be viewed to possess because no charges have been brought against petitioner, and accordingly there is no reason to undertake any inquiry into petitioner's mental competence; and that, in any event, petitioner has failed to establish that his medical or mental condition requires an independent medical evaluation.

For the reasons set out in this memorandum opinion, the Court finds no basis for the emergency relief sought by petitioners at this time. In arriving at this conclusion, the scope of analysis is limited. The Court does not find **[**4]** it necessary to address the bounds of its authority under the All Writs Act (or any other constitutional or statutory source), or the extent to which that authority may be cabined in the circumstances of this case by the separation of powers. In addition, petitioner is no longer a minor, and the relief sought by this motion is prospective, and therefore the Court need not decide at this time the extent to which, if at all, a detainee's status as a minor alters the rights of the detainee or the responsibilities of the United States in administering his detention. Finally, and most importantly, the Court does not directly address the merits of the challenges to the legality of petitioner's detention or the conditions of his confinement.

Instead, the Court's ruling is narrow, and pertains solely to the emergency request for an independent medical evaluation **[*48]** and the release of medical records. As to that request, the Court concludes that petitioners have identified no legal proceeding for which there is a legal right to a determination of mental competency at this time. Even if there were such a proceeding, moreover, the Court concludes that petitioners have failed to produce evidence **[**5]** that calls into question petitioner's mental competency such that the relief sought would be appropriate. Finally, the Court rejects petitioners' request, untethered to any substantive claim of a violation of legal rights, that the Court should intercede in the decision-making of medical personnel at Guantanamo.

Accordingly, petitioners' emergency motion to compel the government to allow an independent medical evaluation and to produce medical records is denied.

BACKGROUND

A. Factual Background

On September 11, 2001, the al Qaeda terrorist network used hijacked commercial airplanes to launch a vicious and coordinated attack on the United States. Approximately 3,000 people were killed in the terrorist attack. One week later, the Congress passed a resolution authorizing the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks." Authorization for Use of Military Force, Pub. L. 107-40, § 2, 115 Stat. 224. Pursuant to that authority, the President ordered United States Armed Forces to Afghanistan with the mission of subduing the al **[**6]** Qaeda network and the Taliban regime that supported it. In the course of that campaign, the United States and its allies captured a large number of individuals, many of them foreign nationals, and transported many to the United States Naval Base at Guantanamo Bay, Cuba ("Guantanamo") for detention. There

are presently more than 500 alien detainees being held at Guantanamo. See Decl. of Dr. John S. Edmondson ("Edmondson Decl.") P 1.

One of those detainees is the petitioner in this case, a now eighteen-year old citizen of Canada. In the wake of the Supreme Court's ruling in Rasul v. **Bush,** 159 L. Ed. 2d 548, 124 S. Ct. 2686 (2004), he filed a petition for a writ of habeas corpus on his own behalf and through his grandmother as his "next friend" (collectively, petitioner and his grandmother are referred to herein as "petitioners"). n2 The petition challenges the legality of petitioner's detention and the conditions of his confinement under the Constitution, several federal statutes and regulations, and international law.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n2 The petition was later amended to clarify that it was being filed exclusively through his grandmother as his next friend, because petitioner "cannot secure access either to legal counsel or to the courts of the United States." Petition P 4.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[**7]**

Shortly after filing the habeas petition, petitioners filed an emergency motion asking this Court to instruct respondents n3 to allow an independent medical evaluation of petitioner at Guantanamo and to release his full medical records. The thrust of petitioners' argument as it has evolved is that this Court has an obligation to ensure petitioner's mental competency so that he can understand and participate in the defense of any charges that might be brought against him by military authorities. The motion also hints, at times, at a **[*49]** broader argument that the Court bears a more general duty to monitor the health and physical well-being of detainees at Guantanamo.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n3 The respondents are listed as President George W. **Bush,** Secretary of Defense Donald Rumsfeld, Army Brigadier General Jay Hood, and Army Colonel Nelson J. Cannon, all sued in their official and individual capacities.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Attached to the motion is a series of newspaper articles and website print-outs that generally address the conditions at Guantanamo, **[**8]** but do not specifically discuss petitioner's situation (except for a single article that mentions his confinement but does not discuss his health or living conditions). Somewhat more helpful is an affidavit submitted by petitioner's grandmother that is attached as an exhibit to the habeas petition. From this affidavit, as well as several submissions by respondents, the Court can piece together the circumstances of petitioner's capture and his detention that are relevant to this emergency motion.

Petitioner is a Canadian citizen born in Ottawa on September 19, 1986. See Petition PP 3, 13; Aff. of Fatmah Elsamnah ("Elsamnah Aff.") P 11. After living in Canada and

Pakistan for portions of his childhood, he moved with his family to Kabul, Afghanistan in 1997. See Petition P 13; Elsamnah Aff. PP 15-32. In July of 2002, petitioner was captured during a battle with American forces in Kabul. See Petition P 13; Elsamnah Aff. P 47. At least one American soldier died in the battle. n4 See Elsamnah Aff. P 46; Return at 11. At the time of his capture, petitioner was fifteen years of age and seriously injured, with shrapnel wounds to several parts of his body, including one to his left eye that **[**9]** has led to the loss of much of his vision in the eye. See Elsamnah Aff. P 46; [TEXT REDACTED BY THE COURT.]

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - -

n4 In fact, respondents state that petitioner has "admitted he threw a grenade which killed a U.S. soldier during the battle in which the detainee was captured." Resp. Factual Return ("Return") at 11.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Petitioner was transported to Guantanamo in the late fall of 2002. See Petition P 13; Letter from Dep. Ass't Att'y Gen. Thomas Lee to Senior Judge Joyce Hens Green, Sept. 3, 2004, at 2 n.1 ("Sept. 3 Lee Letter"); Resp'ts' Resp. Emergency Mot. Compel ("Resp."), Ex. A (Healthcare Services Evaluation). He was sixteen years old when he arrived at Guantanamo. See Sept. 3 Lee Letter at 2 n.1. The petition for a writ of habeas corpus represents that petitioner has since been held "virtually *incommunicado"* at Guantanamo, "separated from his mother and other family members, and without access to counsel." Pet'rs' Memo. Supp. Emergency Mot. ("Pet. Mem.") at 4. He is now eighteen years of age, and is still detained **[**10]** at Guantanamo at this time.

Petitioner has been housed in general population since he arrived at Guantanamo. See Sept. 3 Lee Letter at 2 n.1; Elsamnah Aff. P 49. According to newspaper accounts, each detainee in general population lives in a separate cell that is 6 feet 8 inches by 8 feet and, as a general rule, is allowed out of the cell three times a week for 20 minutes of solitary exercise, followed by a 5- minute shower. See Pet. Mem., Ex. C (Ted Conover, In the Land of Guantanamo, N.Y. Times Magazine, June 29, 2003 ("New York Times Article")) at 3. There is a separate detention facility at Guantanamo called Camp Iguana, reserved for detainees under the age of sixteen, that is modified to meet the needs of juveniles. See Sept. 3 Lee Letter at 1. Detainees at Camp Iguana participate in group counseling and meet with specialists to address their behavioral and educational needs. They are also provided with an opportunity to learn mathematics and improve their literacy, as well as participate in physical exercise. See id. at 1-2; New York Times Article at 1-2. Petitioner has never been **[*50]** housed at Camp Iguana. The respondents explain that this is because he did not arrive at Guantanamo **[**11]** until after his sixteenth birthday. See Sept. 3 Lee Letter at 2 n.1. n5

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - -

n5 The respondents state that there were only three detainees known to be younger than sixteen who were detained at Guantanamo, although they were all released to their home countries in January 2004. See id. at 1. As of September 3, 2004, there

were only two detainees other than petitioner who were believed to be older than sixteen but younger than eighteen. See id. at 2 n.1. Petitioner is now eighteen years old.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

According to a declaration submitted by Dr. John S. Edmondson, a Captain in the United States Navy who oversees the hospital that provides medical care to the detainees at Guantanamo, all detainees arriving at Guantanamo are given a complete physical examination upon arrival, and continue to receive medical attention throughout their detention. See Edmondson Decl. PP 5-6. A detainee can obtain medical care at any time by making a request to a guard or to medical personnel who make rounds on the cellblocks every other day. **[**12]** See id. P 5. From January 2002 to December 2003, the hospital staff conducted over 30,000 outpatient visits. See id.

The detention hospital has eighteen beds and a medical staff of seventy, as well as a twenty-one member behavioral health services staff. See id. PP 3-4. For medical procedures beyond the means of the detention hospital, Dr. Edmondson says that detainees are transferred to the Naval Base Hospital at Guantanamo, and specialists are occasionally flown in to provide care to detainees when the care even at the Naval Base Hospital is insufficient. See id. P 6. Dr. Edmondson reports that detainees at Guantanamo have been treated for a variety of medical conditions, among them hepatitis, diabetes, tuberculosis, malaria, and malnutrition. See id. P 7. The medical staff has provided prescription drugs as well as prescription eyeglasses and prosthetic limbs. See id. P 7. Since January 2002, the staff has performed over 160 surgical procedures on detainees, ranging from the removal of an appendix to coronary artery stent replacement. See id. P 9.

Finally, in a portion of the declaration filed under seal for reasons of privacy, n6 Dr. Edmondson states that he has reviewed the **[**13]** medical records of petitioner, and concludes that [TEXT REDACTED BY THE COURT.] See id. P 10. Dr. Edmondson states that petitioner "has a history of [TEXT REDACTED BY THE COURT.]" Dr. Edmondson also emphasizes that at "no time was [petitioner] denied medical care as a consequence of not cooperating in interrogations." Id. Along with Dr. Edmondson's declaration, the respondents submitted under seal a "Healthcare Services Evaluation" that summarizes the treatment of petitioner for his battle wounds and several minor medical problems, and concludes that he has [TEXT REDACTED BY THE COURT.] Healthcare Services Evaluation at 1-2. The Healthcare Services Evaluation notes that petitioner "has been followed by Behavioral Health Services for a diagnosis of [TEXT REDACTED BY THE COURT.] but is "currently not being followed by BHS." Id. at 2.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n6 Consistent with those personal privacy concerns of petitioner, references to petitioner's specific medical or mental history, treatment and assessment as drawn from respondents' submission have been redacted from this opinion.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[**14]**

Petitioners do not submit any evidence specifically refuting Dr. Edmondson's account of the medical facilities at Guantanamo. n7 Nevertheless, they express concern **[*51]** about the actual nature of the medical care that has been given to petitioner and his current physical and mental condition. Petitioner's grandmother states in an affidavit that petitioner's older brother Abdurahman, who was detained in Guantanamo for several months, was able to talk to petitioner:

I am advised that Abdurahman never saw [petitioner]. However, they did speak one time through a fence. [Petitioner] expressed concerns over his health and the fact that, without medical attention, he would completely lose the sight in his left eye.

Elsamnah Aff. PP 33-36, 46, 48. The affidavit does not explain how petitioner's grandmother came to be aware of this conversation, and it does not provide any more information about petitioner's concerns. Petitioners allege that petitioner's grandmother has "received several messages from petitioner expressing concern over his detention," although neither the messages, nor any description of the messages, is in the record. See Petition P 4.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n7 In fact, the newspaper articles submitted by petitioners tend to confirm Dr. Edmondson's account. See, e.g., Pet. Mem., Ex. F at 1 (Charlie Savage, Guantanamo's 'Child Soldiers' in Limbo, November 16, 2003, at 2) ("At an on-site hospital, doctors give the detainees regular health and dental checkups."); New York Times Article at 3 ("The average prisoner, I am told, has gained 13 pounds since arriving at Guantanamo.").

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[**15]**

Beyond these statements, petitioners rely on three kinds of information in support of their emergency motion. First, they direct the Court to newspaper articles and reports from international organizations expressing concern about the rising number of suicide attempts by detainees and, more generally, the allegedly deteriorating state of the mental health of many of the detainees in the face of indefinite confinement and extended isolation. See Pet. Mem. at 4-6. The articles submitted by petitioners also include some accounts by ex-detainees of the use of torture in the interrogation of detainees at Guantanamo, and reports that the Defense Department has authorized the use of attack dogs and "stress and duress" techniques in the interrogation of detainees. None of these accounts discuss petitioner or his physical or mental condition. Petitioners do not submit as evidence sworn affidavits from any the ex-detainees.

Second, petitioner submits two declarations of Dr. Eric Trupin, a professor of psychiatry and behavioral sciences at the University of Washington School of Medicine. In the first, Dr. Trupin concludes on the basis of what is known about petitioner's age, background and **[**16]** conditions of his confinement that his detention at Guantanamo places him "at significant risk for future psychiatric deterioration." Pet. Mem., Ex. E (Aug. 5, 2004, Decl. of Eric W. Trupin, Ph.D. ("Trupin Decl.")) P 17. Dr. Trupin notes that he has not

been allowed to meet or talk with petitioner, and therefore acknowledges that he cannot base his conclusions on a personal examination of petitioner. Id. P 21. In the second declaration, Dr. Trupin states that the Edmondson Declaration and the Healthcare Services Evaluation filed by respondents do "not meet minimal standards in addressing" petitioner's psychological health, and "never in my thirty years of clinical experience have I encountered an adolescent who has sustained this level of injury and changes in the circumstances of his functioning who has not displayed more serious forms of psychiatric and cognitive impairments." Pet. Reply Mem. Supp. Emergency Relief ("Pet. Reply Mem."), Ex. A (Aug. 23, 2004 Decl. of Eric W. Trupin, Ph.D. ("Trupin Reply Decl.")) PP 5, 9.

Finally, petitioners cite to a website containing a report written by three British citizens who were released from Guantanamo **[*52]** in March 2004. Pet. Mem. at 4-5 (citing **[**17]** http://www.ccr-ny.org/v2/reports/report.asp?ObjID=4bUT8M23lk&Content=424 ("Report of British Detainees")). The report alleges a range of abuses at Guantanamo, and describes the treatment of certain detainees in particular, including petitioner. The authors claim that in the time that they were at Guantanamo, petitioner was in constant pain, and yet doctors denied him medical care on numerous occasions because he had refused to cooperate with interrogators. They relate one instance where petitioner was allegedly on the floor in isolation badly ill. When the guards called the medics, "they said they couldn't see [petitioner] because the interrogators had refused to let them." Report of British Detainees P 298. The authors of the report do not swear to the truth of the allegations contained therein, and neither the report nor any other materials from these individuals has been submitted as evidence in this case.

On September 7, 2004, a military Combatant Status Review Tribunal ("CSRT") concluded that petitioner is "properly classified as an enemy combatant and is a member of, or affiliated with al-Qaida. n8 Return at 7-8. The documents filed by respondents in this Court regarding **[**18]** the CSRT proceedings state that the CSRT unanimously determined that petitioner "was medically and physically capable of participating in the proceeding" and "understood the tribunal proceeding." n9 Id. at 7-9. On September 10, 2004, the Legal Advisor to the CSRTs concluded that the proceedings and decision of the Tribunal were "legally sufficient and no corrective action is required" and recommended "that the decision of the Tribunal be approved and the case be considered final." Id. at 2-3.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n8 Among the documents from the CSRT proceedings is a "Summary of Evidence" stating that "the United States Government had previously determined that the detainee is an enemy combatant" on the basis of "information possessed by the United States that indicates that he is a member of al Qaida and participated in military operations against U.S. forces," including that: petitioner "admitted he threw a grenade which killed a U.S. soldier"; "attended an al Qaida training camp where he received weapons training";

admitted to working as a translator for al Qaida"; "conducted a surveillance mission ... to collect information on U.S. convoy movements"; and "planted 10 mines against U.S. forces in ... a choke point where U.S. convoys would travel." Id. at 11.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[**19]**

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n9 The documents also state that petitioner "chose not to participate in the Tribunal process." Id. at 8-9.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

B. Procedural History

Petitioner filed a petition for a writ of habeas corpus on July 2, 2004. He then filed this emergency motion on August 10, 2004, and an amended petition for a writ of habeas corpus on August 17, 2004. n10 Respondents filed their response to the emergency motion on August 18, 2004, to which they attached the affidavit of Dr. Edmondson and the Healthcare Services Evaluation discussed above. On September 1, 2004, and again in a clarifying order on September 14, 2004, this Court required respondents to provide a factual basis for petitioner's detention. On September 15, 2004, respondents submitted materials pertaining to petitioner's CSRT proceedings, some of which are summarized above.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n10 The amended petition is styled not only as a petition for a writ of habeas corpus, but also as a "Complaint for Declaratory and Injunctive Relief."

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

That same day, the Executive Session **[**20]** of this Court issued a Resolution observing that "a significant number of cases pertaining to more than 60 individual detainees **[*53]** at Guantanamo Bay are already pending with this Court," and instructing that all of these cases "be transferred by the judge to whom they are assigned, pursuant to LCvR 40.6(a) and 40.5(e), to Senior Judge Joyce Hens Green for coordination and management." Sept. 15, 2004 Resolution at 1-2. The Resolution states that the "transferring Judge will retain the case for all other purposes." Id. at 2.

Accordingly, on September 21, 2004, this Court issued an order transferring this case to Senior Judge Green for coordination and management. Senior Judge Green has since issued a scheduling order for the filing of a response by the United States to show cause why the writs of habeas corpus should not be granted. Consistent with this order, the United States filed a global motion to dismiss the habeas petitions of petitioner and all other Guantanamo petitioners. Responsive papers are due from the various petitioners on November 5, 2004.

Pursuant to the Resolution, this Court in its transfer order retained the case "for all other purposes" not related to coordination **[**21]** and management. One of those purposes is the resolution of the present emergency motion to compel the government to allow an independent medical evaluation and to produce medical records. The motion has now been fully briefed by the parties.

ANALYSIS

It is important at the outset to understand the exact nature of this emergency motion. Petitioners are not claiming that they require an emergency order to redress some ongoing violation of petitioner's rights that cannot await later resolution through these proceedings. So, for example, petitioners are not arguing that petitioner needs an independent medical evaluation because, without it, there will be a continuing violation of the Geneva Convention (claim seven of the petition) or the Army's torture regulations (claim ten), that will cause him irreparable harm and therefore must be resolved now. n11 Such a request, which would be in the nature of a motion for a preliminary injunction, is not the motion filed here.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n11 Indeed, although petitioners raise fifteen different claims for relief in their petition, they appeal to none of them as bases for the emergency relief presently sought.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[**22]**

Likewise, petitioner is not seeking discovery on his substantive claims. That is, he is not asking for an emergency independent medical examination or the production of medical records because that evidence is relevant to the legal allegations that he makes in his habeas petition. Indeed, petitioner would not be able to obtain the relief sought on that basis, because no discovery has yet been permitted in this habeas case.

Instead, petitioner asks for emergency relief on a narrower ground. He seeks an emergency independent medical examination and the production of medical records because such relief allegedly is necessary to ensure his ability "to understand the charges against him (if and when they are actually stated by the Government), and his ability to

participate meaningfully in his defense." Pet. Mem. at 11; see also, e.g., Pet. Reply Mem. at 5 ("Petitioner's legal competency has been thrown into question."). That, then, is the core issue presented for decision in petitioners' emergency motion: whether it is appropriate for the Court at this time to order an independent medical examination and the production of medical records to ensure that petitioner is mentally competent **[**23]** to participate in his defense in some future, anticipated (but not yet scheduled) proceeding.

[*54] Respondents argue that the Court has no authority to issue such an order. They maintain that the order would offend the constitutional doctrine of the separation of powers by injecting the judiciary into military decision-making about the war-time provision of medical care to enemy combatant detainees, and that the Court in any event lacks authority to issue the order under the All Writs Act, which they read as circumscribing the Court's authority to award injunctive relief to those orders that are "necessary to protect its jurisdiction." Resp. at 6-9. Petitioners reply that any argument that the relief they seek is foreclosed by the separation of powers does not survive Rasul v. **Bush,** 124 S. Ct. 2686 (2004), where they say the Supreme Court rejected similar arguments that the Court's habeas authority would interfere with the executive's conduct of the war against al Qaeda. See Pet. Reply Mem. at 2-3. Petitioners also maintain that the Court's authority to issue orders under the All Writs Act is expansive, and even if it were not, the Court would have the power to issue **[**24]** the order requested here pursuant to its inherent judicial and habeas powers. See id. at 4-6.

It is not necessary for this Court to address the contours of its authority to issue the relief sought by petitioners. For, even assuming there is authority to provide such relief, this Court concludes that it would be inappropriate to exercise that authority in this instance.

I. The Right to a Mental Competence Determination

As discussed above, petitioners' emergency motion as it has evolved is premised on the argument that an independent medical examination and the release of medical records is necessary to ensure petitioner's ability to understand any charges that are brought against him by the United States and to participate meaningfully in his own defense. See Pet. Mem. at 11. This argument, however, immediately runs into a problem: As petitioners must admit, no criminal charges have been brought against petitioner at this time. See id. Petitioners do not even claim that there is reason to believe that charges will be brought at any point in the foreseeable future.

Thus, petitioners are asking this Court to intercede -- before any criminal charges have been filed or **[**25]** there is even any prospect of criminal charges -- to assess the mental competence of an individual in the custody of the United States in the event that charges eventually are brought. Petitioners do not point the Court to any precedent for the preemptive mental assessment they propose. The law, in fact, is to the contrary. See, e.g., United States v. Copley, 935 F.2d 669, 671 (4th Cir. 1991) ("If there are no pending charges against the defendant, there is no need to determine his competency to stand trial."); United States v. Clark, 617 F.2d 180, 184 n.5 (9th Cir. .1980) ("The

determination of legal competency by a federal court is limited to the purposes of a criminal trial in that court. It has no general effect outside those criminal proceedings.").

HN1 The determination of competency is limited to the time of a criminal trial. Prior to the commencement of any criminal proceedings, and after the completion of those proceedings, an assessment of mental competence is irrelevant except insofar as it bears indirectly on the defendant's capacity at the time of trial to understand the proceedings. See, e.g., United States v. Bartlett, 856 F.2d 1071, 1077 n.5 (8th Cir. 1988) **[**26]** (purpose of mental competency proceeding is to determine whether defendant "at the time of his trial" has "sufficient present ability to consult with his lawyer" (quotation omitted)); **[*55]** United States v. Vamos, 797 F.2d 1146, 1150 (2d Cir. 1986) ("The question of competency to stand trial is limited to the defendant's abilities at the time of trial."). In light of the fact that no charges have been pressed, and none loom in the future, it is not evident why a determination of mental competence is an "emergency" at this time, or how petitioner would suffer imminent and irreparable harm without an immediate assessment of his ability to understand proceedings that have not been commenced, and may never take place. n12 See Martin v. Department of State, 2003 U.S. App. LEXIS 8175, No. 03-5070, 2003 WL 21026740, at *1 (D.C. Cir. Apr. 29, 2003) (rejecting motion for emergency relief at preliminary stage of proceedings because plaintiff had not shown irreparable harm).

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n12 Respondents admit that in "the event a detainee at Guantanamo is charged with a crime, such charges are prosecuted through a military commission. The detainee would have to be mentally competent to stand trial in order for these proceedings to take place." Resp. at 8.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[**27]**

The Court therefore declines to initiate a medical competence assessment at this time. The relief petitioners seek would transform the mental competency issue from a narrow inquiry designed to ensure that a criminal defendant is "mentally competent to understand the nature of the charges against him and to assist in his defense," United States v. Caldwell, 178 U.S. App. D.C. 20, 543 F.2d 1333, 1348 (D.C. Cir. 1975), into a process that draws courts into monitoring the health and welfare of any individual in the custody of the United States, n13 regardless of whether criminal charges have been brought or are likely to be brought in the future. Petitioners offer no support whatsoever for such an undertaking. To challenge the medical conditions of petitioner's confinement, petitioners should point to an actual violation of one of petitioner's legal rights or entitlements. There is simply no authority for petitioners' attempt to obtain judicial oversight of prison medical care through the backdoor of a mental competency proceeding for a non-existent criminal charge. See Berman v. Lamer, 874 F. Supp. 102, 106 (E.D. Pa. 1995) ("Absent a showing that ... officials have engaged **[**28]** in constitutionally impermissible

conduct, it [is] not in the public's interest for the court to usurp the [government's] authority and micro-manage the medical needs of a particular inmate.").

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n13 This could potentially encompass not only the detainees at Guantanamo, but also, for instance, individuals detained by the Immigration and Naturalization Service.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

In their reply memorandum, petitioners retreat to the position that, even if a medical examination and release of medical records are inappropriate to ensure petitioner's mental competency for any future *criminal charges*, they nonetheless are necessary to guarantee his competence for the ongoing *habeas proceedings.* See Pet. Reply Mem. at 6. Petitioners' mental competency theory fares no better in this new form.

HN2 The Due Process Clauses of the Fifth and Fourteenth Amendments prohibit the prosecution of a criminal defendant who is not mentally competent to stand trial. See Godinez v. Moran, 509 U.S. 389, 394, 125 L. Ed. 2d 321, 113 S. Ct. 2680 (1993). To protect **[**29]** this right, a criminal defendant is entitled to a hearing on mental competency whenever there is sufficient evidence of incompetency See Pate v. Robinson, 383 U.S. 375, 385-86, 15 L. Ed. 2d 815, 86 S. Ct. 836 (1966); United States v. Weissberger, 292 U.S. App. D.C. 412, 951 F.2d 392, 395 (D.C. Cir. 1991). However, these constitutional guarantees do not apply outside of criminal proceedings. See United States v. Mandycz, **[*56]** 351 F.3d 222, 225 n.l (6th Cir. 2003) ("At present, mental incompetency is only recognized as a defense to trial in criminal proceedings"). So, for example, courts have refused to recognize a right to a hearing on the defendant's mental competence in the context of deportation proceedings or naturalization proceedings. Nee Hao Wong v. INS, 550 F.2d 521, 523 (9th Cir. 1977); United States v. Mandycz, 199 F. Supp. 2d 671, 675 (E.D. Mich. 2002), appeal dismissed, 351 F.3d 222 (6th Cir. 2003). In these settings, a next friend or a guardian may step in to represent the interests of an incompetent defendant. However, the proceeding is not stayed until such time as the detainee is competent. See, e.g., Nelson v. INS, 232 F.3d 258, 261-62 (1st Cir. 2000); **[**30]** Mandycz, 199 F. Supp. 2d at 675.

The same is true of habeas proceedings. The Supreme Court has expressly held that a habeas action may proceed through a "next friend" even when a prisoner's mental incompetence would render him incapable of bringing the action on his own behalf. See Whitmore v. Arkansas, 495 U.S. 149, 162, 109 L. Ed. 2d 135, 110 S. Ct. 1717 (1990). Therefore, the prohibition on the prosecution of an incompetent defendant, and the accompanying right to a determination of mental competence, cannot be said to extend to habeas proceedings. See, e.g., Laws v. Lamarque, 351 F.3d 919, 923 (9th Cir. 2003) (noting that it has not found any "right to competency in noncapital postconviction proceedings"); Mines v. Cockrell, 2003 U.S. Dist. LEXIS 8736, No. 00-2044, 2003 WL

21394632, at *4 (N.D. Tex. May 21, 2003) (finding no legal authority for petitioner's request that his "habeas proceeding be stayed due to his alleged incompetence to assist in his own defense").

The logic of this principle is obvious -- HN3 unlike in the criminal setting, where a defendant is subjected to a proceeding to determine his guilt at risk of his liberty, a habeas proceeding is brought by the petitioner **[**31]** in an attempt to obtain release. Mental incompetence may bar imposing the penalty of incarceration, but it should not preclude lifting that penalty. n14 Accordingly, there is no basis for petitioners' suggestion that an order is necessary **[*57]** to guarantee petitioner's competence for these habeas proceedings. n15

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n14 There are three narrow exceptions to the general rule that a habeas petitioner does not have a right to a determination of mental competency. None applies here.

First, the Ninth Circuit has recognized a statutory right to a determination of mental competence in the habeas review of a death penalty conviction. Gates v. Woodford (Rohan ex rel. Gates), 334 F.3d 803, 817 (9th Cir. 2003). The court indicated that a determination of mental incompetence in this context will stay any ongoing habeas proceedings and delay the petitioner's execution. Laws, 351 F.3d at 923; Rohan, 334 F.3d at 814-16, 818-19. The Ninth Circuit has been careful to emphasize that this decision does not imply a general "right to competency in noncapital postconviction proceedings." Laws, 351 F.3d at 923. This line of cases is inapplicable here, for petitioner is not challenging a death penalty conviction.

Second, some courts have held that the mental incompetency of a habeas petitioner is an "extraordinary circumstance" that will justify tolling the statute of limitations for a habeas petition. Laws, 351 F.3d at 923, Worley v. Lytle, 2000 U.S. App. LEXIS 16095, No. 99-2103, 2000 WL 963169, at *1 (10th Cir. July 12, 2000). Petitioner makes no such argument here.

Finally, several cases have held that a court must conduct an inquiry into a death row inmate's mental competence to abandon or waive an ongoing collateral attack on a death penalty conviction and sentence. See Rees v. Peyton, 384 U.S. 312, 16 L. Ed. 2d 583, 86 S. Ct. 1505 (1966); Comer v. Stewart, 215 F.3d 910 (9th Cir. 2000); Mata v. Johnson, 210 F.3d 324, 330 (5th Cir. 2000); Ford v. Haley, 195 F.3d 603, 617 (11th Cir. 1999). Even if this rule were to apply outside the death penalty setting, petitioner is not attempting to waive or withdraw his habeas challenge.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[**32]**

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n15 Petitioners appeal to Wallace v. Reno, 194 F.3d 279, 285 (1st Cir. 1999), but in that case the court merely issued a stay of deportation so that it would be able to consider a habeas petition challenging the deportation. The basis of the ruling was that a court may issue any orders necessary to "protect its authority to issue the writ" of habeas corpus. Id. As the cases in the text indicate, guaranteeing the mental competence of a habeas petitioner is not necessary to protect a court's habeas authority.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

For these reasons, petitioner has no legal right to an emergency order to assist in assessing his mental competence, either for any criminal charges that might be brought against him in the future, or for the habeas action that he currently pursues. A word should be added, however, about the ongoing military Combatant Status Review Tribunals (CSRTs). Each of the Guantanamo detainees is being reviewed by a CSRT, a military tribunal convened to make a determination whether the detainee **[**33]** is properly designated as an enemy combatant. Petitioner underwent his review in September 2004. The United States argues in its global motion to dismiss the detainee petitions that the CSRTs satisfy any due process rights to which the detainees might be entitled under the Supreme Court's recent decisions. See Mot. to Dismiss at 32-42. However, neither of the parties in their papers on this emergency motion address whether petitioner has a constitutional n16 or statutory right to a mental competence determination before his status as an enemy combatant can be reviewed by a CSRT.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n16 The parties also do not raise here, and the Court does not have occasion to decide, the argument of the United States in its global motion to dismiss that detainees, as "aliens held outside the foreign sovereignty of the United States," do not enjoy any rights or privileges under the Constitution at all. Mot. to Dismiss at 19-29.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

The absence of any mention of this issue in the parties' papers, together with the ongoing briefing **[**34]** of related issues on the United States' motion to dismiss, leads the Court to elect not to address the question at this time. However, even if this Court were to find that petitioner has a right to a mental competence determination before his status is reviewed by a CSRT, the Court would still deny petitioners' emergency motion, for an independent reason: he has failed to submit evidence that raises a reasonable or *bona fide* doubt as to his mental competence.

II. The Evidence of Mental Incompetence

HN4To be competent to stand trial, a criminal defendant must demonstrate an ability "to consult with his lawyer with a reasonable degree of rational understanding" and a "rational as well as factual understanding of the proceedings against him." Godinez, 509 U.S. at 396; United States v. Klat, 341 U.S. App. D.C. 340, 213 F.3d 697, 702 n.5 (D.C. Cir. 2000). However, a court will order a mental examination of the defendant, or a hearing on the mental competence of a defendant to stand trial, only if "there is reasonable cause to believe he is incompetent to understand the proceedings or assist in his own defense." United States v. Grimes, 173 F.3d 634, 635 (7th Cir. 1999). **[**35]** Where the evidence fails to raise a *"bona fide* doubt" as to the defendant's mental competency, a court will not order an independent mental evaluation. Pate, 383 U.S. at 385; Weissberger, 951 F.2d at 395; United States v. Nickels, 324 F.3d 1250, 1252 (11th Cir. 2003); Mata, 210 F.3d at 328.

The Court is mindful of the secrecy regarding the detentions at Guantanamo, **[*58]** driven by national security concerns, and the difficulty that presents for the collection and development of evidence. Further, unlike in most cases, the Court does not have the opportunity personally to observe the petitioner before determining whether discovery on mental competence is necessary. See, e.g., Davis v. Woodford, 384 F.3d 628, 2003 U.S. App. LEXIS 27909, No. 01-99014, 2004 WL 2093453, at *12 (9th Cir. Sept. 21, 2004) (discussing relevance of defendant's demeanor before trial judge in determining mental competence). Nevertheless, even accounting for these obstacles, petitioners have failed to come forward with sufficient evidence of mental incompetency to raise a *bona fide* doubt about petitioner's mental capacity.

There is no evidence in the record that **[**36]** petitioner has been engaging in any sort of bizarre or irrational behavior. See Drope v. Missouri, 420 U.S. 162, 179, 43 L. Ed. 2d 103, 95 S. Ct. 896 (1975); Grimes, 173 F.3d at 635. Petitioners do not supply information suggesting that petitioner has difficulty communicating or responding to questions, see United States v. Graves, 98 F.3d 258, 260 (7th Cir. 1998); United States v. Crosby, 739 F.2d 1542, 1545 (11th Cir. 1984); that he exhibits paranoid or delusional ideas or beliefs, see Pate, 383 U.S. at 385; United States v. Auen, 846 F.2d 872, 878 (2d Cir. 1988); that he has a history of psychiatric illness, see Grimes, 173 F.3d at 635; Agan v. Dugger, 835 F.2d 1337, 1339 (11th Cir. 1987); or that he has a severe loss of memory, see Crosby, 739 F.2d at 1545-46; Wilson v. United States, 129 U.S. App. D.C. 107, 391 F.2d 460, 463-64 (D.C. Cir. 1968).n17 There is simply no indication at all that petitioner presently lacks a "rational as well as factual understanding" of his circumstances. Godinez, 509 U.S. at 396.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n17 The court does not mean to suggest that any of these pieces of evidence standing alone would suffice to raise a *bona fide* doubt of mental capacity, but rather simply that they have all been found relevant in prior cases, and petitioners are unable to cite evidence of any of them here.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[**37]**

In fact, there is evidence that just the opposite is true. The communications between petitioner and his family members since his detention show him engaged in rational discussion and logical thought. Petitioner's grandmother reports that petitioner, in a conversation with his older brother at Guantanamo, "expressed concerns over his health and the fact that, without medical attention, he would completely lose the sight in his left eye." Elsamnah Aff. P 48. Petitioner's grandmother also claims to have "received several messages from her grandson expressing concern over his detention." Petition P 4. These communications, limited as they are, reveal a young man who is aware of his physical problems and concerned for his welfare, not an individual who is incapable of consulting with his lawyer or participating in a "rational understanding" of what is occurring around him. n18

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n18 According to his grandmother, petitioner enjoyed a relatively healthy childhood. She reports that he "enjoyed school, loved to read, and worked hard to achieve in class." Elsamnah Aff. P 19. Petitioners do not point to anything indicating that his capability for rational thought has changed in the years since he was detained.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[**38]**

This conclusion is consistent with the medical information submitted by the respondents, indicating that petitioner has [TEXT REDACTED BY THE COURT.] one would expect relating to his detention but is otherwise [TEXT REDACTED BY THE COURT.] To rebut this account, petitioners offer the declarations of Dr. Trupin, a child and adolescent psychologist who, without having the opportunity to interview petitioner, states that it is "extraordinarily unlikely" that an adolescent in the position of petitioner "does not suffer from more severe residual **[*59]** psychological effects" than those identified in the submissions of the United States. Trupin Reply Decl. P 5. Dr. Trupin concludes "to a reasonable scientific certainty" that petitioner is "at significant risk" of disorders such as "psychopathology," "depression" and "aggressiveness." Trupin Decl. P 17.

The Court has no reason to doubt Dr. Trupin's medical opinion that the physical trauma and isolation he would expect petitioner to have experienced places him at a significant risk of these maladies. However, even if the Court were inclined to credit the opinion that petitioner is at a significant risk of such effects as evidence that he actually **[**39]** has these maladies, there remains a critical difference between the psychiatric issues identified by Dr. Trupin and the severe mental impairment that would cause petitioner to be incapable altogether of rational thought. See. e.g., United States v. Teague, 956 F.2d 1427, 1431-32 (7th Cir. 1992) (evidence that defendant had been diagnosed with "major

depression, generalized anxiety, and borderline personality disorder" was insufficient to show mental incompetence); United States v. Davis, 61 F.3d 291, 304 (5th Cir. 1995) (evidence that defendant had attempted suicide and was "depressed but alert" does not raise a *bona fide* doubt as to mental incompetence).

On that score, the most Dr. Trupin can offer is that the conditions of petitioner's confinement "may cause" an impairment in his "ability to understand the legal consequences of the charges made against him." n19 Trupin Decl. P 16. This statement is simply too speculative to create a*bona fide* doubt as to petitioner's mental competency, such that an independent mental examination would be warranted. Dr. Trupin's opinion is not premised on any facts that indicate that this is presently petitioner's **[**40]** state of mind, and it does not attempt to square its conclusion with the alleged communications from petitioner that appear to show a "rational as well as factual understanding" of his situation. Godinez, 509 U.S. at 396. This sort of abstract and conclusory opinion does not furnish a reasonable basis for a conclusion that petitioner is incompetent. See Demosthenes v. Baal, 495 U.S. 731, 736-37, 109 L. Ed. 2d 762, 110 S. Ct. 2223 (1990) (finding no evidence of mental incompetence where psychiatrist's affidavit "was not based on personal examination" and "stated only in conclusory and equivocal fashion" that defendant "may not be competent"); United States v. Cruz, 805 F.2d 1464, 1479 (11th Cir. 1986) (finding no bona fide doubt as to competency where doctor's conclusion that defendant was incompetent was speculative and based on a single meeting with petitioner).

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n19 To repeat the obvious, and as explained supra, there are no current or threatened charges against petitioner.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Petitioners cannot **[**41]** blame their inability to supply evidence raising doubts as to petitioner's competence entirely, or even largely, on the inaccessibility of petitioner at Guantanamo. There are several individuals who have had contact with petitioner. Some of these encounters, such as that between petitioner's older brother and petitioner, are in the record (in a fashion n20) **[*60]** but do not reveal any signs of mental incompetence. Other contacts, such as the letters from petitioner to his grandmother, are referred to in the pleadings but not submitted for review by the Court; yet even these do not appear to furnish any evidence of mental incompetence. Finally, three British citizens who were once at Guantanamo but have been released have written about the treatment of petitioner at the facility. However, these ex-detainees have not submitted to the Court any sworn affidavits or other evidence of their discussions, and what they have reported, although troubling, does not shed any light on whether petitioner lacks the "rational understanding" of his situation that is required for a mental competence determination.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n20 This discussion is described in an affidavit written by petitioner's grandmother. See Elsamnah Aff. P 47. The affidavit does not explain how she came to know of the details of this communication. One can surmise that she was told of the conversation by petitioner's older brother, who evidently was released from Guantanamo (although he has not submitted any declaration to the court on his own). This is hearsay, to be sure, and it could be several layers of hearsay at that if she heard of the discussion through a third party. However, since "the issue is whether evidence must be taken," courts are permissive in the kinds of "evidence" they will consider in determining whether discovery or a hearing on competence is necessary. "Anything that points to the need for evidence is admissible to help the judge decide whether reasonable cause for an evidentiary hearing exists." Grimes, 173 F.3d at 636. Despite this liberal standard, petitioners have been unable to provide any evidence of mental incompetence here.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - **[**42]**

The account that has emerged from Guantanamo is that petitioner is concerned for his welfare, and is in physical discomfort, but that he has control of his mental faculties. Were there evidence to the contrary, the Court is convinced that petitioners, or one of the individuals who has talked to petitioner, would bring it to the attention of the Court. At this juncture, however, petitioners have not come forward with evidence that would give rise to a *bona fide* doubt regarding petitioner's mental competence to stand trial or otherwise participate in his defense. Accordingly, even if there were a proceeding -- the anticipation of criminal charges, this habeas action, or the CSRT -- that entitled petitioner to a determination of mental competency, he has failed to produce evidence that would place his mental competency in question at this time. Therefore, in view of the record as it currently exists, petitioners' emergency motion for an independent medical evaluation and the production of medical records must be denied. n21

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n21 Having once denied a competency examination, the Court retains the authority to order a medical review or a hearing later if events warrant. Drope, 420 U.S. at 178-82 ("[A] trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial.").

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - -

[43]**

III. The Right to Physical and Mental Well-Being

On occasion, petitioners have hinted at a broader and more sweeping claim. Petitioners might be taken to suggest that the Court bears an affirmative responsibility to ensure the physical and mental well-being of petitioner, in light of his status as a minor, his serious physical injuries, the views of many that conditions at Guantanamo are too harsh (and inappropriate for juveniles), and reports that medical care has been withheld as an interrogation tool or as a means of punishment, even perhaps as to petitioner in particular. n22 See, e.g., Pet. Mem. at 8 ("An immediate medical examination and the release of medical records are necessary to ensure O.K.'s well-being and to effectuate this Court's *habeas* jurisdiction."); Pet. Reply Mem. at 1 ("Respondents' opposition ... seeks to paper over the legitimate concerns regarding Petitioner's physical and mental health."). Such an argument must be assessed against the background of a consistent **[*61]** body of law reflecting the reluctance of courts to second-guess the medical treatment provided to prisoners by government officials.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n22 In fairness, this may only be the Court's reading of petitioners' apparent arguments -- they may not be intending to assert such a claim at all.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[**44]**

Although petitioner does not assert a constitutional violation (or any other violation of a substantive legal right) in the present motion, the issue of a dereliction of medical care for a person detained by the government usually arises in the context of constitutional challenges to prison conditions. *HN5* The Supreme Court has emphasized on several occasions that a claim of deficient medical care will not be cognizable under the Constitution unless a prisoner can show a level of dereliction so grave that it amounts to a "deliberate indifference" to the prisoner's "serious medical needs." Neitzke v. Williams, 490 U.S. 319, 321, 104 L. Ed. 2d 338, 109 S. Ct. 1827 (1989); Estelle v. Gamble, 429 U.S. 97, 104, 50 L. Ed. 2d 251, 97 S. Ct. 285 (1976). A prisoner challenging his medical care must be prepared to show that officials "were knowingly and unreasonably disregarding an objectively intolerable risk of harm to the prisoners' health or safety." Scott v. District of Columbia, 329 U.S. App. D.C. 247, 139 F.3d 940, 943 (D.C. Cir. 1998) (quoting Farmer v. Brennan, 511 U.S. 825, 846, 128 L. Ed. 2d 811, 114 S. Ct. 1970 (1994)). n23

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n23 *HN6* The "deliberate indifference" standard was developed to assess the claims of prisoners under the Eighth Amendment. Estelle, 429 U.S. at 104. The standard of care for a pre-trial detainee who has not yet been convicted, however, is governed by the Due Process Clause of the Fifth and Fourteenth Amendments rather than by the Eighth

Amendment. See, e.g., Hill v. Nicodemus, 979 F.2d 987, 990 (4th Cir. 1992). Although the Supreme Court has said that the due process rights of pre-trial detainees are "at least as great" as the Eighth Amendment rights of a convicted prisoner, See City of Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 244, 77 L. Ed. 2d 605, 103 S. Ct. 2979 (1983), most courts have applied the "deliberate indifference" standard in both settings, see Hill, 979 F.2d at 991-92 (collecting cases). Without concluding that the "deliberate indifference" doctrine is the correct standard for any constitutional claims that petitioners might raise in this case, the Court will draw on this well-developed body of law to guide its analysis on this emergency motion.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[**45]**

*HN7*This standard means that "courts will not intervene upon allegations of mere negligence mistake or difference of opinion." Bowring v. Godwin, 551 F.2d 44, 48 (4th Cir. 1977); see also Estelle, 429 U.S. at 106 ("Medical malpractice does not become a constitutional violation merely because the victim is a prisoner."). Absent a showing of misconduct that rises to the level of deliberate indifference, courts will not sit as boards of review over the medical decisions of prison officials, and they will not second-guess the adequacy of a particular course of treatment. Bowring, 551 F.2d at 48; see also Berman, 874 F. Supp. at 106 ("It is not in the public's interest for the court to usurp the Bureau of Prisons' authority and micro-manage the medical needs of a particular inmate."). In particular, a prisoner has no discrete right to outside or independent medical treatment. See Roberts v. Spalding, 783 F.2d 867, 870 (9th Cir. 1986) ("A prison inmate has no independent constitutional right to outside medical care additional and supplemental to the medical care provided by the prison staff within the institution."). **[**46]**

Petitioners do not explain why these principles should be diluted in the context of military detention centers. Accordingly, these decisions, and the role they suggest for courts in the review of allegations of prison misconduct, frame the analysis here. n24 *HN8*To be sure, a court will **[*62]** not hesitate to intervene if a prisoner can identify a dereliction of duty so grave that it violates the prisoner's constitutional rights (or any other rights the prisoner might possess). However, to make this showing, a prisoner will generally have to combine two things: a claim under either the Constitution or some other source of legal rights that allows petitioner to challenge the conditions of confinement, together with sufficiently competent evidence of mistreatment to support the claim. Petitioners satisfy neither of these requirements in their emergency motion.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n24 As explained below, this discussion should not be taken to suggest that petitioners necessarily are entitled to these constitutional protections, or even that petitioners claim that they are entitled to these rights in their emergency motion, but rather only that any claim of a violation of a right to medical care must generally adhere to these principles.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[**47]**

As to the first point, petitioners' emergency motion is not based on any claim of an actual violation of legal rights. They do not maintain that any of the legal claims set out in their habeas petition support the relief they seek in this motion, and they do not attempt to base their request for relief in any other legal right or entitlement. Instead, they seem to propose that the Court has some free-floating responsibility to ensure the general welfare of petitioner pursuant to its powers under the All Writs' Act and its inherent judicial and habeas authority. The principles discussed above essentially foreclose that result in this context: The Court is exceptionally reluctant to monitor the medical care of detainees in the absence of a colorable assertion of some substantive violation of a legal right. The Court does not reach the issue, or offer its views regarding, whether the allegations in petitioners' habeas papers are sufficiently grave to support a claim that one of petitioner's rights was violated. It is enough to say that petitioners do not make any such claim in their emergency motion. n25

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n25 The analysis does not change because petitioner was a minor when he arrived at Guantanamo. Whatever additional rights, if any, petitioner may have enjoyed when he was a juvenile, he is now an adult, and petitioners seek only prospective relief in the form of a future medical assessment.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[**48]**

Even if petitioners were alleging in this motion that Guantanamo officials are violating his legal rights, petitioners would still have to come forward with direct and competent evidence of the violation. Here, petitioners have provided newspaper and other accounts by ex-detainees of alleged torture and the withholding of medical care as to detainees at Guantanamo (including petitioner). Such allegations are certainly cause for concern. However, respondents have supplied the Court with a sworn declaration from Dr. Edmondson, the commander of the medical services at Guantanamo, describing in substantial detail a high level of medical care provided at the facility. This account is largely corroborated by the accounts of newspaper reporters who have been taken on tours of the facility. Dr. Edmondson also swears under oath that petitioner is [TEXT REDACTED BY THE COURT.]." Edmondson Decl. PP 10. To rebut this testimony, and obtain the extraordinary relief they seek through this motion, petitioners would need to submit a more concrete and competent form of evidence than that presently before the Court. As currently framed and supported, then, petitioners' emergency motion is simply not **[**49]** an appropriate vehicle to assess the important, and potentially difficult, issues posed by general allegations of torture of detainees or intentional withholding of necessary medical care.

CONCLUSION

Accordingly, petitioners' emergency motion to compel the government to allow an **[*63]** independent medical evaluation and to produce medical records is denied.

/s/

JOHN D. BATES

United States District Judge

Dated: October 26, 2004

ORDER

Upon consideration of petitioners' emergency motion to compel the government to allow an independent medical evaluation and to produce medical records, it is for the reasons stated in the memorandum opinion issued on this date hereby ORDERED that the motion is DENIED.

/s/

JOHN D. BATES

United States District Judge

Dated: October 26, 2004

*377 F. Supp. 2d 102, *; 2005 U.S. Dist. LEXIS 13758, **

O. K., et al., Petitioners, v. GEORGE W. **BUSH,** et al., Respondents.

Civil Action No. 04-1136 (JDB)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

377 F. Supp. 2d 102; 2005 U.S. Dist. LEXIS 13758

July 12, 2005, Decided

PRIOR HISTORY: O.K. v. **Bush,** 344 F. Supp. 2d 44, 2004 U.S. Dist. LEXIS 21567 (D.D.C., 2004)

CASE SUMMARY

PROCEDURAL POSTURE: In petitioner detainee's habeas corpus action challenging his continued detention at the United States Naval Base in Guantanamo Bay, Cuba, the detainee moved for a preliminary injunction barring respondent government from subjecting him to torture or interrogation and a preliminary injunction ordering the government to provide his counsel and the court with 30 days' notice prior to transferring him out of Guantanamo to a foreign country.

OVERVIEW: The detainee, an 18-year-old Canadian citizen, was 15 years old when he was taken into custody in Afgahanistan following a gun fight. The court denied the detainee a preliminary injunction barring the government from subjecting him to torture or interrogation because: (1) he did not cite any law for the extraordinary notion that a court could forbid the interrogation of individuals captured in the course of ongoing military hostilities; and (2) the record was barren of evidence of a real and immediate threat that the detainee would be subjected in the foreseeable future to mistreatment similar to that which he alleged occurred in 2003. The detainee's mere speculation that it would happen was not a competent basis for the exercise of the court's equitable powers. The court also denied the detainee a preliminary injunction ordering the government to provide his counsel and the court with 30 days' notice prior to transferring him out of Guantanamo to a foreign country because it was implausible that Congress intended Fed. R. App. P. 23(a) to block the movement of detainees captured in the course ongoing military hostilities.

OUTCOME: The detainee's motions for preliminary injunctions were denied.

CORE TERMS: detainee, declaration, interrogation, interrogator, torture, custody, preliminary injunction, floor, military, notice, injunction, transferred, custodian, mistreatment, temperature, cold, motions to dismiss, prisoner, transferring, ongoing, special agent, interrogated, detention, inmate, stress, high-level, successor, soil, respondents filed, memorandum

LexisNexis(R) Headnotes ◆ Hide Headnotes

Civil Procedure > Injunctions > Preliminary & Temporary Injunctions

HN1

To prevail on a motion for a preliminary injunction, petitioners must demonstrate (i) a substantial likelihood of success on the merits; (ii) that they will suffer irreparable harm absent the relief requested; (iii) that other interested parties will not be harmed if the requested relief is granted; and (iv) that the public interest supports granting the requested relief. In determining whether to grant urgent relief, a court must balance the strengths of the requesting party's arguments in each of the four required areas. A clear showing of irreparable harm, however, is the sine qua non of preliminary injunctive relief. More Like This Headnote

Civil Procedure > Injunctions > Preliminary & Temporary Injunctions

HN2

Because preliminary injunctions represent an exceptional form of judicial relief, courts should issue them sparingly. As the United States Court of Appeals for the District of Columbia Circuit recently emphasized, a preliminary injunction is an extraordinary remedy that should be granted only when the party seeking the relief, by a clear showing, carries the burden of persuasion. More Like This Headnote | *Shepardize:* Restrict By Headnote

Constitutional Law > Substantive Due Process > Scope of Protection

HN3

That the right of an individual to be free from the use of excessive force is anchored in principles of substantive due process --at least when it occurs other than during a criminal arrest or an investigatory stop --has been affirmed on several occasions by the United States Supreme Court. More Like This Headnote

Constitutional Law > Substantive Due Process > Scope of Protection

HN4

The United States Supreme Court has instructed that the substantive component of the Due Process Clause is violated by executive action only when it can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense. Conduct that shocks in one environment may not be so patently egregious in another, however, and the concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking. So, for instance, the Court has set a higher bar for excessive force claims arising out of riots or high-speed chases than in other settings. No federal court has ever examined the nature of the substantive due process rights of a prisoner in a military interrogation or prisoner of war context. More Like This Headnote

Civil Procedure > Injunctions > Preliminary & Temporary Injunctions

HN5

There are fundamental limits on the breadth of a court's jurisdiction and the scope of its remedial powers. One of those is the principle that a court will not issue prospective relief unless there is a concrete showing that a party is likely to face unlawful conduct in

the imminent future. Thus, a plaintiff seeking an injunction cannot simply allege that he was previously subjected to the defendant's actions. She must also show that there is a real and immediate threat of repeated injury in the future. More Like This Headnote

Civil Procedure > Injunctions > Preliminary & Temporary Injunctions

HN6 Whether regarded as a prerequisite to a plaintiff's standing to seek injunctive relief, or as a facet of the irreparable harm element of the preliminary injunction test, the requirement that a plaintiff demonstrate a likelihood of injury in the imminent future in order to secure an injunction is a well-established rule of law. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Injunctions > Preliminary & Temporary Injunctions

HN7 In assessing the need for extraordinary preliminary injunctive relief, the court must examine whether such relief is warranted here because of a real, imminent threat of harm to petitioner in the future. More Like This Headnote

Criminal Law & Procedure > Habeas Corpus > Appeals

Criminal Law & Procedure > Habeas Corpus > Custody Requirement

HN8 See Fed. R. App. P. 23(a).

Criminal Law & Procedure > Habeas Corpus > Appeals

Criminal Law & Procedure > Habeas Corpus > Custody Requirement

HN9 As its text indicates, the concern of Fed. R. App. P. 23(a) is one of technical compliance with the rule that there is generally only one proper respondent to a habeas petition: the person with the ability to produce the prisoner's body before the habeas court. Rule 23(a) requires a district court to monitor compliance with this rule even where the case is otherwise before the appellate court, to ensure that the courts remain in a position to order the respondent to produce and release the petitioner if a ruling of the appellate court --or a later ruling of the district court --so requires. More Like This Headnote

Criminal Law & Procedure > Habeas Corpus > Appeals

Criminal Law & Procedure > Habeas Corpus > Custody Requirement

HN10 Nothing in Fed. R. App. P. 23(a) indicates a desire to extend it to situations where the United States (or a state) is transferring an individual out of federal or state custody entirely. More Like This Headnote

Governments > Legislation > Interpretation

HN11 A court should not construe a statute to interfere with the province of the Executive over military affairs in the absence of a clear manifestation of Congressional intent to do so. More Like This Headnote

Constitutional Law > Congressional Duties & Powers > War Powers Clause

HN12 Congress has the constitutional authority to make rules

concerning captures on land and water, and were it to enact a statute within the proper bounds of its authority, it would be the role of the Court to faithfully apply those laws as written. U.S. Const. art. I, § 8. It is not for a court to write the rules of war in the interim, either by its own pen or through an overly generous interpretation of existing statutes. More Like This Headnote

Immigration Law > Deportation & Removal > General Overview

HN13

The Foreign Affairs Reform and Restructuring Act of 1988 (FARRA) is expressly limited to claims arising out of a final order of removal. The FARRA is quite explicit that no legal rights can be derived from its rules outside of the removal setting, by analogy or otherwise. More Like This Headnote

COUNSEL: **[**1]** For Petitioner OMAR **KHADR,** Detainee, Camp Delta: Muneer I. Ahmad, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, Washington, DC, Richard J. Wilson, Washington, DC.

For Petitioner FATMAH ELSAMNAH, a next Friend of Omar **Khadr:** Richard J. Wilson, Washington, DC.

For Respondents GEORGE W. **BUSH,** President of the United States; DONALD RUMSFELD, Secretary, United States Department of Defense; JAY HOOD, Army Brig. Gen.; NELSON J. CANNON, Army Col., all sued in their official capacity: Lisa Ann Olson, U.S. DEPARTMENT OF JUSTICE, Washington, DC, Preeya M. Noronha, U.S. DEPARTMENT OF JUSTICE, Washington, DC, Robert J. Katerberg, U.S. DEPARTMENT OF JUSTICE, Washington, DC, Terry Marcus Henry, U.S. DEPARTMENT OF JUSTICE CIVIL DIVISION, Washington, DC.

CHARLES B. GITTINGS, JR., Amicus Pro se, Manson, WA.

JUDGES: JOHN D. BATES, United States District Judge.

OPINIONBY: JOHN D. BATES

OPINION: [*103] MEMORANDUM OPINION

The petitioner in this habeas action is an eighteen-year old detainee at the United States Naval Base in Guantanamo Bay, Cuba, who has been held in United States custody since the age of fifteen. This action comes before the Court on his dual motions for a preliminary injunction barring **[**2]** the respondents from subjecting him to torture or interrogation and a preliminary injunction ordering the government to provide his counsel and the Court with thirty days' notice prior to transferring him out of Guantanamo to a foreign country. The first motion reflects the opening of a new front in the ongoing litigation over the legal rights of the detainees at Guantanamo, while the second motion seeks to introduce new arguments in favor of a form of relief that this Court already denied with regard to a different Guantanamo detainee several weeks ago.

For the reasons set out below, the Court denies both of the motions.

BACKGROUND

Petitioner O.K. (" petitioner") is a citizen of Canada who was taken into United States custody in Afghanistan following a gun fight in which at least one American soldier was killed. He was fifteen years old at the time of his capture in July 2002. n1 He was detained for a period at a military base in Bagram, Afghanistan, following his capture, and was then transferred in October 2002 to the United States Naval Base in Guantanamo Bay, Cuba, where he has been held to this day. This action began on July 2, 2004, when petitioner filed a petition **[**3]** for a writ of habeas corpus -- through his grandmother as next friend --challenging the fact of his detention and the conditions of his confinement in United States custody. n2 The petition states claims under the United States Constitution, several federal statutes and regulations, and international law.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 Because petitioner was a minor when the habeas petition in this case was filed, the Court uses his initials, consistent with the rules of this Court and the practice of the parties throughout this litigation. See L. Civ. R. 5.4(f)(2).

n2 Petitioner and his grandmother together will be referred to as "petitioners."

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Shortly after commencing this action, petitioners filed a motion seeking an emergency order requiring the respondents to release his medical records and permit an outside doctor to perform an independent **[*104]** medical evaluation of him at Guantanamo. The motion was premised on the theory that an assessment of petitioner's mental health was necessary to determine his competency to participate **[**4]** in the litigation of his habeas claims. The Court denied that motion in a memorandum opinion and order dated October 26, 2004, explaining that an individual does not enjoy a right to a determination of his mental competence to bring a habeas action, and even if there existed such a right, petitioners had failed to submit competent evidence calling into question petitioner's competence to assist in the litigation of the habeas claims in this case. See O.K. v. **Bush**, 344 F. Supp. 2d 44, 54-60 (D.D.C. 2004).

Meanwhile, on August 17, 2004, the Calendar and Case Management Committee of the Court issued an order instructing the judges presiding over Guantanamo petitions to transfer those petitions to Senior Judge Joyce Hens Green for the limited purpose of coordination and management. On September 15, 2004, the Executive Session of the Court issued a Resolution also authorizing Judge Green to address substantive issues common to the Guantanamo cases upon the consent of the transferring judge. The respondents filed motions to dismiss in this case and the other twelve Guantanamo cases pending at that time. n3 On November 10, 2005, this judge transferred the motion to dismiss **[**5]** in this case to Judge Green for decision. The judges presiding over ten of the other twelve Guantanamo cases also transferred the motions to dismiss in their cases to Judge Green. Judge Richard Leon elected to retain the motions to dismiss in his two cases.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n3 The thirteen actions involved the petitions of more than sixty detainees. See In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 451 (D.D.C. 2005).

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

On January 31, 2005, Judge Green issued a memorandum opinion and order in this case and the other transferred cases denying in part and granting in part the respondents' motions to dismiss. The opinion concludes in principal part that the petitioners at Guantanamo are vested with the right not to be deprived of liberty without due process of law under the Fifth Amendment to the United States Constitution, and that the composition and the procedures of the Combatant Status Review Tribunals tasked with assessing whether the petitioners were properly held at Guantanamo as enemy combatants **[**6]** infringed that right. See In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 454-64, 468-78 (D.D.C. 2005). Judge Green also held that those petitioners who were determined by the Combatant Status Review Tribunals to be Taliban fighters potentially could maintain certain claims under the Geneva Convention as well. See id. at 478-80. In most other respects, Judge Green dismissed the petitioners' claims. See id. at 480-81. Judge Green's decision departed in significant respects from the decision of Judge Leon two weeks earlier granting the respondents' motions to dismiss in full in the two cases pending before him. See Khalid v. **Bush**, 355 F. Supp. 2d 311 (D.D.C. 2005).

In an order accompanying the January 31, 2005 memorandum opinion, Judge Green asked the parties to brief the question of how the cases should proceed in light of her decision. On February 3, 2005, the respondents filed a motion seeking certification of the decision for an interlocutory appeal, and requesting a stay of the proceedings in the transferred cases pending the appeal. The petitioners filed papers the same day urging Judge Green to allow the **[**7]** cases to continue forward without a stay of any kind. They explained that further proceedings were necessary not only to develop the record on issues relating to the legality of the petitioners' detention, but also to allow the **[*105]** Court to consider the petitioners' "forthcoming motion" on the conditions of their confinement at Guantanamo. Pet'rs' Joint Submission at 2-4, Feb. 3, 2005. Judge Green issued an order later the same day certifying her decision for interlocutory appeal and staying the proceedings in the transferred cases "for all purposes pending resolution of all appeals in this matter." Order of Feb. 3, 2005 at 1.

The petitioners then filed additional papers asking Judge Green to modify the stay "to allow Petitioners to pursue factual development regarding claims of torture and severe mistreatment." On February 8, 2005, Judge Green denied this motion, citing "the substantial resources that would be expended and the significant burdens that would be incurred should this litigation go forward" when reversal of her January 31, 2005 decision on appeal would render the further proceedings moot. Order of Feb. 8, 2005, at 1. During the next several weeks, the respondents and petitioners **[**8]** would take appeals from Judge Green's decision denying in part and granting in part the motions to dismiss in the transferred cases, and the petitioners would take appeals from Judge Leon's decision granting motions to dismiss in his cases. Those appeals are now pending before the United States Court of Appeals for the District of Columbia Circuit.

Meanwhile, at the same time that Judges Green and Leon were adjudicating the motions to dismiss in their thirteen cases, dozens of new habeas petitions were being filed in this federal court on behalf of Guantanamo detainees. Starting in March 2005, a number of the petitioners in these new cases, along with several of the petitioners in the first group of thirteen cases, began filing emergency motions seeking a new form of relief: a preliminary injunction requiring the respondents to provide thirty days' notice to petitioners' counsel and the Court prior to transferring the petitioners out of Guantanamo to foreign countries. Most of the judges of this Court have granted the request, but others have not. Compare Kurnaz v. **Bush**, 2005 U.S. Dist. LEXIS 6560, No. 04-1135, 2005 WL 839542, at *3 (D.D.C. Apr. 12, 2005) (requiring respondents to provide thirty **[**9]** days' notice prior to any transfer where "respondents do not have an understanding with the receiving country that a transfer ...is for purposes of release only"), and Al-Marri v. **Bush**, 2005 U.S. Dist. LEXIS 6259, No. 04-2035, 2005 WL 774843, at *6 (D.D.C. Apr. 4, 2005) (ordering respondents to provide" 30 days' notice of any transfer from GTMO"), with Almurbati v. **Bush**, 366 F. Supp. 2d 72, 82 (D.D.C. 2005) (denying motion for thirty days' notice but requiring respondents to submit a declaration advising the Court of any transfers and "certifying that any such transfers ...were not made for the purpose of merely continuing the petitioners' detention on behalf of the United States or for the purpose of extinguishing this Court's jurisdiction over the petitioners' actions for habeas relief").

On April 21, 2005, in a habeas petition brought on behalf of several Saudi Arabian citizens detained at Guantanamo and filed after Judges Green and Leon issued their decisions, this judge denied the motion for thirty days' notice prior to transfer. See Al-Anazi v. **Bush**, 370 F. Supp. 2d 188, 190 (D.D.C. 2005). This Court based its decision in part on the absence **[**10]** of any competent evidence that the respondents were transferring detainees out of Guantanamo for continuing United States custody on foreign soil, either to procure their torture outside of the jurisdiction of this Court through a foreign intermediary or for any other improper motive. See id. at 195-96. The Court also relied on sworn and unrebutted declarations from high-level government officials confirming that the United States was not transferring detainees to foreign soil for ongoing United States custody, and the pledge of the respondents at **[*106]** a hearing that respondents would notify the Court were this practice to change. (A more detailed discussion of this Court's earlier decision in Al-Anazi can be found in the Analysis section below.)

Petitioners in this action have filed two separate motions for preliminary injunctions that are now pending before this Court. The first motion, filed on March 21, 2005, seeks an order preventing the "interrogation, torture and other cruel, inhuman, or degrading treatment of petitioner." The motion explains that when counsel for petitioner met with him for the first time in November 2004, petitioner reported several instances **[**11]** of alleged mistreatment at the hands of interrogators and military personnel at both the military base in Afghanistan and at Guantanamo. See Decl. of Muneer I. Ahmad (" Ahmad Decl."), March 21, 2005, Ex. 1. Following the meeting, petitioner wrote a letter to counsel --dated January 13, 2005 and received by counsel on February 7, 2005 --that described additional allegations of misconduct, and prompted a second visit from counsel on April 25, 2005 at which petitioner voiced further concerns about his treatment.

The allegations of mistreatment can be divided into three separate time periods. n4 The first period consists of incidents that are alleged to have occurred while petitioner was still being held in Bagram, Afghanistan, in the summer of 2002.

Petitioner claims that while he was recovering from bullet wounds he sustained during his capture, interrogators threw cold water at him, forced him to carry heavy buckets of water, and made him stand with his hands tied above a door frame for hours at a time. Petitioner also alleges that he was interrogated at his bedside in the period immediately following his capture, and was refused pain medication on occasion. Finally, petitioner **[**12]** describes incidents in United States custody in Afghanistan where he was interrogated with a bag over his head in a room with barking dogs, was forced to urinate on himself during interrogations, and was ordered to pick up trash and place it in a trash bag, only to have an interrogator empty the trash bag and force him to collect the trash once again. See Ahmad Decl., Ex. 1, P P 16-17.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n4 The allegations are submitted to the Court in memoranda attached to the sworn declaration of one of petitioners' counsel, and in an unsworn declaration of another of petitioners' counsel. See Ahmad Decl., Mar. 21, 2005, Exs. 1 & 2; Decl. of Richard Wilson (" Wilson Decl."), Apr. 25, 2005.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

The second set of allegations comprise the first year of petitioner's detention at Guantanamo (from October 2002 to October 2003). Petitioner claims that when he first arrived at Guantanamo he heard a military official say "Welcome to Israel." Several months later, in March 2003, petitioner contends that he was removed from his cell **[**13]** in the middle of the night and brought to an interrogation room, where he was "short shackled" such that his wrists and ankles were handcuffed together and the handcuffs were bolted to the floor. He alleges that military police then forced him into stress positions for periods of hours. One of the positions required him to lie on his stomach with his hands and feet cuffed together behind his back. He was not allowed to use the bathroom while in the stress positions, and eventually urinated on the floor and himself. Petitioner alleges that military police then poured pine oil on the floor and on petitioner, and with petitioner still short shackled, used petitioner as a "human mop," dragging petitioner back and forth through the mixture of urine and pine oil on the floor. See Ahmad Decl., Ex. 1, P P 15, 18.

During this same period, petitioner claims that an interrogator displeased with **[*107]** his answers spat in his face, pulled his hair, and threatened to send him to Egypt, Israel, Jordan, or Syria if he did not cooperate. See id. P 12. According to petitioner, the interrogator also told him that if he were sent to Egypt, the Egyptian authorities would send in "Askri raqm tisa" --which **[**14]** is Arabic for "Soldier Number 9" --and that this was a man who would be sent to rape him. The interrogator is then alleged to have shackled petitioner's hands and ankles and forced petitioner to sit down on the floor and then stand up many times in succession. Petitioner reports that he found this difficult because of the way he was shackled, and when he finally refused to stand again, the interrogator called two military police officers into the room, who grabbed petitioner, lifted him up, and then dropped him to the floor. He alleges that they repeated this sequence several times at the instruction of the interrogator. See id. P P 12-13.

Petitioner alleges that several months later, in September 2003, he was interrogated by two individuals claiming to be from Canada. He says that following the interrogation, his security level was changed from Level 1 to Level 4 minus, everything was taken from him, and he spent a month in isolation. He claims that the room in which he was confined was kept so cold that it felt like a refrigerator. See id. P 9. In October 2003, he says he was interrogated by a man claiming to be a representative of the Afghan government. The interrogator **[**15]** grew dissatisfied with petitioner's statements and short-shackled his hands and feet to a bolt in the floor, moved his hands behind his knees, and maintained him in that position for hours. At one point, the interrogator allegedly told petitioner that a new detention center was being built in Afghanistan for uncooperative detainees. The interrogator threatened to send petitioner to Afghanistan, and told petitioner that they like small boys there, a comment that petitioner says he understood to be a threat of sexual violence. Petitioner alleges that the interrogator then took a piece of paper and wrote on it, "This detainee must be transferred to Bagram," and left the room. See id. P P 10-11.

The final set of allegations concerns the period from November 2004 to the present day. Petitioner claims that he was interrogated in November 2004 after his visit with his counsel, and that an interrogator asked about the visit. See id. P 2. Petitioner claims that he was interrogated again for four consecutive days from December 7 to December 10, 2004. He maintains that during the first day of questioning, interrogators threatened to strip him to his undershorts if he did not confess **[**16]** to certain terrorist acts, and during the second day, he was forced to sit on an extremely cold floor and was not allowed to perform his prayers. He alleges that he was subjected to extremely cold temperatures in his cell during this period, and that guards have refused to change the temperature when asked. Petitioner also reports that he was recently pushed to the floor and held face-down when he complained to guards during his exercise period, and that he has been questioned by psychologists who he believes are sharing information with his interrogators. n5

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - -

n5 Petitioner adds that Emergency or Initial Response Forces have pacified detainees who responded violently during interrogations, although he admits that no such force has been used against him, because he has never violently resisted instructions given to him by an interrogator or official. Wilson Decl. P P 15-16.

- - - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - -

Petitioners maintain that many of these allegations are consistent with the reports of federal officials who have visited Guantanamo. For **[**17]** example, petitioners cite correspondence released to the American Civil **[*108]** Liberties Union under the Freedom of Information Act in which an agent of the Federal Bureau of Investigation ("FBI") provides an eye-witness account of the shortshackling of detainees in stress positions, the exposure of detainees to extreme cold temperatures, and the placement of detainees in situations where they are forced to urinate on themselves: On a couple of occasions, I entered interview rooms to find a detainee chained hand and foot in a fetal position to the floor, with no chair, food, or water. Most times they had urinated or defecated on themselves, and had been left there for 18, 24 hours or more. On one occasion, the air conditioning had been turned down so far and the

temperature was so cold in the room, that the barefooted detainee was shaking with cold. When I asked the MPs what was going on, I was told that interrogators from the day prior had ordered this treatment, and the detainee was not to be moved. On another occasion, the A/C had been turned off, making the temperature in the unventilated room probably well over 100 degrees. The detainee was almost unconscious on the floor, with **[**18]** a pile of hair next to him. He had apparently been literally pulling his own hair out throughout the night. On another occasion, not only was the temperature unbearably hot, but extremely loud rap music was being played in the room, and had been since the day before, with the detainee chained hand and foot in the fetal position on the tile floor.

Email from [redacted] to [redacted], Aug. 2, 2004, available at http://www. aclu. org/torturefoia/ released/fbi. 121504.5053. pdf.

According to newspaper reports, former interrogators at Guantanamo recently "confirmed earlier accounts of inmates being shackled for hours and left to soil themselves while exposed to blaring music." Neil A. Lewis, Fresh Details Emerge on Harsh Methods at Guantanamo, New York Times, Jan. 1, 2005, at A11. News sources have also reported that a top Navy psychologist told a supervisor in December 2002 that interrogators were starting to use "abusive techniques"; the General Counsel of the Navy described the interrogation techniques at Guantanamo as "unlawful and unworthy of the military services"; and Navy officials considered removing Navy interrogators from the operation at Guantanamo in 2002 **[**19]** because they were outraged at the level of abuse in interrogations. Charlie Savage, Abuse Led Navy to Consider Pulling Cuba Interrogators, Boston Globe, Mar. 16, 2005, at A1. Finally, petitioners cite newspaper articles relating the similar allegations of detainees who have since been released from Guantanamo. See Carol D. Leonnig & Glenn Frankel, U.S. Will Transfer Five Guantanamo Prisoners, Washington Post, Jan. 12, 2005, at A1 (describing detainee allegations of "frigid and stifling temperatures, short shackles and random beatings").

At the November 2004 meeting, petitioners' counsel elicited information from petitioner regarding his mental condition and administered a Folstein Mini Mental Status examination. After clearing the information with the Department of Justice, n6 **[*109]** counsel for petitioners provided it to Dr. Eric W. Trupin, a specialist in issues relating to the physical and mental abuse of juveniles. Dr. Trupin has submitted a declaration that concludes, on the basis of the material before him, that there is a "high probability" that petitioner "suffers from a significant mental disorder, including but not limited to post-traumatic stress disorder and depression" **[**20]** and that petitioner's "symptoms are consistent with those exhibited by victims of torture and abuse." Decl. of Eric W. Trupin, Ph. D., Mar. 17, 2005, P P 19-23. Counsel for petitioners also administered a Proxy Psychiatric Assessment during their second visit with petitioner in April 2005. They submitted the results to a forensic psychologist, who concluded in a letter to counsel that petitioner's self-reporting symptoms meet the "full criteria for a diagnosis of Post-Traumatic Stress Disorder." Letter from Dr. Daryl Matthews to Prof. Rick Wilson, Apr. 21, 2005.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n6 Petitioners' counsel report that they relinquished their notes to military officials

upon leaving Guantanamo for the first time on November 10, 2004. They received the notes back in the mail on December 16, 2004, submitted a memorandum containing portions of the notes to the Compliance Review & Litigation Security Group at the Department of Justice on December 30, 2004, and received a determination on January 12, 2005 that more than half of the paragraphs in the memorandum were classified. Petitioners' counsel asked the Department of Justice to reconsider the classification determination, and were notified on January 28, 2005, that all of the paragraphs in the memorandum were determined on second review to be unclassified. Petitioners' counsel explain that they forwarded the notes to Dr. Trupin that same day. Ahmad Decl. P P 4-8.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - **[**21]**

On April 13, 2005, respondents filed a memorandum in opposition to petitioners' motion. Attached to the memorandum were declarations from several government officials who are involved in the detention and interrogation of persons at Guantanamo. These include a declaration from Colonel John A. Hadjis, the Chief of Staff for the Commander, Joint Task Force-Guantanamo, stating that it is the policy of the officers at Guantanamo, consistent with the President's directive to treat detainees humanely, not to permit the mistreatment or abuse of detainees and to investigate any allegations of mistreatment at Guantanamo; a declaration from Esteban Rodriguez, the Director of the Joint Intelligence Group at Guantanamo, who describes in general terms the essential contribution that the interrogation of detainees at Guantanamo has made to the nation's security; and a declaration from Captain John S. Edmondson, M. D., the Commander of the U.S. Navy Hospital at Guantanamo, who describes the medical care available to detainees at Guantanamo, details the particular medical care that has been provided to petitioner, and states that the medical care of a detainee is not affected in any way by the detainee's **[**22]** cooperation (or lack thereof) with interrogators.

Finally, respondents also submitted a declaration of a special agent with the Criminal Investigation Task Force of the Department of Defense. The declaration describes a series of interrogations the special agent conducted with the petitioner at Guantanamo. First, the special agent discusses an interrogation in May 2004 in which the petitioner said that he was being well treated by guards. The special agent then provides an account of his interrogation of petitioner on December 7 and 8, 2004 (dates that coincide with one of the interrogations that petitioner discusses in his motion). The special agent describes the atmosphere of the interrogation as friendly and non-adversarial, and specifically refutes petitioner's allegations that he was threatened with being stripped to his undershorts or forced to sit on a cold floor at this interrogation. Finally, the special agent states that he did not question petitioner about this litigation or petitioner's meeting with his lawyers, because he did not believe that these were a proper topic for examination. See Decl. of [redacted], Apr. 11, 2005, P P 3-8.

Before filing the motion, counsel **[**23]** for petitioners informed respondents' counsel that they possessed information that petitioner had been mistreated, and asked respondents' counsel to consent to an end to **[*110]** interrogations of petitioner. Counsel for respondents informed counsel for petitioners that they would forward a letter to the Department of Defense outlining the claims of abuse, but could take no further remedial action. Respondents have since informed the Court that the United States Navy's Naval Criminal Investigative Service has commenced

an investigation into petitioner's allegations of mistreatment. See Mem. in Opp. to Pet'rs' Appl. for Prel. Inj. at 17.

On April 7, 2005, petitioners filed the second motion pending before the Court, this one seeking a preliminary injunction that would require respondents to provide thirty days' notice of an intent to remove petitioner from Guantanamo to another country. The motion rests in large part on newspaper articles detailing reports of "rendition" by the Central Intelligence Agency of suspected terrorists (none of whom were detained at Guantanamo before they were rendered), and petitioner's claims -- described above --that interrogators have threatened him with deportation **[**24]** to countries where he would be sexually assaulted. Respondents submitted an opposition to this motion to which they attached declarations from high-level United States government officials averring that the United States does not transfer individuals to countries where it is more likely than not that they will be tortured. The declarations proceed to explain that when the United States transfers Guantanamo detainees to another country, the detainees are no longer subject to the control of the United States, and any ongoing confinement in the receiving country is solely the result of the law-enforcement interests of the receiving government based on its own assessment and application of its domestic law. See Decl. of Matthew C. Waxman, Mar. 8, 2005, P P 3-5; Second Decl. of Matthew C. Waxman, Mar. 16, 2005, P 5; Decl. of Pierre-Richard Prosper, Mar. 8, 2005, P 4. These are the same declarations that served as the basis for this Court's ruling in Al-Anazi denying the request in that case for a period of thirty days' notice prior to the transfer of detainees. n7

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n7 On July 11, 2005, a day before this opinion was issued, respondents filed a new declaration of one of the government officials. See Decl. of Matthew C. Waxman, June 2, 2005. The declaration states that it "replaces" the earlier declarations of the official in this case. Id. P 1; see also Notice of July 11, 2005, at 1 (new declaration serves "to update, consolidate, and supersede" the official's earlier declarations). Upon a review of the new declaration, the Court finds that it does not depart from the earlier declarations in any way that is material to the issues in this opinion, except in three respects. First, the new declaration omits a statement contained in an earlier declaration that "no transfer of any current habeas petitioner in this or the other pending habeas cases brought by individual, named GTMO detainees, other than for release as a result of being determined by a CSRT to no longer be an enemy combatant, is currently scheduled and, in all events, any transfer of any such petitioner, including those for release, would be several weeks away." Second Decl. of Matthew C. Waxman, Mar. 16, 2005, P 5. Second, the new declaration omits a statement contained in an earlier declaration that "there is no plan being considered now, or that has been considered in the recent past, to effect an immediate transfer of large numbers of GTMO detainees out of GTMO, including to other countries." Id. P 4. Third, the new declaration replaces a statement in an earlier declaration that "nor is there any plan to effect transfers of GTMO detainees in order to thwart the actual or putative jurisdiction of any court with respect to detainees" with the statement "transfers of detainees are and have been made in accordance with the policy and process outlined herein, rather than to thwart the actual or putative jurisdiction of any court." Compare id. with Decl. of Matthew C. Waxman, June 2, 2005, P 3.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - **[**25]**

A hearing was held on both of the pending motions on May 10, 2005.

[*111] STANDARD OF REVIEW

HN1To prevail on a motion for a preliminary injunction, petitioners must demonstrate (i) a substantial likelihood of success on the merits; (ii) that they will suffer irreparable harm absent the relief requested; (iii) that other interested parties will not be harmed if the requested relief is granted; and (iv) that the public interest supports granting the requested relief. Cobell v. Norton, 391 F.3d 251, 258 (D.C. Cir. 2004); Katz v. Georgetown Univ., 345 U.S. App. D.C. 341, 246 F.3d 685, 687-88 (D.C. Cir. 2001); Taylor v. Resolution Trust Corp., 312 U.S. App. D.C. 427, 56 F.3d 1497, 1505-06 (D.C. Cir. 1995); Washington Area Metro. Transit Comm'n v. Holiday Tours, Inc., 182 U.S. App. D.C. 220, 559 F.2d 841, 843 (D.C. Cir. 1977). In determining whether to grant urgent relief, a court must "balance the strengths of the requesting party's arguments in each of the four required areas." CityFed Fin. Corp. v. Office of Thrift Supervision, 313 U.S. App. D.C. 178, 58 F.3d 738, 747 (D.C. Cir. 1995). A clear showing **[**26]** of irreparable harm, however, is the sine qua non of preliminary injunctive relief. Experience Works, Inc. v. Chao, 267 F. Supp. 2d 93, 96 (D.D.C. 2003).

HN2Because preliminary injunctions represent an exceptional form of judicial relief, courts should issue them sparingly. Sociedad Anonima Vina Santa Rita v. United States Dep't of the Treasury, 193 F. Supp. 2d 6, 13 (D.D.C. 2001); see Dorfmann v. Boozer, 134 U.S. App. D.C. 272, 414 F.2d 1168, 1173 (D.C. Cir. 1969). As the D.C. Circuit recently emphasized, a "preliminary injunction is an extraordinary remedy that should be granted only when the party seeking the relief, by a clear showing, carries the burden of persuasion." Cobell, 391 F.3d at 258; see Mazurek v. Armstrong, 520 U.S. 968, 972, 138 L. Ed. 2d 162, 117 S. Ct. 1865 (1997).

ANALYSIS

I. Motion for a Preliminary Injunction Against the Use of Interrogation or Torture

In his first motion, petitioners ask the Court to enjoin the use against him of interrogation, torture, and other cruel, inhuman, or degrading treatment. The aspect of this motion that relates specifically to interrogations **[**27]** can be disposed of quickly. Petitioners do not cite any law for the extraordinary notion that a court may forbid the interrogation of individuals captured in the course of ongoing military hostilities. Even supposing that the Court has the constitutional authority to intrude so dramatically on the prerogative of the Executive in the performance of the war power, petitioners do not offer a plausible legal or evidentiary basis for the exercise of that authority in this case.

In fact, the legal claims that petitioners raise in their papers do not seem to bear any discernible relation to interrogations at all. Petitioners do not explain how the mere fact of the interrogation of detainees could conceivably be a violation of the Due Process Clause or any other cognizable source of legal rights. Petitioners do not assert a right to the presence of counsel during his interrogations under Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966), or identify any other limitation --in the Constitution or otherwise --on the manner in which interrogation of

detainees is conducted. n8 Perhaps most important, petitioners have **[*112]** no answer to the declaration of a high-level military **[**28]** intelligence official detailing the critical role that the interrogation of Guantanamo detainees has played in the war on terror and the danger that an injunction against further questioning of detainees could pose to our nation's security. Petitioners' request for an injunction against interrogation has no likelihood of success on the merits and would present a grave risk to the public interest, and therefore will be denied.

The request for an injunction against the torture or other cruel or degrading treatment of petitioner demands closer scrutiny. Petitioner alleges that he was subject to several instances of harsh treatment during his initial detention in Afghanistan (being forced to perform manual labor and stand in taxing positions while recovering from wounds); even more severe treatment in the course of his first year of his detention at Guantanamo (short-shackling of petitioner in stress positions for several hours, using petitioner as a "human mop" to clean up a mixture of urine and pine solvent, multiple threats of deportation and rape, and exposure to cold temperatures); and milder treatment in the last year and a half (sitting on a cold floor in an interrogation room, **[**29]** threats of disrobement during interrogations, and further exposure to cold temperatures). The question for the Court is whether this series of allegations --the most serious of which occurred more than eighteen months ago --warrants the exceptional remedy of a preliminary injunction respecting the conduct of respondents in this setting. The Court concludes that such relief is not warranted.

In reaching that conclusion, the Court does not downplay the seriousness of petitioner's allegations. Judge Green held that petitioner is vested with rights arising out of the Due Process Clause of the Fifth Amendment. That holding is the law of this particular case, and this Court will not revisit it here. The analysis underlying that holding does not obviously distinguish between the procedural due process rights that were principally at issue in Judge Green's decision and the substantive due process right to be free from excessive force that petitioners wish to invoke here. n9 And although the precise contours of that latter right would be shaped by the considerable deference owed the Executive in the domain of military affairs, and the unique issues raised by the interrogation of detainees **[**30]** in a war footing, it is at least conceivable that a detainee could allege facts so egregious that they would demand judicial review. n10

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n8 Of course, petitioners do bring a challenge to the alleged use of torture in the interrogations, an issue to which the Court will turn in a moment. But it is telling that even the lone case on which petitioners rely in arguing for an injunction against the use of *torture* during interrogations rejected a request for a broader injunction against the *interrogations themselves*. See Inmates of the Attica Corr. Facility v. Rockefeller, 453 F.2d 12, 24 (2d Cir. 1971) ("Plaintiffs ask for an injunction against any interrogation of inmates unless it is conducted in the presence of the inmate's counsel or the inmate has first been advised by legal counsel. Such an order, however, would go beyond what is necessary for the protection of the rights of the inmates here, since they have been advised of their right to legal counsel and have been offered the services of numerous qualified lawyers, of which many inmates have availed themselves."). That case involved convicted felons being questioned about a prison riot, and thus there existed an even greater role for judicial oversight

of interrogations than in this case, where the court must also account for the substantial deference due the Executive in carrying out its war and military powers. **[**31]**

n9 HN3That the right of an individual to be free from the use of excessive force is anchored in principles of substantive due process --at least when it occurs other than during a criminal arrest or an investigatory stop --has been affirmed on several occasions by the Supreme Court. See County of Sacramento v. Lewis, 523 U.S. 833, 843-49, 140 L. Ed. 2d 1043, 118 S. Ct. 1708 (1998); Graham v. Connor, 490 U.S. 386, 394, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989). Of course, petitioners are not arguing that petitioner is being denied the due process of law prior to being tortured. Petitioners are arguing that it is unlawful for him to be tortured at all.

N10 HN4The Supreme Court has instructed that "the substantive component of the Due Process Clause is violated by executive action only when it can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense." Lewis, 523 U.S. at 846 (quotation omitted). Conduct that "shocks in one environment may not be so patently egregious in another," however, and the "concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking." Id. at 850-51; see also Hudson v. McMillian, 503 U.S. 1, 4, 117 L. Ed. 2d 156, 112 S. Ct. 995 (1992) (" What is necessary to establish an 'unnecessary and wanton infliction of pain,' we said, varies according to the nature of the alleged constitutional violation."). So, for instance, the Supreme Court has set a higher bar for excessive force claims arising out of riots or high-speed chases than in other settings. See Lewis, 523 U.S. at 848. No federal court has ever examined the nature of the substantive due process rights of a prisoner in a military interrogation or prisoner of war context.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - **[**32]**

[*113] The Court does not find it necessary to decide whether petitioner has a constitutional right to be free from torture, the exact location of the line that the Constitution would draw in this setting, or whether the petitioner's allegations in this case cross that line. Even if petitioner were able to demonstrate that he possesses a right to be free from torture and that certain of his allegations would constitute violations of that right, he has not come forward with the showing necessary to secure the forward-looking order he seeks. HN5There are fundamental limits on the breadth of a court's jurisdiction and the scope of its remedial powers. One of those is the principle that a court will not issue prospective relief unless there is a concrete showing that a party is likely to face unlawful conduct in the imminent future. Thus, a plaintiff seeking an injunction "cannot simply allege that he was previously subjected to the defendant's actions." Dist. of Columbia Common Cause v. Dist. of Columbia, 273 U.S. App. D.C. 137, 858 F.2d 1, 8 (D.C. Cir. 1988). She must also show that "there is a real and immediate threat of repeated injury" in the future. Id.

HN6Whether regarded as a prerequisite **[**33]** to a plaintiff's standing to seek injunctive relief, City of Los Angeles v. Lyons, 461 U.S. 95, 105, 110, 75 L. Ed. 2d 675, 103 S. Ct. 1660 (1982), or as a facet of the irreparable harm element of the

preliminary injunction test, Comm. in Solidarity with the People of El Salvador v. Sessions, 289 U.S. App. D.C. 149, 929 F.2d 742, 745-46 (D.C. Cir. 1991), the requirement that a plaintiff demonstrate a likelihood of injury in the imminent future in order to secure an injunction is a well-established rule of law. See Lyons, 461 U.S. at 105, 110 (plaintiff seeking injunction against police abuse must show "real and immediate threat of again being illegally choked"); Does I through III v. Dist. of Columbia, 216 F.R.D. 5, 9 (D.D.C. 2003) (" plaintiff must demonstrate, not only that she has been harmed in the past, but that she is realistically threatened by a repetition of the violation") (alteration and quotation omitted). And if anything, the requirement takes on added importance in a case where the Court is asked to regulate the conduct of the Executive in the theater of war. See D.L.S. v. Utah, 374 F.3d 971, 973 (10th Cir. 1994) **[**34]** (cases such as Lyons "preserve appropriate separation of powers between the courts and the other branches").

Petitioners have not satisfied this requirement. As noted, the most serious of petitioner's allegations -- short-shackling in stress positions for extended periods, use of petitioner as a "human mop," abusive physical treatment by guards, and threats of sexual abuse --date to October 2003. Petitioner does not claim that these forms of mistreatment, or any others of a similar level of severity, have occurred since that date. Petitioners also do not offer any reason to believe that this sort of misconduct is going to suddenly materialize again in the near future. The news reports and government documents referenced in petitioners' papers do not shed any light on this question. Quite simply, even accepting **[*114]** petitioners' allegations of past misconduct as true, the record is barren of evidence of a "real and immediate threat" that petitioner will be subjected in the foreseeable future to mistreatment similar to that which he alleges occurred in 2003. n11 See Lyons, 461 U.S. at 110; Dist. of Columbia Common Cause, 858 F.2d at 8. Petitioners' mere **[**35]** speculation that this will happen is not a competent basis for the exercise of the Court's equitable powers. n12

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n11 The Court notes that petitioners' counsel themselves waited more than four months to file this motion even after they discovered the most serious allegations from petitioner, and the conduct apparently did not recur even during that period. See Lyons, 461 U.S. at 107 (" We note that five months elapsed between October 6, 1976, and the filing of the complaint, yet there was no allegation of further unfortunate encounters between Lyons and the police.").

n12 The fact that petitioner was a minor when many of the alleged incidents occurred does not change this analysis. His status as a minor does not make the allegations of mistreatment any more likely to occur again in the future. Moreover, as this Court noted in an earlier opinion in this case, "whatever additional rights, if any, petitioner may have enjoyed when he was a juvenile, he is now an adult, and petitioners seek only prospective relief" in their motions for a preliminary injunction. O.K., 344 F. Supp. 2d at 62.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - **[**36]**

That leaves the milder allegations of petitioner's interactions with officers in recent

months. Several of these allegations --such as the threats that petitioner would be stripped to his underwear if he did not cooperate with interrogators, and that he was forced to sit on a cold floor in an interrogation room --were denied by his interrogator in a sworn declaration. None of these allegations --including arguably the most serious during this period, which is the temperature in his cell being kept very low --rise to the level of misconduct that would lead the Court to issue an injunction. Absent a persuasive claim that the conditions of confinement at Guantanamo are so severe that they present an imminent threat to petitioner's health, the Court will not insert itself into the day-to-day operations of Guantanamo.

The ruling here is limited to the request for a preliminary injunction and the record in support of that request. Past acts of cognizable mistreatment of petitioner or other detainees by the United States --if proven --should not be condoned by the federal courts. But HN7 in assessing the need for extraordinary preliminary injunctive relief, the Court must examine whether such **[**37]** relief is warranted here because of a real, imminent threat of harm to petitioner in the future. This Court is not equipped or authorized to assume the broader roles of a congressional oversight committee or a superintendent of the operations of a military base. Indeed, to do so here could potentially open the gates to hundreds of detainee motions challenging every detail of the living conditions at Guantanamo at the very moment that the Court of Appeals is considering whether the detainees have any cognizable rights at all.

Recognizing these concerns, Judge Green issued a stay in this case (and many others) pending the appeal of her decision. She entered the stay (and denied modification of it) over petitioners' repeated objection that a stay would prevent them from filing motions and developing evidence about their treatment at Guantanamo. See supra at 4. Based on those rulings, entered in this case, the Court is reluctant to act inconsistent with the stay absent compelling circumstances. To be sure, the Court can lift that stay when the proper circumstances present themselves. But the present setting, in which there is no showing of an irreparable and imminent danger to the **[**38]** rights of petitioner, is not **[*115]** such a circumstance. For this reason, petitioners' motion must be denied.

II. Motion for Notice Prior to Transfer

In their second motion, petitioners seek a preliminary injunction that would force respondents to provide petitioners' counsel and the Court with thirty days' notice prior to any transfer of petitioner out of Guantanamo to a foreign state. On April 21, 2005, this Court denied a similar motion filed by other petitioners. See Al-Anazi v. **Bush**, 370 F. Supp. 2d 188 (D.D.C. 2005). In that opinion, this Court explained that the petitioners there had failed to present persuasive evidence that the United States had transferred (or was planning to transfer) Guantanamo detainees to a foreign state in order to exercise continuing custody over the detainees on foreign soil, or secure their torture through the intermediary of a foreign government, or for any other impermissible purpose. See id. at 194-95. The Court noted that the very newspaper articles on which the petitioners relied in bringing their motion drew a careful distinction between reports of the "rendition" of terrorism suspects by the Central Intelligence **[**39]** Agency (where the receiving government was expected to carry out the will of the United States), and the transfer of Guantanamo detainees by the Department of Defense (where that was not the case). See id. at 191, 196.

The Court also based its decision on sworn and unrebutted declarations from high-level Department of Defense and Department of State officials explaining that the

United States did not transfer any Guantanamo detainee to a foreign state without first obtaining assurances from the receiving state that it was "more likely than not" that the detainee would be humanely treated upon transfer (the legal standard set out in the regulations implementing the Convention Against Torture). The declarations also stated that the United States had declined to transfer certain Guantanamo detainees due to unresolved concerns about the possibility that they would be tortured by the receiving country. See id. at 192. The declarations further explained that the Department of Defense does not ask receiving governments to detain a Guantanamo detainee on behalf of the United States on foreign soil, and that there was no plan in place to effect transfers of **[**40]** detainees to thwart the jurisdiction of any court. See id. at 190-91, 195-96. n13 Finally, the respondents pledged to inform the Court if the United States ever were to begin to transfer detainees overseas for continuing United States custody. See id. at 196-97. Petitioners offered little in response to the declarations other than their own suspicions regarding the United States' intentions at Guantanamo. The Court declined to issue an order that would interfere with **[*116]** the President's diplomatic relations and the movement of detainees in a time of ongoing hostilities on the basis of the petitioners' simple mistrust of the government, and hence denied the motion.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n13 As noted in the background section, respondents filed in this case a more recent declaration of one of the officials that "replaces" prior declarations that respondents had earlier filed in this case, and that served as part of the basis for this Court's decision in Al-Anazi. Decl. of Matthew C. Waxman, June 2, 2005, P 1; see supra note 7. After a careful review of the new declaration, the Court concludes that it does not alter the conclusions this Court reached in Al-Anazi. Although the new declaration omits certain statements that were contained in the earlier declarations, it continues to state unequivocally that once a detainee is transferred from Guantanamo, the detainee "is no longer in the custody and control of the United States," and that the United States does not transfer detainees out of Guantanamo "to thwart the actual or putative jurisdiction of any court." Id. P P 2, 5. The Court continues to regard the respondents as bound to the pledge the Court understood them to make at a hearing in Al-Anazi that they will inform the Court if these policies change and they begin transferring Guantanamo detainees overseas for ongoing United States custody.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - **[**41]**

Petitioners now ask the Court to reach a different result in this case, relying on two considerations that they believe distinguish this case from Al-Anazi. First, they observe that this case (unlike Al-Anazi) was one of the habeas petitions that was transferred to Judge Green for a consolidated decision on the respondents' motion to dismiss. Her decision on the motion to dismiss is currently pending on appeal before the D.C. Circuit. Therefore, petitioners argue, this case implicates Federal Rule of Appellate Procedure 23(a), which provides:

HN8 Transfer of Custody Pending Review. Pending review of a decision in a habeas corpus proceeding commenced before a court, justice, or judge of the United States for the release of a prisoner, the person having custody of the prisoner must not transfer custody to another unless a transfer is directed in accordance with this rule. When, upon application, a custodian shows the need for a transfer, the court, justice,

or judge rendering the decision under review may authorize the transfer and substitute the successor custodian as a party.

Fed. R. App. P. 23(a) **[**42]** .

HN9 As its text indicates, the concern of Rule 23(a) is one of technical compliance with the rule that "there is generally only one proper respondent" to a habeas petition: "the person with the ability to produce the prisoner's body before the habeas court." Rumsfeld v. Padilla, 542 U.S. 426, 124 S. Ct. 2711, 2717, 159 L. Ed. 2d 513 (2004) (quotation omitted). Rule 23(a) requires a district court to monitor compliance with this rule even where the case is otherwise before the appellate court, to ensure that the courts remain in a position to order the respondent to produce and release the petitioner if a ruling of the appellate court --or a later ruling of the district court --so requires. Id.; see Wood v. United States, 873 F. Supp. 56, 56 (W.D. Mich. 1995) (" Rule 23(a) is designed to prevent frustration of an appeal through transfer of the custody of the prisoner while the appeal is pending. This purpose is reflected in the provisions of the rule for substituting the successor custodian as a party.").

HN10 Nothing in the Rule indicates a desire to extend it to situations where the United States (or a state) is transferring an individual out of federal **[**43]** or state custody entirely. Petitioners seize on the word "another", but at a minimum, there is ambiguity as to whether that word is meant to refer to "another custodian who is a federal or state official" or "another custodian even if no court in the United States retains jurisdiction over the custodian." The latter interpretation immediately runs into difficulty in the next sentence of the Rule: if the prisoner is released from federal or state custody in such a situation, there will be no successor custodian to substitute, and therefore a court cannot "authorize the transfer and substitute the successor custodian as a party" upon a showing of need. Fed. R. App. P. 23(a). n14

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n14 Because there is no comparable provision in the Federal Rules of Civil Procedure, this interpretation would also lead to the curious result that the United States may transfer an individual out of its custody at any point in a case except for the brief period when the case is on appeal.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Whatever **[**44]** might be said for an interpretation of the Rule that encompasses the transfer of a prisoner out of federal or state custody, it is implausible that Congress intended the Rule to block the movement of detainees captured in the course of ongoing military hostilities. The Court has been pointed to no evidence on the **[*117]** face of the statute or elsewhere that indicates that such a use of the Rule was even within the

contemplation of Congress, much less that it was Congress's intent. The interpretation of the Rule must therefore be guided by the well-settled canon of statutory interpretation providing that HN11 a court should not construe a statute to interfere with the province of the Executive over military affairs in the absence of a clear manifestation of Congressional intent to do so. See Dep't of Navy v. Egan, 484 U.S. 518, 527, 98 L. Ed. 2d 918, 108 S. Ct. 818 (1988) (" Unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs."); William N. Eskridge, Jr. & Philip P. Frickey, Forward: Law as Equilibrium, 108 Harv. L. Rev. 26, 100 (1994) (collecting **[**45]** cases that recognize a "super-strong rule against congressional interference with [the] President's authority over foreign affairs and national security").

This case practically calls out for the application of this canon. Petitioners' reading of Rule 23(a) would transform a technical and procedural rule that addresses the identity of the parties in a habeas proceeding into a sweeping prohibition on the transfer and release of military detainees while a case is on appeal. n15 If the military affairs canon is to mean anything, it is that the Court cannot accomplish this transformation without clear evidence that the resulting limitations on the Executive's war powers reflect the will of Congress. There is no such evidence in this case. HN12 Congress has the constitutional authority to "make Rules concerning Captures on Land and Water," and were it to enact a statute within the proper bounds of its authority, it would be the role of the Court to faithfully apply those laws as written. U.S. Const. art. I, § 8. It is not for the Court to write the rules of war in the interim, either by its own pen or through an overly generous interpretation of existing statutes. n16

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n15 Note that this prohibition would not be confined to Guantanamo detainees, applying instead to any individual captured in military hostilities who has filed a habeas claim in federal court and then taken that case on appeal. **[**46]**

n16 The Court notes that two of the petitioners in Rasul v. **Bush** were released from United States custody (apparently without the prior authorization of any court) after the Supreme Court granted certiorari in that case. The Supreme Court mentioned the release of these petitioners in a footnote in Rasul without suggesting that it posed any problems under the counterpart to Rule 23(a) in the Supreme Court rules. See Rasul, 542 U.S. 466, 159 L. Ed. 2d 548, 124 S. Ct. 2686, 2690 n. 1 (2004); Sup. Ct. Rule 36(1)-(2) ("Pending review in this Court of a decision in a habeas corpus proceeding commenced before a court, Justice, or judge of the United States, the person having custody of the prisoner may not transfer custody to another person unless the transfer is authorized under this Rule. Upon application by a custodian, the court, Justice, or judge who entered the decision under review may authorize transfer and the substitution of a successor custodian as a party.").

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

The other basis suggested by petitioners for distinguishing Al-Anazi is the presence in this case of allegations that interrogators **[**47]** threatened petitioner on more than one occasion with transfer to a third country where he would be sexually assaulted. The question whether threats of this sort in a military interrogation setting amount to torture or otherwise violate any of the detainee's rights must be set to one side. The issue here is whether the allegation of such threats amount to sufficient evidence of an actual transfer in the imminent future to warrant a different result in this case than the one reached in Al-Anazi. As to this question, the Court notes once again the declarations in the record from high-level officials in the Department **[*118]** of Defense and Department of State that it is not the policy or practice of the United States to transfer detainees for the purpose of torture or any other improper reason. It is this policy and practice that is relevant to whether there is a basis for the Court to issue an order providing thirty days' notice of a transfer, not what an interrogator may have told a detainee in an attempt to induce him to divulge information. Petitioners do not cite any evidence that the interrogators have taken steps to carry out their threat to transfer the petitioner, or that a transfer **[**48]** of petitioner is otherwise imminent. Petitioners also do not cite any facts that rebut the officials' sworn declarations in this case. Thus, the Court rejects this attempt to distinguish the instant case from Al-Anazi, and denies petitioners' motion for notice prior to transfer. n17

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n17 At oral argument, counsel for petitioners argued by analogy to cases in which courts have inquired into an individual's claims that it is more likely than not that he will be tortured if he is removed from the United States for immigration violations. These cases are brought under section 2242(a) of the Foreign Affairs Reform and Restructuring Act of 1988 (" FARRA"), which implements Article 3 of the United Nations Convention Against Torture. See 8 U.S.C. § 1231. But as this Court explained in Al-Anazi, HN13 FARRA is expressly limited to claims arising out of a final order of removal. See Al-Anazi, 370 F. Supp. 2d 188, 2005 WL 1119602, at *5; see also Cornejo-Barreto v. Siefert, 379 F.3d 1075, 1086 (9th Cir. 2004) (" While § 2242(d) plainly contemplates judicial review of final orders of removal for compliance with the Torture Convention and the FARR Act, it just as plainly does not contemplate judicial review for anything else."). Although the Executive is free to honor the instructions of FARRA outside of the removal context if it wishes, and there is at least some indication that the Executive has sought to adhere to the FARRA regulations and their "more likely than not" standard in the case of the Guantanamo detainees, FARRA is quite explicit that no legal rights can be derived from its rules outside of the removal setting, by analogy or otherwise.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[**49]**

CONCLUSION

For the reasons set out above, petitioners' motions for a preliminary injunction blocking the interrogation or torture of petitioner, and for a preliminary injunction for thirty days' notice prior to transfer, are DENIED. A separate order will issue herewith.

/s/John D. Bates

JOHN D. BATES

United States District Judge

Dated: July 12, 2005

ORDER

Upon consideration of [108] petitioners' application for preliminary injunction to enjoin interrogation, torture and other cruel, inhuman, or degrading treatment of petitioner, and [113] petitioners' motion for preliminary injunction to provide notice of intent to remove petitioner from Guantanamo, and the entire record in this case, and for the reasons stated in the accompanying Memorandum Opinion issued on this date, it is this 12th day of July, 2005, hereby

ORDERED that [108] petitioners' application for preliminary injunction to enjoin interrogation, torture and other cruel, inhuman, or degrading treatment of petitioner is **DENIED**; and it is further

ORDERED that [113] petitioners' motion for preliminary injunction to provide notice of intent to remove petitioner **[**50]** from Guantanamo is **DENIED**.

/s/John D. Bates

JOHN D. BATES

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

O.K.,[1] et al., **Petitioners,** **v.** **GEORGE W. BUSH, et al.,** **Respondents.**	**Civil Action No. 04-1136 (JDB)**

ORDER

The Court issues the following order in the interest of providing clarification on the status of motions still pending on the docket in this case, which presently is before the United States Court of Appeals for the District of Columbia Circuit on certified interlocutory appeal.

Petitioners filed a motion for leave to take discovery and for a preservation order on January 10, 2005 -- three weeks before Judge Joyce Hens Green issued her opinion and order granting in part and denying in part respondents' motion to dismiss. On February 3, 2005, Judge Green ordered that the proceedings in this and ten other related cases be stayed "for all purposes," pending resolution of the interlocutory appeal. Thus, insofar as petitioners' motion seeks leave to take discovery, it is stayed by the February 3, 2005, order and, accordingly, the Court will order it held in abeyance. In related cases, other judges of this court have so concluded expressly, see e.g., Al Odah v. United States, No. 02-CV-0828 (D.D.C. April 25, 2005) (order); Anam v. Bush,

[1] Because petitioner O.K. was a minor when the habeas petition in this case was filed, the Court uses his initials, consistent with the rules of this Court and the practice of the parties throughout this litigation. See L.Civ.R. 5.4(f)(2).

No. 04-CV-1194 (D.D.C. June 10, 2005) (order), or by implication.

Petitioners' motion, however, also seeks a court order requiring respondents to preserve and maintain "all information about the torture, mistreatment, and abuse of the detainees now at Guantanamo, as well as all information regarding recommendations to continue their imprisonment or release and repatriate them." See Pet'rs' Mot. for Disc./Protect. Order at 9. The Court cannot treat this part of petitioners' motion as having been stayed by the February 3, 2005, order, because doing so would ignore the very purpose of a preservation order -- to ensure the continued existence and integrity of all potentially relevant material during the pendency of litigation. There is a split of authority over the precise standard that a party seeking a preservation order must satisfy. Compare Battayav v. Bush, No. 05-CV-0714 (D.D.C. May 19, 2005) (order) (stating that "[a] motion to preserve evidence is an injunctive remedy" and citing to cases that address preservation orders as requests for temporary injunctions), with Al-Marri v. Bush, No. 04-CV-2035 (D.D.C. Mar. 7, 2005) (order) (relying on Pueblo of Laguna v. United States, 60 Fed. Cl. 133, 138 n.8 (2004), which states that "a document preservation order is no more an injunction than an order requiring a party to identify witnesses or to produce documents in discovery" and demands only that the party seeking a preservation order "demonstrate that it is necessary and not unduly burdensome"); see also Capricorn Power Co., Inc. v. Seimens Westinghouse Power Corp., 220 F.R.D. 429, 433-34 (W.D. Pa. 2004) (applying a three-part balancing test to resolve a motion to preserve documents). Although the Court is not predisposed to assume that the government would alter or destroy records in its possession absent a court order and is therefore inclined to demand, at the very least, that parties seeking preservation orders against the government make a credible showing of a significant risk of alteration or

destruction, the Court need not determine the appropriate standard in order to resolve this motion. That is because respondents already are under a duty to preserve the very information that this motion addresses, pursuant to court orders issued in Anam and Al-Marri, as well as in Abdah v. Bush, No. 04-CV-1254 (D.D.C. June 10, 2005) (order). As a result, to the extent petitioners' motion seeks a preservation order, it is moot. See Battayav ("respondents are already under an obligation to preserve relevant documents" based on an order in another case); El-Banna v. Bush, No. 04-CV-1144 (D.D.C. July 18, 2005) ("another preservation order would be unnecessary").

For the forgoing reasons, it is hereby

ORDERED that petitioners' motion for leave to take discovery shall be held in abeyance, in light of the February 3, 2005, stay order; and it is further

ORDERED that petitioners' motion for a preservation order is **DENIED** without prejudice as moot.

/s/ John D. Bates
JOHN D. BATES
United States District Judge

Dated: October 27, 2005

Copies to:

Muneer I. Ahmad
Richard J. Wilson
AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW
4801 Massachusetts Avenue, NW
Washington, DC 20016
Email: mahmad@wcl.american.edu
Email: rwilson@wcl.american.edu

Counsel for petitioners

Terry Marcus Henry
Robert J. Katerberg
Preeya M. Noronha
Lisa Ann Olso
UNITED STATES DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, NW
Washington, DC 20001
Email: terry.henry@usdoj.gov
Email: robert.katerberg@usdoj.gov
Email: preeya.noronha@usdoj.gov
Email: lisa.olson@usdoj.gov

Counsel for respondents

Cleared for Public Filing CSO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

O.K.,	**Case No. 1:04-CV-01136 (JDB)**
Petitioner,	
v.	
GEORGE W. BUSH, *et al.*,	
Respondents.	

MOTION FOR LEAVE TO FILE SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Petitioner Omar Khadr is a 19-year-old Canadian citizen at Guantánamo Bay, Cuba who has been in unlawful U.S. custody since the age of 15, whose petition for habeas corpus and other relief has been pending in this Court since July 2, 2004. That petition challenged Petitioner's ongoing detention by Respondents at Guantánamo Bay, where he had been held without charge for over three years. On November 7, 2005, Respondents for the first time charged Petitioner with various "crimes." Subsequently, Respondents referred his case for trial before a military commission. In so doing, Respondents have made the United States the only country in the world, at any time in history, to charge an individual with war "crimes" based on conduct allegedly committed as a juvenile. Moreover, the "crimes" with which Petitioner is now charged have been made up after the fact by Respondents, are not authorized by Congress, and are without basis in the law of war. These invalid charges are to be heard before a military commission that is improperly appointed and that violates Petitioner's due process rights under U.S. statutory and constitutional law, as well as under international law.

In light of these recent developments, Petitioner seeks leave of the Court, pursuant to Rule 15(d) of the Federal Rules of Civil Procedure, in order to file a supplemental pleading in this matter.[1] This supplemental pleading is necessary in order for Petitioner to challenge the legality of the military commission process which Respondents now seek to use against Petitioner, something that Petitioner could not have done properly in his earlier pleadings because the filing of charges against Petitioner and their referral to a military commission have transpired since Petitioner's last pleading.[2]

STATEMENT OF FACTS

1. Petitioner is currently incarcerated by Respondents at Guantánamo Bay Naval Station, Guantánamo Bay, Cuba. He has been in U.S. custody since July 27, 2002. Throughout his time at Guantánamo Bay, he has been held virtually *incommunicado.*
2. Following the Supreme Court's decision in *Rasul v. Bush,* 542 U.S. 466, 124 S. Ct. 2686 (2004), which recognized this Court's authority to review applications for habeas relief from detainees at Guantánamo Bay, counsel for Petitioner filed on July 2, 2004 a Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief [Dkt. No. 1]. That petition challenged the legality of Petitioner's ongoing detention at Guantánamo Bay as a violation of Petitioner's rights under U.S statutory and constitutional law as well as under international law. At the time of filing of the petition, Petitioner had not been charged with any crime.
3. On August 17, 2004, counsel for Petitioner filed a First Amended Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief [Dkt. No. 11], which added and

[1] Counsel for Respondents have indicated that they do not oppose the present motion but that they reserve the right to do so.
[2] Petitioner's Supplemental Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief is submitted simultaneous with the present motion.

amended several causes of action relating to Petitioner's ongoing, unlawful detention. At the time of filing of the First Amended Petition, Petitioner had not been charged with any crime.

4. On October 4, 2004, Respondents filed a motion to dismiss or for judgment as a matter of law [Dkt. No. 33], which was subsequently transferred to Judge Joyce Hens Green [Dkt. No. 62], as were several other Guantánamo detainee cases pending before different judges of the Court. Following briefing and oral argument, Judge Green issued a decision on January 31, 2005 denying in part and granting in part Respondents' motion to dismiss [Dkt. No. 95]. Judge Green's decision, and a contrary decision by Judge Richard Leon in the cases of other Guantánamo detainees, were consolidated for appeal before the D.C. Circuit Court of Appeals, where the cases are now pending.

5. On November 7, 2005, the United States Supreme Court granted *certiorari* in *Hamdan v. Rumsfeld,* 415 F. 3d 33 (D.C. Cir. 2005), *cert. granted,* 74 U.S.L.W. 3108 (U.S. Nov. 7, 2005) (No. 05-184). *Hamdan* involves another detainee at Guantánamo Bay who faces charges before a military commission, and challenges the legality of the military commission process under U.S. and international law.

6. Later in the day on November 7, 2005, Respondents publicly announced charges against Petitioner for various "crimes." *See* Charge Sheet, attached hereto as Exhibit A. This constituted the first time in over three years of detention by Respondents that Petitioner has been charged. The charges against Petitioner were subsequently referred to a military commission. *See* Referral, attached hereto as Exhibit B.

ARGUMENT

The Court should permit Petitioner to file a supplemental petition because it is essential to the just and timely adjudication of Petitioner's challenge to his ongoing detention. Permitting

the supplemental petition is in the interests of justice and judicial economy, and in no way prejudices Respondents.

Rule 15(d) of the Federal Rules of Civil Procedure authorizes the Court, "upon reasonable notice and upon such terms as are just," to permit service of a supplemental pleading that sets forth "transactions or occurrences or events that have happened since the date of the pleading sought to be supplemented." Fed. R. Civ. P. 15(d). As the D.C. Circuit has noted, "the appropriate bases for supplemental pleadings are new facts bearing on the relationship between the parties". *U.S. v. Hicks,* 283 F. 3d 380, 385-86 (D.C. Cir. 2002). A supplemental pleading "may introduce new causes of action not alleged in the original complaint so long as their introduction does not create surprise or prejudice to the rights of the adverse party." *Aftergood v. Central Intelligence Agency,* 225 F.Supp.2d 27, 30 (D.D.C.2002) (citation omitted). The Court has broad discretion to permit a supplemental pleading in the interests of judicial economy and convenience. *Wright v. Herman,* 230 F.R.D. 1, 3 n. 3 (D.D.C. 2005). Moreover, "leave to file a supplemental pleading should be freely permitted when the supplemental facts connect it to the original pleading." *Id.* at 30; *accord Miller v. Air Line Pilots Ass'n Int'l,* 2000 WL 362042, at * 1 (D.D.C. Mar.30, 2000) ("'as a general rule plaintiffs should be liberally allowed to set up new facts which really are a part of the original case.'") (quoting *Gomez v. Wilson,* 477 F. 2d 411, 417 n. 33 (D.C. Cir. 1973)).

Petitioner's supplemental petition is necessitated by Respondents' decision to file charges against him on November 7, 2005 and to refer those charges to a military commission. These events, which come over a year after Petitioner filed his First Amended Petition, are exactly the type of "new facts" that justify the filing of a supplemental pleading. *See Hicks,* 283 F. 3d at 386. Moreover, because the challenge to the military commission process that Petitioner seeks to make is a basis for habeas relief, it connects directly and integrally to Petitioner's prior pleading. *See Wright, 230 F.R.D. at 30.* Indeed, a full and fair adjudication of the legality of Petitioner's

ongoing detention must encompass Petitioner's challenge to the military commission process, as trial before a commission now serves as an additional rationale proffered by Respondents for Petitioner's detention.[3]

Here, Petitioner's supplemental petition is prompted not only by events that have transpired since his last pleading, but events over which Respondents maintain absolute control. As such, Respondents cannot claim that they are prejudiced by the Court permitting the supplemental petition, as it is only because of Respondents' own recent conduct that the supplemental petition has become necessary.

While it is in the Court's broad discretion to grant the present motion, the caselaw makes clear that leave to file a supplemental pleading should be granted freely and liberally where, as here, supplementation promotes the fair and economic resolution of the controversy between the parties. In order to have the fair opportunity to challenge in habeas proceedings the legality of his ongoing detention, as authorized by the Supreme Court authorized in *Rasul,* Petitioner should be granted leave to serve on Respondents his supplemental pleading relating to the military commission process.

Dated: December 14, 2005
Washington, D.C.

Respectfully submitted,

/s/ Muneer I. Ahmad
Muneer I. Ahmad, Bar No. 438131
Richard J. Wilson, Bar No. 425026

INTERNATIONAL HUMAN RIGHTS LAW
CLINIC, AMERICAN UNIVERSITY
WASHINGTON COLLEGE OF LAW

[3] In order to challenge the military commissions as a basis for his detention, Petitioner has added two respondents in his supplemental pleading: John D. Altenburg, Jr., Appointing Authority for the Military Commissions, and Colonel Michael Bumgarner, Commander, Joint Detention Group, Joint Task, Guantánamo Bay.

4801 Massachusetts Ave., NW
Washington, DC 20016
(202) 274-4004
(202) 274-0659 (fax)

Counsel for Petitioner

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

O.K., Petitioner, v. GEORGE W. BUSH, President of the United States, et al., Respondents.	Civil Action No. 04-CV-1136 (JDB)

RESPONDENTS' RESPONSE TO PETITIONER O.K.'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Respondents hereby submit this response to Petitioner O.K.'s Motion for Leave to File Supplemental Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief.

Petitioner O.K. has moved for leave to amend his petition for habeas corpus pursuant to 28 U.S.C. § 2243. Respondents do not oppose this motion; however, they reserve the right to raise any and all defenses or other responses they may have to the petition as supplemented and amended.

Dated: December 16, 2005

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

KENNETH L. WAINSTEIN
United States Attorney

DOUGLAS N. LETTER
Terrorism Litigation Counsel

/s/ Marc A. Perez
JOSEPH H. HUNT (D.C. Bar No. 431134)
VINCENT M. GARVEY (D.C. Bar No. 127191)
TERRY M. HENRY
JAMES J. SCHWARTZ
PREEYA M. NORONHA
ROBERT J. KATERBERG
NICHOLAS J. PATTERSON
ANDREW I. WARDEN
EDWARD H. WHITE
MARC A. PEREZ (WA State Bar No. 33907)
Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W.
Washington, DC 20530
Tel: (202) 514-4505
Fax: (202) 616-8202

Attorneys for Respondents

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

O.K.,* **Detainee, Guantánamo Bay Naval Base Guantánamo Bay, Cuba;** **Petitioner,** **v.** **GEORGE W. BUSH, President of the United States;** **DONALD RUMSFELD, United States Secretary of Defense; GORDON R. ENGLAND, Secretary of the United States Navy;** **JOHN D. ALTENBURG, JR., Appointing Authority for Military Commissions, Department of Defense;** **Brigadier General JAY HOOD, Commander, Joint Task Force, Guantánamo Bay, Cuba,** **and** **Colonel MICHAEL BUMGARNER, Commander, Joint Detention Group, Joint Task, Guantánamo Bay, Cuba** **Respondents.** **All sued in their official capacities.**	**SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF** **Case Number 1:04CV01136** **Judge: John D. Bates** **Deck Type: Habeas Corpus/2255**

* Pursuant to Local Civil Rule 5.4(f)(2), which requires that the names of minor children not be used in electronically filed documents, the initials "O.K." are used to refer to the Petitioner detainee.

SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Petitioner O.K. is a 19-year old Canadian citizen designated as an "enemy combatant" by the President of the United States, who since the age of 15 has been held illegally by Respondents, without access to counsel for more than two years, and without any fair process by which he might challenge his designation and detention. Now, over three years after O.K. was taken into U.S. custody, Respondents have charged O.K. with "crimes" he allegedly committed at the age of 15, "crimes" which Respondents have made up after the fact. Respondents intend to try O.K. for those "crimes" before a military panel they have appointed and over which they exercise reviewing authority. In so doing, Respondents have made the United States the first and only country in the world to charge an individual with war "crimes" for conduct allegedly committed while he was a juvenile—something that was not done at Nuremburg, in Rwanda, the former Yugoslavia, Sierra Leone, or East Timor, or in any known or reported case in any country, at any time in history.

The military panel before which Respondents intend to try O.K. lacks jurisdiction over the "crimes" with which O.K. has been charged, and its procedures violate O.K.'s rights under statutory, constitutional, and international law.

O.K.'s ongoing detention is by color and authority of the Executive, and in violation of the Constitution, laws and treaties of the United States as well as customary international law. Accordingly, this Court should issue a Writ of Habeas Corpus, and order injunctive, declaratory, and damages relief.

This Supplemental Petition is filed pursuant to Federal Rule of Civil Procedure 15(d), and is meant to supplement rather than supersede the First Amended Petition for

Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief that was filed with the Court and served on Respondents on August 7, 2004.

I.
INTRODUCTION

1. Petitioner O.K. is currently incarcerated at the United States Naval Station, Guantánamo Bay, Cuba ("Guantánamo Bay"). Upon information and belief, O.K. was seized in Afghanistan by United States forces on July 27, 2002, at the age of 15, and was subsequently transferred to Guantánamo Bay.

2. O.K. has been unlawfully detained at the direction of Respondents for over three years. During the period of his initial seizure and subsequent confinement, Respondents have authorized, directed, and/or permitted illegal, abusive and coercive conditions of confinement and interrogation to be directed against O.K. Interrogation techniques used by Respondents against O.K. rose to the level of torture, as well as other cruel, inhuman, and degrading treatment.

3. There is no basis for O.K.'s detention. At no time did O.K. engage in any criminal or terrorist conduct. He did not at any time commit any criminal violations, or any violations of the law of war, nor did he ever enter into any agreement with anyone to do so. Accordingly, O.K. brings this action seeking a writ of habeas corpus to secure his release from Respondents' unlawful detention.

4. Lacking any lawful basis for O.K.'s continued detention, Respondents now seek to justify O.K.'s detention by subjecting him to a "trial" by military commission (the "Commission") on purported war crime charges of Respondents' own creation and definition, never before recognized under international law. The procedures to be

used by the Commission are of Respondents' ongoing invention, subject to modification by the Commission as its proceedings take place. These procedures fail to comport with O.K.'s rights under the laws of the United States, the Constitution, or international law, including his rights as a juvenile at the time of the conduct alleged against him. Because Respondents' war crimes charges are indisputably invalid and the Commission's process and procedures unlawful, O.K. seeks habeas relief with respect to his unlawful detention and trial by the Commission.

5. As set forth more fully below, O.K. also challenges numerous other unlawful aspects of his continued detention by Respondents, including, without limitation (i) Respondents' failure to afford O.K. the protections of the Geneva Conventions and other applicable law to which he is presumptively and actually entitled, (ii) Respondents' denial of O.K.'s rights to due process and equal protection of the laws, (iii) O.K.'s continued detention in derogation of his right to speedy trial under applicable law, (iv) Respondents' reliance, in charging and detaining O.K. for trial, on statements garnered through the use of illegal, improper, abusive and coercive means and methods of interrogation and treatment directed at O.K. and other detainees, and (v) various other deficiencies in the Commission and/or combatant status review tribunal process and procedures.

6. In June 2004, the Supreme Court explained that "[c]onsistent with the historic purpose of the writ, this Court has recognized the federal courts' power to review applications for habeas relief in a wide variety of cases involving Executive detention, in wartime as well as in times of peace." *Rasul v. Bush*, 542 U.S. 466, 557, 124 S. Ct. 2686, 2692-93 (2004).

7. This is one such application. O.K. invokes the protection of this Court and seeks the Great Writ in order to secure his release and to vindicate the fundamental rights recognized by the Supreme Court. *See Hamdi v. Rumsfeld,* 542 U.S. 507, 124 S. Ct. 2633 (2004); 28 U.S.C. §§ 2241(c)(1), 2241(c)(3) ; *Rasul*, 542 U.S. at 487, 124 S. Ct. at 2700 (Kennedy, J., concurring) ("[a] necessary corollary of [*Johnson v.*] *Eisentrager* [, 339 U.S. 763 (1950)] is that there are circumstances in which the courts maintain the power and the responsibility to protect persons from unlawful detention even where military affairs are implicated"), citing *Ex parte Milligan*, 4 Wall. 2, 18 L. Ed. 281 (1866).

II.

JURISDICTION

8. This action arises under the Constitution, laws and treaties of the United States, including Articles I, II, III, and VI and the 5th and 6th Amendments, 28 U.S.C. §§1331, 1350, 1361, 1391, 2241, and 2242, 5 U.S.C. §702, the All Writs Act (28 U.S.C. §1651), 42 U.S.C. §1981, the *Bivens* doctrine [*Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971)], and the Geneva Conventions, as well as international law more generally.

9. This Court possesses subject matter jurisdiction under 28 U.S.C. §§ 1350, 1361 and 1391, 5 U.S.C. § 702, as well as the habeas corpus statute, 28 U.S.C. §2241, and the All Writs Act, 28 U.S.C. §1651. In addition, the Court may grant the relief requested under Art. 2(a)(12) of the Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. §802(a)(12), which grants jurisdiction over a petition for judicial review filed by or on behalf of parties incarcerated at Guantánamo. As explained above, the Supreme

Court expressly held that this Court has subject matter jurisdiction to consider a habeas petition by a Guantánamo detainee in *Rasul*.

10. This Court has personal jurisdiction over the parties. Respondents have substantial contacts in this District.

11. Venue is proper in this Court under 28 U.S.C. §§1391(b) and (e) since a substantial part of the events, acts, and omissions giving rise to the claim occurred in this District and a Respondent may be found in the District. *See Rasul*, 542 U.S. 466 at 483, 124 S. Ct. at 2698; *Rumsfeld v. Padilla*, 542 U.S. 426, 124 S. Ct. 2711 (2004). *See also Gherebi v. Bush*, 374 F.3d 727 (9th Cir. 2004) (amended opinion) (transferring Guantánamo Bay detainee's action to the District of the District of Columbia in light of *Padilla*).

III.

PARTIES

12. Petitioner O.K. was born on September 19, 1986, in Toronto, Canada, and is a Canadian citizen presently held in Respondents' unlawful custody at Guantánamo Bay. In 1997, when O.K. was 11 years old, he and his family moved from Pakistan to Kabul, Afghanistan. The United States military assumed custody of O.K. in Afghanistan on or about July 27, 2002, when O.K. was 15 years old.

13. Respondent George W. Bush is the President of the United States, and executed the Military Order that created the military commissions under which O.K. is being detained and Commander in Chief of the United States Military. Respondent

President Bush also designated O.K. a person eligible for trial by the Commission, which is why O.K. is scheduled for an unlawful trial before the Commission.

14. Respondent Donald H. Rumsfeld is the Secretary of Defense of the United States, and commands all aspects of the United States Military, including the Office of Military Commissions established by the applicable Presidential Military Order. Respondent Secretary Rumsfeld has custodial authority over O.K. and is ultimately in charge of the prosecution of O.K. by the Commission.

15. Respondent Gordon R. England is Secretary of the Navy, and is Respondent Secretary Rumsfeld's designee for the Combatant Status Review Tribunals.

16. Respondent John D. Altenburg, Jr., is the Appointing Authority for Military Commissions, and in that capacity exercises authority over the entire Commission process.

17. Respondent Brigadier General Jay Hood is the Commander of Joint Task Force Guantánamo and, in that capacity, is responsible for O.K.'s continued and indefinite detention at Guantánamo Bay.

18. Colonel Brice A. Gyurisko is the Commander of Joint Detention Operations Group and in that capacity, is responsible for the U.S. facility where O.K. is presently detained. He exercises immediate custody over O.K. pursuant to orders issued by Respondent President Bush, Respondent Secretary Rumsfeld and Respondent General Hood.

IV.

ALLEGATIONS COMMON TO ALL COUNTS

19. Following the September 11, 2001 attack upon targets in the United States, the United States commenced military operations in Afghanistan on or about October 7, 2001

against Taliban and "*al Qaeda*" targets within Afghanistan. That activity was augmented twelve days later on October 19, 2001, with ground operations by U.S. forces. Through December 2001, the U.S. military action initially involved a small number of Special Forces operating on the ground in Afghanistan, and working with forces of the Northern Alliance, a consortium of armed and organized Afghan foes of the Taliban government. A substantial air campaign supported these units as well as a small number of Special Forces from other nations (hereinafter collectively the "Coalition Forces""). The Northern Alliance and Coalition Forces operated in full cooperation and coordination in their joint campaign against the Taliban and *al Qaeda*.

20. The above military activities were authorized by Congress in a "use of force" resolution passed on September 18, 2001:

> [t]hat the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

See Authorization for Use of Military Force ("AUMF"), Pub.L. 107-40, 115 Stat. 224 (2001). *See also Rasul*, 542 U.S. at 470, 124 S. Ct. at 2690 ("[a]cting pursuant to that authorization, the President sent U.S. Armed Forces into Afghanistan to wage a military campaign against *al Qaeda* and the Taliban regime that had supported it").

21. Pursuant to the AUMF, the United States, in support of, and in conjunction with, the Northern Alliance, commenced military action against Afghanistan's Taliban government. Within ninety days, by January 2002, the Taliban government was defeated and Coalition Forces and the Northern Alliance had captured and/or

apprehended a number of persons allegedly associated with the Taliban and/or *al Qaeda*. Upon information and belief, O.K. was seized by United States forces in Afghanistan on July 27, 2002.

22. Following his removal from Afghanistan by U.S personnel, O.K. was transported by U.S. military aircraft to Guantánamo Bay in October 2002. Upon arrival O.K. was placed in a special facility reserved for alien detainees denominated "enemy combatants" by Respondent President Bush and/or the Department of Defense.

23. During O.K.'s now 40-month confinement by the United States, O.K. has been the subject of continued, intensive, and uncounseled interrogation. O.K. was not permitted to meet with counsel until November 2004. On information and belief, the interrogation of O.K. has included physical and psychological abuse.

24. Those coercive and illegal techniques constitute torture under the definition set forth in Article 1 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* February 4, 1985, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 ("CAT") ("any act by which severe pain or suffering . . . is intentionally inflicted on a person for such purposes as obtaining from him . . . information or a confession . . . when such pain is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity[.]") *See also Khouzam v. Ashcroft*, 361 F.3d 161, 168-69 (2d Cir. 2004). The United States became a party to the CAT in 1994.

25. After more than three years of confinement and interrogation, on July 30, 2005, Respondent President Bush designated O.K. as a person eligible for trial before the

Commission. The Commission was established by Presidential Military Order, dated November 13, 2001, *see* 66 Fed. Reg. 57,833 (November 13, 2001) ("PMO"), and the March 21, 2002, Military Commission Order No. 1 ("MCO No. 1"). (A copy of the PMO is attached hereto as Exhibit A; a copy of MCO No. 1 is attached hereto as Exhibit B.)[1]

26. On November 7, 2005, more than three years after O.K. was detained by Respondents, charges against him were publicly released. The charges were approved by Respondent Altenburg on November 4, 2005. The charges consist of four offenses:

Count One – Conspiracy.

Count Two – Murder by an unprivileged belligerent.

Count Three – Attempted murder by an unprivileged belligerent.

Count Four – Aiding the enemy.

See United States v. O.K. Ahmed Khadr, Charge Sheet (attached hereto as Exhibit C). O.K.'s charges were referred to a Commission on November 23, 2005. (A copy of the Referral is attached hereto as Exhibit D).

27. Some of the procedures for the military commissions under which O.K. will be tried were set up in the MCO No. 1 (see Exhibit B). Many other procedures will be made up as the proceedings go along, precluding the accused from having anywhere close to a full understanding of the procedures under which he will be tried.

---

[1] The presidential designation of O.K. is CLASSIFIED and thus is not included here. The fact of the presidential designation is unclassified, as stated in the Charge Sheet issued by Respondents. *See* Charge Sheet ¶ 1, Exh. C.

28. Even those procedures that have been clearly established are deficient and will not result in a full and fair trial. Under these existing procedures, Respondent Secretary Rumsfeld has appointed an Appointing Authority, Respondent Altenburg, a retired Army officer who is currently employed by the Department of Defense in a civilian capacity. The Appointing Authority in turn has appointed members of the Commission. Only the presiding officer is required to have any legal experience. The defendant will have no peremptory challenges with respect to members of the Commission. Thus, Respondent Secretary Rumsfeld and his appointee, who are investigating and prosecuting O.K., are ultimately responsible for choosing the panel that will judge him.

29. During the military commission proceedings, there is no bar to admission of evidence that courts normally deem unreliable -- such as statements coerced from O.K. at a time when he had no counsel, or statements coerced from other detainees. Indeed, witness statements can be used even if the witnesses are not available to testify and their testimony is presented as unsworn hearsay.

30. There will be no direct appeal from a decision of the Commission. *Id.* The proceedings will be reviewed, but not in federal court. The first review will be conducted by the Appointing Authority (who appointed the Commission members, brought the charges and decided any interlocutory legal issues). *Id.*[2] The second review will be by a panel consisting of four members already appointed by the Respondent Secretary of Defense, including two members who were on the very

---

[2] The MCO's clear requirement that case-dispositive motions be certified to the Appointing Authority is in irreconcilable conflict with the PMO's directive that the Commission is the determinant of all issues of "law and fact." Thus, the Commission rules themselves fail to adhere to the PMO, and are invalid. *See* MCO No. 1, § 4(A)(5)(e), Exh. B.

panel that crafted the trial procedures, *id.*, another member who has written an op-ed piece stating that, "[i]t is clear that the September 11 terrorists and detainees, whether apprehended in the United States or abroad, are protected neither under our criminal-justice system nor under the international law of War," and a fourth member who is a close friend of Respondent Secretary Rumsfeld.[3] Subsequent review will be by the Secretary of Defense and/or the President. *Id.* O.K.'s accusers will thus be the "appellate court." Thus, not only has O.K. been held without trial for 40 months but there is no future prospect of a trial by an impartial tribunal using only reliable evidence. Moreover, even if the initial factfinder were to overcome its bias and find O.K. not guilty, this would not guarantee an acquittal. At any stage in the review process, the reviewers can send the case back for further proceedings -- perhaps even after a finding of not guilty.

31. Just as there has not been and will not be an unbiased determination that O.K. is guilty of any crimes, there also has been no determination by a neutral tribunal that O.K. can justifiably be held as an enemy combatant. On June 28, 2004, the United States Supreme Court decided *Rumsfeld v. Hamdi,* 542 U.S. 507, 124 S. Ct. 2633 (2004), in which it determined that individuals could not be detained as enemy combatants unless such a determination was made by a neutral tribunal that accorded them due process.

32. Subsequently, the United States created a Combatant Status Review Tribunal ("CSRT") to make determinations as to whether those held were enemy combatants. The CSRT was hastily formed in the wake of the Supreme Court's decisions in *Rasul*

---

[3] Stephen J. Fortunato, Jr., *A Court of Cronies*, In These Times (Jun. 28, 2004) *available at* http://www.inthesetimes.com/site/main/article/a_court_of_cronies.

and *Hamdi*, and does not qualify as the neutral tribunal that satisfies the requirements of due process. For example, the CSRT fails even to meet the standards for Article 5 hearings as set forth in U.S. Army regulations.[4]

33. The CSRT varies from both the Army regulations and *Hamdi* (and due process generally) materially and dispositively, including with respect to, *inter alia*: (1) the standard of proof required [Regulation 190-8, §1-6(e)(9)'s preponderance of the evidence standard as opposed to the CSRT's "rebuttable presumption" that the detainee is an enemy combatant][5]; (2) the availability of an appeal by the government of a ruling favorable to the detainee; (3) the categories in which a detainee may be placed (*i.e.*, the CSRT fails to allow for POW status, but instead purport to determine only whether or not a detainee is an "enemy combatant"); (4) the detainee's right to counsel and/or representation by a personal representative of choice before the Tribunal; (5) whether the hearings are open to the public; (6) the government's reserved power to rescind or change the conditions of the Tribunals at its whim; (7) the composition of the Tribunal(s) (in contrast with *Hamdi's* requirement of "neutral decisionmaker[s,]" 542 U.S. at 533, 124 S. Ct. at 2648); and (8) even the definition of "enemy combatant." These deficiencies are individually and collectively fatal to the CSRT.

34. O.K. has been denied his speedy trial rights, he will be deprived of the rights to confront the evidence against him, and to present his defense at Commission

---

[4] *See* Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Regulation 190-8, §1-6 (1997).

[5] Indeed, the Order implementing the Combatant Status Review Tribunals informs tribunal members that the detainee's status has already been predetermined by their superiors: "[e]ach 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." *See* Dep't of Defense Order No. 651-04, (July 07, 2004), *available at* http://www.defenselink.mil/releases/2004/nr20040707-0992.html.

proceedings. The absence of a speedy trial is another ground for O.K.'s release.

V

CLAIMS FOR RELIEF

COUNT ONE

RESPONDENTS MAY NOT DETAIN O.K. FOR TRIAL BEFORE AN INVALIDLY CONSTITUTED MILITARY COMMISSION

35. O.K. re-alleges and incorporates by reference paragraphs 1 through 34 above.

36. The Commission in this case is invalid and improperly constituted, and the grant of subject matter jurisdiction to the Commission is overbroad and unlawful for at least the following reasons:

A. The Commission lacks jurisdiction because the President lacked congressional authorization to establish the Commission

37. The Supreme Court has noted that "[w]hen the President acts in absence of . . . a congressional grant . . . of authority, he can only rely upon his own independent powers." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637, 72 S. Ct. 863, 872 (1952) (Jackson, J. concurring). *See also Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S. Ct. 2633 (2004). The Constitution expressly grants Congress the sole power to create military commissions and define offenses to be tried by them. The Constitution vests Congress, not the Executive, with "All legislative powers," with the power "[t]o define and punish offences against the Law of Nations" and "[t]o constitute Tribunals inferior to the Supreme Court." U.S. Const., Art. I § 8, cl. 9, cl. 10.

38. Congress has not authorized the establishment of military commissions to try individuals captured during the Afghanistan war. Accordingly, Respondents' detention of O.K. for trial by the Commission is improper, unlawful and invalid as an

ultra vires exercise of authority. It exceeds the President's powers under Article II and thus violates the constitutional principles of separation of powers.

39. O.K.'s status as a Canadian citizen does not confer unlimited power on Respondents to operate outside of the Constitutional framework. The Supreme Court's assertion of jurisdiction for the federal courts in *Rasul* establishes indisputably that aliens held at the base in Guantánamo Bay, no less than American citizens, are entitled to invoke the federal courts' authority under 28 U.S.C. § 2241. *Rasul,* 542 U.S. at 561, 124 S. Ct. at 2696 ("[c]onsidering that the statute draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship") (footnote omitted). Thus, both Congress and the judiciary possess constitutional authority to check and balance the power of the Executive to act unilaterally. *Rasul*, 542 U.S. at 487, 124 S. Ct. at 2700 (Kennedy, J., concurring).

B. The Appointing Authority lacks power to exercise military authority to appoint a military commission.

40. Because there is no statute expressly stating who can appoint members of a Commission, the power to appoint members of a military commission is based upon the power to convene a general court martial. Only the Executive, the Secretary of Defense (or Secretaries of the other branches of the armed forces) or a commanding officer to whom the Secretary has delegated authority may convene a general court-martial. *See* 10 U.S.C. § 822.

41. In this case, the Respondent Secretary Rumsfeld purportedly has delegated authority to Respondent Altenburg to appoint the members of military commissions.

42. Respondent Altenburg is a civilian, not a commissioned officer, and thus lacks the power to exercise military jurisdiction in any form.

43. As a result, the Commission by which the Respondents intend to try O.K. is improperly constituted and invalid, such that O.K. is entitled to a writ of habeas corpus preventing his unlawful detention and trial before that improper tribunal.

C. The Commission lacks jurisdiction to try individuals at Guantánamo Bay.

44. Military commissions have no jurisdiction to try individuals far from the "locality of actual war." *See Milligan*, 71 U.S. at 127.

45. The Commission that will try O.K. is situated far outside any zone of conflict or occupation, and O.K.'s alleged conduct on which the charges are based did not occur at Guantánamo Bay. As such, the Commission lacks authority to try O.K., and therefore, the Respondents lack the authority to continue to detain O.K. for any purported trial at Guantánamo Bay.

COUNT TWO

RESPONDENTS MAY NOT DETAIN O.K. FOR OFFENSES THAT HAVE BEEN CREATED BY THE PRESIDENT AFTER THE FACT

46. O.K. alleges and incorporates by reference paragraphs 1 through 45 above.

47. Respondent President Bush is attempting to try O.K. for "crimes" that he created long after the alleged offenses were committed.

48. None of the four offenses stated in the Charges against O.K., as defined in those charges – conspiracy, murder by an unprivileged belligerent, attempted murder by an unprivileged belligerent, and aiding the enemy – previously existed as offenses.

These "offenses" were in effect created by the PMO, MCO No. 1, and Military Commission Instruction No. 2 (attached hereto as Exhibit E), well after they were allegedly committed by O.K. In essence, the government alleges that O.K. is *criminally* liable for allegedly participating in combat against the United States and its allies. That has never been a criminal offense.

A. The Executive cannot define crimes.

49. Congress, not the Executive, has the authority to legislate under Article I of the Constitution. This expressly includes the power "[t]o define and punish . . . Offences against the Law of Nations." Absent Congressional authorization, the Executive lacks the power to define specific offenses. If he attempts to do so, as he has done here, his actions are *ultra vires* and violate the principles of separation of powers. Accordingly, O.K. may not be detained for trial on newly-created offenses established and defined solely by the President.

B. Crimes cannot be defined after the fact.

50. In addition, any charges instituted by the Commission must constitute offenses under the law of war as it existed at the time the alleged conduct was committed. Applying laws created after the conduct (such as the definition of offenses set forth in MCO No. 2 and those which have been included in the Charges against O.K.) would violate the *ex post facto* clause of the Constitution (Art. 1, §9, cl. 3) and the principle that a person must have reasonable notice of the bounds of an offense. (Offenses defined to criminalize the conduct of a single person or group of people -- such as those in MCI No. 2 -- also violate the Constitutional prohibition on bills of attainder.)

51. Since the Charges do not allege any offenses against O.K. under the law of war as it existed at the time he allegedly committed these acts, O.K. cannot be detained as a

result of these Charges. Accordingly, O.K. is entitled to a writ of habeas corpus, and O.K. should be released immediately.

COUNT THREE

RESPONDENTS MAY NOT DETAIN O.K. FOR TRIAL ON CHARGES OUTSIDE THE JURISDICTION OF THE MILITARY COMMISSION

52. O.K. re-alleges and incorporates by reference paragraphs 1 through 51 above.

53. O.K.'s confinement is unlawful because he is being detained to face charges before a Commission that is not empowered to hear and/or adjudicate the charges instituted against him. O.K.'s continued detention purportedly to face trial on the charges leveled against him is unlawful because the charges are outside the parameters established by the Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. §801, *et seq.*, the statutory scheme that controls military detentions and that limits the offenses triable by military commissions (even in instances where Congress has provided any jurisdiction to the military commissions, which it has not with respect to the conflict in Afghanistan).

54. Under the UCMJ, military commissions may not hear and adjudicate any offenses other than those that are recognized by the traditional law of war or those that Congress has expressly authorized them to hear. Here, the offenses charged are not within either of these categories.

55. The purported offense of conspiracy is not a valid offense triable by the Commission under recognized principles of the law of war, the UCMJ or any other statutory authorization. Because civil law countries do not recognize a crime of conspiracy, conspiracy has never been part of the laws of war. No international criminal

convention has ever recognized conspiracy to violate the laws of war as a crime. This includes the Geneva Conventions, as well as those setting up the international criminal tribunals in Yugoslavia and Rwanda, as well as the international criminal court. Indeed, the government is making up charges that have been specifically rejected as violations of the laws of war -- including at Nuremburg, for example.

56. The purported offense of murder by an unprivileged belligerent also is not a valid offense triable by the Commission under recognized principles of the law of war, the UCMJ or any other statutory authorization. Once again such an offense has not been recognized in any of the conventions setting forth substantive violations of the laws of war. Nor does it have any other source in the law of war. Such an offense would criminalize participation in war, which is not the intent of the laws of war.

57. The purported offense of attempted murder by an unprivileged belligerent also is not a valid offense triable by the Commission under recognized principles of the law of war, the UCMJ or any other statutory authorization. Once again such an offense has not been recognized in any of the conventions setting forth substantive violations of the laws of war. Nor does it have any other source in the law of war. Such an offense would criminalize participation in war, which is not the intent of the laws of war.

58. The purported offense of aiding the enemy also is not a valid offense triable by the Commission under recognized principles of the law of war, the UCMJ or any other statutory authorization. From the point of view of the law of war, there are no "enemies," since the laws of war are meant to apply to both sides in a battle. And while Congress has defined a statutory crime of aiding the enemy over which it has given military commissions jurisdiction, that crime applies to American citizens or

others who owe a duty to the United States, not to a Canadian citizen. Surely the United States does not believe that Canada could try a United States citizen for "aiding the enemy." Similarly, the United States cannot try a Canadian on such a charge.

59. As a plurality of the Supreme Court held in *Reid v. Covert*:

> [t]he jurisdiction of military tribunals is a very limited and extraordinary jurisdiction derived from the cryptic language in Art. I, § 8 [granting Congress the power to "define and punish . . . Offences against the Law of Nations"], and, at most, was intended to be only a narrow exception to the normal and preferred method of trial in courts of law. Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections.

354 U.S. 1, 21, 77 S. Ct. 1222, 1233 (1957).

60. Since the charges do not allege any offenses against O.K. under the law of war or express statutory authority, the Commission lacks jurisdiction to try and/or punish O.K. for those offenses. Accordingly, O.K. is entitled to a writ of habeas corpus, and should be released immediately.

COUNT FOUR

THE MILITARY COMMISSION PROCEDURES VIOLATE O.K.'S RIGHTS UNDER STATUTORY, CONSTITUTIONAL, AND INTERNATIONAL LAW

61. O.K. re-alleges and incorporates by reference paragraphs 1 through 60 above.

62. Even if the Commission had jurisdiction, O.K.'s detention to stand trial before the Commission still would be unlawful because the Commission's procedures violate applicable principles of statutory, constitutional, and international law.

63. In a series of "Military Commission Orders" (the "MCOs"), Respondent Secretary Rumsfeld prescribed the procedural rules of these special military commissions. If

O.K. is tried according to these proposed procedures, he will receive less protection than he is entitled to under American law, the Constitution, and international law and treaties. The procedures set forth by the MCOs provide O.K. with far less protection than those set forth in the UCMJ. The MCOs violate O.K.'s rights to certain basic procedural safeguards. The MCOs fail to provide O.K. an impartial tribunal to adjudicate the charges against him or review those charges. O.K.'s accusers effectively appoint the "judge and jury" and then review their decision. And during these proceedings themselves, his accusers can introduce unreliable evidence of the worst sort -- unsworn allegations derived from coerced confessions with no right of confrontation.

64. The absence of procedural protections makes the Commission inadequate as a matter of law.

A. The UCMJ

65. O.K. is entitled to the protections of the basic trial rights set forth by Congress in the UCMJ. By its own terms, the UCMJ applies to all persons, including O.K., who are detained within the territory or leased properties of the United States. And the UCMJ prohibits biased tribunals and the use of unreliable evidence of the sort the commissions intend to permit.

B. The Geneva Convention

66. The Geneva Convention requires that prisoners of war ("POW"s), as defined by the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, be treated with the same procedural protections as the soldiers of the country

detaining them.[6] Under Article 5 of the Geneva Convention (III) ("Article 5"), O.K. is entitled to be treated as a POW until a competent tribunal has determined otherwise.[7] As a result, he is entitled to the procedural protections that would apply in a court martial.

67. Even if O.K. were not a prisoner of war, any proceeding would still have to meet the requirements of Common Article III of the Geneva Conventions and Article 75 of Protocol I to the Geneva Conventions. These provide that conviction can only be pronounced by an impartial court respecting generally recognized principles of judicial procedure. Article 75 of Protocol I to the Geneva Conventions specifically provides that no one can be compelled to confess guilt. O.K.'s 40-month period of interrogations certainly defies the requirements of Article 75. These requirements are not met by the Commission.

C. The Due Process Clause

68. The Constitution's guarantee of due process also guarantees O.K. the basic trial rights he will be denied before the Commission. A trial without these basic procedural safeguards lacks the fundamental fairness required in any judicial proceedings -- especially in criminal proceedings that can result in life imprisonment.

69. Since the Commission procedures violate statutory, constitutional, and international law, and in so doing, fail to provide O.K. with the basic safeguards necessary to constitute a fundamentally fair criminal proceedings, O.K. is entitled to a writ of

---

[6] Geneva Convention (III) Relative to the Treatment of Prisoners of War: August 12, 1949, 75 U.N.T.S. 135, *entered into force* Oct. 21, 1950. The Geneva Convention has also been codified in the UCMJ.

[7] *See id.* at Art. 5.

habeas corpus holding these proceedings to be illegitimate, and should be released immediately.

COUNT FIVE

TRIAL BEFORE THE COMMISSION VIOLATES O.K.'S RIGHT TO EQUAL PROTECTION OF THE LAWS OF THE UNITED STATES

70. O.K. re-alleges and incorporates by reference paragraphs 1 through 69 above.

A. O.K.'s detention violates the Equal Protection Clause.

71. O.K. is being detained by Respondents under the claimed authority of the PMO and MCO No. 1. These Orders violate O.K.'s right to equal protection of the laws of the United States. Under the PMO and MCO No. 1, O.K. may be held for trial by the Commission only because of his alienage, since the Orders, by their terms, apply *only* to *non*-citizens. See PMO § 4, Exh. A; MCO No. 1, §3(A), Exh. B. Consequently, O.K.'s detention runs afoul of the very purpose of the Equal Protection Clause of the United States Constitution.

72. The Supreme Court has held that any discrimination against aliens not involving governmental employees is subject to strict scrutiny. Here, the government cannot show a compelling governmental reason, advanced through the least restrictive means, for granting *citizens* access to the fundamental protections of civilian justice (including, *inter alia*, indictment, evidentiary rules ensuring reliability and fairness, a system consistent with previously prescribed rules developed by the legislature and enforced by impartial courts, a jury trial presided over by an independent judge not answerable to the prosecutor, and the right to an appeal before a tribunal independent of the prosecuting authority), but affording *non-citizens* a distinctly less protective

and inferior brand of adjudication. While the government may have latitude in differentiating between citizens and aliens in areas such as immigration, it has no such latitude with respect to criminal prosecutions.

73. Thus, the blatant and purposeful discriminatory nature and impact of MCO No. 1 violates the Equal Protection clause.

B. O.K.'s detention violates 42 U.S.C. § 1981.

74. O.K.'s detention for trial by the Commission also violates 42 U.S.C. § 1981.[8] That fundamental statutory provision guarantees equal rights for all persons to give evidence, to receive equal benefit of all laws and proceedings for the security of persons, and to receive like punishment. O.K. is being unlawfully detained for purposes of trial by the Commission solely because he is a non-citizen. A citizen who committed the very same acts as O.K. could not be detained under the PMO and held for trial before the Commission. Accordingly, O.K.'s detention for trial by the Commission on that discriminatory basis is unlawful.

75. Respondents have detained O.K. for trial before the Commission in violation of equal protection of the laws of the United States.

76. Accordingly, O.K. is entitled to a writ of habeas corpus, a determination that the Commission proceedings against him are unlawful, and he should be released immediately.

---

[8] 42 U.S.C. §1981(a) states in its entirety:
[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

COUNT SIX

TRIAL BEFORE THE COMMISSION VIOLATES O.K.'S RIGHTS AS A CHILD UNDER U.S. AND INTERNATIONAL LAW

77. O.K. re-alleges and incorporates by reference paragraphs 1 through 76 above.

A. The Commission lacks jurisdiction over charges for conduct allegedly committed when O.K. was a child.

78. All of the charges made against O.K. by Respondents are for conduct allegedly committed when O.K. was a child.

79. Under customary international law, a child may not be prosecuted for war crimes. The Commission set to try O.K. is the first known or reported tribunal in the world, at any time in history, to try a child for alleged war crimes, thereby contradicting international practice at Nuremberg, the International Criminal Court, the International Tribunal for the Former Yugoslavia, the International Tribunal for Rwanda, and the "hybrid" United Nations and local criminal tribunals for Kosovo, Cambodia, and East Timor.

80. Trial of O.K. for offenses allegedly committed when he was a child contradicts Respondents' affirmative obligation to rehabilitate child soldiers. Under the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, as well as under customary international law, Respondents had an obligation to remove from combat child soldiers encountered in the battlefield, rehabilitate them, and return them to safety. Trial by military commission, with the possibility of a sentence of life imprisonment, is inconsistent with these obligations.

81. Because the Commission lacks jurisdiction over charges for conduct allegedly committed by a child, O.K. is entitled to a writ of habeas corpus.

B. The Commission procedures violate O.K.'s rights as a child under U.S. and international law.

82. Even if the Commission had jurisdiction over the charges against O.K., O.K.'s detention to stand trial before the Commission still would be unlawful because the Commission's procedures violate O.K.'s rights as a child under U.S. and international law.

83. The Due Process Clause of the Fifth Amendment of the Constitution guarantees basic procedures that take cognizance of the age and maturity of an accused child (including an individual who is no longer a child but was one at the time of the alleged criminal conduct). The Commission lacks these basic procedures.

84. International law, including the Convention on the Rights of the Child, as well as customary international law, requires that any trial of a child meet basic standards for juvenile justice. For example, the U.N. Standard Minimum Rules for the Administration of Juvenile Justice require states that prosecute juveniles to, *inter alia,* further the well-being of the child, to use pre-trial detention as a measure of last resort and for the shortest possible time, to employ specially trained personnel, and to avoid unnecessary delay. The Convention on the Rights of the Child requires additional procedure protections. The Commission fails to meet these basic standards.

85. Because the Commission procedures violate U.S. constitutional and international law, and in so doing deprive O.K. of basic safeguards necessary in any trial of an accused child, O.K. is entitled to a writ of habeas corpus and should be released immediately.

COUNT SEVEN

RESPONDENTS HAVE DENIED O.K. THE RIGHT TO A SPEEDY TRIAL AND THE RIGHT TO BE FREE FROM UNREASONABLE PRE-TRIAL CONFINEMENT

86. O.K. re-alleges and incorporates by reference paragraphs 1 though 85 above.

A. O.K. was entitled to a speedy trial under the UCMJ.

87. The PMO, pursuant to which O.K. has been detained for trial, purports to be based, in part, on congressional authorization embodied in selected provisions of the UCMJ. In promulgating the PMO, Respondent President Bush relied, in part, on his authority under 10 U.S.C. §836, which allows the Executive to prescribe rules for military commissions so long as they are not inconsistent with the UCMJ.

88. However, the PMO, and its implementation through MCO No. 1, contravene Article 10 of the UCMJ, 10 U.S.C. §810, which provides that any arrest or confinement of an accused must be terminated unless charges are instituted promptly and made known to the accused, and speedy trial afforded for a determination of guilt on such charges:

> [w]hen any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or dismiss the charges and release him.

10 U.S.C. § 810.

89. O.K. is a person subject to the UCMJ by virtue of Respondent President Bush's PMO and MCO No. 1, as well as by virtue of Article 2 of the UCMJ, 10 U.S.C. § 802(a)(12), which provides that "persons within an area leased by or otherwise reserved or acquired for the use of the United States" and under the control of any of the various branches of the military are subject to the UCMJ. Under the Supreme Court's decision in *Rasul*, 542 U.S. at 480, 124 S. Ct. at 2696-98, Guantánamo Bay

qualifies under both prongs.

90. The type of delays to which O.K. has been subjected are intolerable in the absence of extraordinary or compelling circumstances. Here, the Respondents have not provided any reason whatsoever for their inordinate delays in charging O.K. Since Respondents did not take "immediate steps . . . to inform" O.K. "of the specific wrong of which he is accused," they now have a clear and nondiscretionary duty under the UCMJ to "release him" from his confinement.

B. O.K. was entitled to a speedy trial under the Geneva Convention.

91. O.K.'s lengthy pre-trial confinement violates Article 103 of Geneva Convention (III), as well as United States government regulations. Article 103 of Geneva Convention (III) provides that:

> [j]udicial investigations relating to a prisoner of war shall be conducted as rapidly as circumstances permit and so that his trial shall take place as soon as possible. A prisoner of war shall not be confined while awaiting trial unless a member of the armed forces of the Detaining Power would be so confined if he were accused of a similar offence, or if it is essential to do so in the interests of national security. *In no circumstances shall this confinement exceed three months.*

6 U.S.T. 3316, 3394, 75 U.N.T.S. 135 (emphasis added).

92. In addition, Article 5 of Geneva Convention (III) declares that:

> should any doubt arise as to whether persons . . . belong to any of the categories [entitled to protection as a P.O.W. under the Convention], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

93. Likewise, §1-6(a) U.S Army Regulation 190-8, entitled Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, requires that United States military forces abide by the provisions of Article 5 of Geneva Convention (III).

Similarly, the Commander's Handbook on the Law of Naval Operations states that "individuals captured as spies or as illegal combatants have the right to assert their claim of entitlement to prisoner-of-war status before a judicial tribunal and to have the question adjudicated." Department of the Navy, NWP 1-14M, The Commander's Handbook on the Law of Naval Operations 11.7 (1995).

94. Respondents are under a clear nondiscretionary duty under Geneva Convention (III), and under the U.S. Army's (and Navy's) own regulations to release O.K. because he has been detained for more than three months – indeed, for *40 months*, more than 10 times the permissible period.

95. Even if O.K. were not a presumptive POW, the Geneva Convention would not sanction such delay. The Geneva Convention requires that all civilians and protected persons must be "promptly informed" of the charges and brought to trial "as rapidly as possible." Geneva Convention IV, art. 7. Similarly the fundamental guarantees of Protocol I require that O.K. be "informed without delay" of the particulars of charges, and incorporate the International Covenant on Civil and Political Rights.

C. O.K. was entitled to a speedy trial under the Sixth Amendment.

96. Moreover, the Sixth Amendment to the United States Constitution requires that in all criminal prosecutions, "the accused shall enjoy the right to a speedy . . . trial." U.S. Const. amend. VI. Respondents' unlawful detention violates O.K.'s right to a speedy trial.

97. Respondents have denied O.K. his right to a speedy trial as required by American law, the Constitution, and international law and treaty, and O.K. therefore is entitled to a writ of habeas corpus and immediate release.

COUNT EIGHT

THE ABUSE, MISTREATMENT, AND RELATED INTERROGATION OF O.K. CONSTITUTES SHOCKING AND OFFENSIVE GOVERNMENT CONDUCT DENYING HIM DUE PROCESS

98. O.K. re-alleges and incorporates by reference paragraphs 1 through 97 above.

99. The charges asserted against O.K. cannot properly justify his detention because they are based on unlawfully obtained statements from O.K. and other detainees (at Guantánamo Bay and elsewhere). Those statements have been procured via coercive and "aggressive" interrogation techniques and environment that not only violate O.K.'s Fifth Amendment right to remain silent, his Sixth Amendment right to counsel (with respect to his own statements), and his Eighth Amendment right to be free from cruel and unusual punishment, but also "shock the conscience" and thereby violate O.K.'s Fifth Amendment Due Process rights (with respect to his own statements as well as those of other detainees). Those techniques also violate O.K.'s rights under Geneva Convention (III), the CAT, the UCMJ, the Alien Tort Claims Act (which prohibits both torture and cruel, inhuman and degrading treatment), Army Regulation 190-8 and the APA, and customary international law. The illegitimacy of basing

O.K.'s prosecution by the Commission upon statements obtained through coercive interrogation arises not only from the volume and degree of abuse, but also from the fact that statements obtained via coercion and a naked reward/punishment system are simply not reliable[9] – and certainly not sufficiently so to find O.K. guilty beyond a reasonable doubt, and imprison him as a result. Article 99 of the Geneva Convention (III) specifically provides that "[n]o moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused."[10] A process that permits such unlawful extraction and use of improperly obtained statements to form the basis of charges or at trial cannot stand. *See, e.g., United States v. Russell*, 411 U.S. 423, 431-32 (1973) (acknowledging that there could exist "a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction"), *citing [cf.] Rochin v. California*, 342 U.S. 165 (152). As a result, O.K. also is entitled to habeas relief on that basis.

---

9 Dissenting in *Padilla*, Justice Stevens cautioned:

> [Executive detention] may not, however, be justified by the naked interest in using unlawful procedures to extract information. Incommunicado detention for months on end is such a procedure. Whether the information so procured is more or less reliable than that acquired by more extreme forms of torture is of no consequence. For if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny.

542 U.S. at 465, 124 S. Ct. at 2735 (Stevens, J., *dissenting*).

10 The National Commission on Terrorist Attacks Upon the United States, 108th Cong., The 9/11 Commission Report 380 (Gov't. Printing Office 2004), *at* http://www.9-11commission.gov/report/911/Report.pdf ("the 9/11 Commission"), in its Final Report published last month, recognized the importance of Geneva Convention (III) and international law in the treatment of detainees. In fact, the 9/11 Commission included among its recommendations that:

> [t]he United States should engage its friends to develop a common coalition approach toward the detention and humane treatment of captured terrorists. New principles might draw upon Article 3 of the Geneva Conventions on the law of armed conflict. That article was specifically designed for those cases in which the usual laws of war did not apply. Its minimum standards are generally accepted throughout the world as customary international law.

Id.

100. Since the abuse, mistreatment and related interrogations of O.K. constitute such shocking and offensive government conduct, O.K. has been denied his right to due process. Consequently, the only remedy capable of vindicating O.K.'s rights is the grant of a writ of habeas corpus, dismissal of the Commission charges against O.K., and an order requiring O.K.'s release.

PRAYER FOR RELIEF

WHEREFORE, Petitioner prays that this Court grant him the following relief:

1. Issue the writ of mandamus or issue an Order directing Respondents to show cause why a writ of habeas corpus should not be granted and why O.K. should not be immediately released;

2. If an Order to Show Cause is issued, to include as part of the Order a prompt schedule to receive briefing from the parties, including a Response from Respondents, and a Reply from Petitioner, on the issues raised in this Petition, followed by a hearing before this Court on any contested factual or legal issues, and production of Petitioner O.K. as appropriate;

3. Issue an Order declaring unconstitutional and invalid and enjoining any and all Commission proceedings and/or findings against Petitioner O.K.;

4. Issue a writ of mandamus and an Order to Respondents not to use the PMO and/or the Military Commission Orders and Instructions to detain O.K., or adjudicate charges against Petitioner O.K., or conduct any proceedings related to such charges, because those Orders and instructions violate the U.S. Constitution, U.S. law, and U.S. treaty obligations, both facially and as applied to Petitioner O.K. are *ultra vires*

and illegal;

5. After notice and hearing, determine and declare that Petitioner O.K.'s detention violates the Constitution, laws, treaties, and regulations of the United States; that the PMO is unconstitutional; that O.K. has been denied a speedy trial; and that Respondents lack any jurisdiction over O.K.;

6. After notice and hearing, issue a writ of mandamus that directs Respondents to obey their clear, nondiscretionary duty to follow the Constitution, laws, regulations, and treaties of the United States, and therefore to release Petitioner O.K. immediately;

7. Grant a writ of habeas corpus on behalf of Petitioner O.K. ordering his immediate release;

8. Enter an Order that the Court shall retain jurisdiction over this matter to permit Petitioner O.K. to respond to arguments advanced by Respondents on matters related to his continued detention; and

9. Grant such other and further relief on behalf of Petitioner O.K. and against Respondents as this Court deems just and proper.

Dated: December 14, 2005
Washington, D.C.

Respectfully submitted,

O.K.

By: /s/ Muneer I. Ahmad
Richard J. Wilson, Bar No. 425026
Muneer I. Ahmad, Bar No. 483131
International Human Rights Law Clinic
American University

Washington College of Law
4801 Massachusetts Ave., N.W.
Washington, DC 20016
Ph: (202) 274-4147
Fax: (202) 274-0659

Counsel for Petitioner

VERIFICATION

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

/s/ Muneer I. Ahmad
Muneer I. Ahmad, Bar No. 483131

Executed on this 14th of December, 2005.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

O.K., **Petitioner,** **v.** **GEORGE W. BUSH,** **President of the United States,** ***et al.*,** **Respondents.**	**Civil Action No. 04-CV-1136 (JDB)**

NOTICE OF FILING

Petitioner, by counsel, submits this Notice of Filing in compliance with the Amended Order on Filing Procedures of December 13, 2004, noting submission to the Court Security Office today of Petitioner's Motion to Stay Military Commission Proceedings and For Expedited Briefing Schedule.

Dated: December 23, 2005

Respectfully Submitted,

/s/ Muneer I. Ahmad

Richard J. Wilson, Bar No. 425026
Muneer I. Ahmad, Bar No. 483131
INTERNATIONAL HUMAN RIGHTS LAW CLINIC, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW
4801 Massachusetts Ave., NW
Washington DC 20016
(202) 274-4147
(202) 274-0659 (fax)

Counsel for Petitioner

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

O.K.,	**Case No. 1:04-CV-01136 (JDB)**
Petitioner,	
v.	
GEORGE W. BUSH, *et al.*,	
Respondents.	

PETITIONER O.K.'S MOTION TO
STAY MILITARY COMMISSION PROCEEDINGS
AND FOR EXPEDITED BRIEFING SCHEDULE

Petitioner O.K. respectfully moves this Court to stay military commission proceedings that have been initiated against him by Respondents in Guantánamo Bay, Cuba until the Supreme Court has issued its decision in *Hamdan v. Rumsfeld,* 415 U.S. F.3d 33 (D.C. Cir. 2005), *cert. granted,* 74 U.S.L.W. 3108 (U.S. Nov. 7, 2005) (No. 05-184). Such a stay is necessary in order to protect Petitioner from the irreparable harm of being tried by a tribunal that lacks jurisdiction over the charges against him. Moreover, the issuing of this stay serves the interests of judicial economy and is in the public interest, as the exact, substantial issues to be resolved by the Supreme Court in *Hamdan* have been raised by Petitioner in his challenge to the legality of the military commission process. [1]

Because the commencement of military commission proceedings against O.K. is imminent, with hearings scheduled as early as January 9, 2006, Petitioner respectfully requests that the Court set an expedited briefing schedule on this matter.

---

[1] Counsel for Respondents have indicated that they will oppose the present motion.

After subjecting Petitioner to over three years of detention without any charge against him, Respondents on November 7, 2005 for the first time announced charges. On November 23, 2005, those charges were referred to a military commission. That commission has now required counsel, including the undersigned, to be available for conferences with the presiding officer from January 9 to 12, 2006, and has scheduled an initial proceeding for January 11, 2006. Petitioner has filed with this Court and served on Respondents a Supplemental Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief ("Supplemental Petition") [Dkt. No. 145], which, *inter alia,* challenges the jurisdiction of the military commission over the charges that have been brought against him, and alleges that the structural bias of the commission process and numerous procedural infirmities render it unconstitutional and in violation of international law.

Petitioner's substantive challenges to the military commission process include the identical issues to be resolved by the Supreme Court in *Hamdan.* Specifically, Petitioner has argued that (1) any trial by military commission violates the principle of separation of powers, as such commissions have not been authorized by Congress, and (2) the processes established for military commissions violate the Geneva Conventions. In *Hamdan,* the D.C. Circuit held that petitioner was entitled to pre-commission adjudication of both of these challenges. Although the D.C. Circuit ultimately resolved these challenges against Hamdan, and the Supreme Court subsequently granted *certiorari,* it is the Circuit Court's determination of these challenges that is being reviewed, and not the conclusion that petitioner was entitled to have them heard prior to the commission process. Thus, a decision by the Supreme Court reversing the D.C. Circuit would necessarily mean that the military commission process against Petitioner O.K. is illegitimate, and that O.K. is entitled to have that process stopped before it begins. A stay of the commission proceedings in O.K.'s case is therefore necessary in order to prevent irreparable harm to him in the form of nullification of his right to pre-commission adjudication of his claims.

Judge Kollar-Kotelly of this Court reached this conclusion in a recent opinion on a motion by David Hicks, another Guantánamo detainee against whom military commission proceedings have been initiated. Judge Kollar-Kotelly enjoined further proceedings against Hicks "until the Supreme Court has issued a final and ultimate decision in *Hamdan.*" *Hicks v. Bush,* 397 F. Supp. 2d 36 (D.D.C. November 14, 2005). The reasoning of that decision should apply with equal force to the present motion.

I. FACTUAL BACKGROUND

1. Petitioner O.K. is a 19-year-old Canadian citizen detained by Respondents at Guantánamo Bay. For over three years, he was detained by Respondents without any charges against him.
2. On July 2, 2004, following the Supreme Court's decision in *Rasul v. Bush,* 542 U.S. 466, 124 S. Ct. 2686 (2004), counsel for Petitioner filed with this Court a Petition for Writ of Habeas and Complaint for Declaratory and Injunctive Relief [Dkt. No. 1] challenging the legality of Petitioner's ongoing detention. On August 17, 2004, counsel filed a First Amended Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief [Dkt. No. 11].
3. On November 7, 2005, the United States Supreme Court granted *certiorari* in *Hamdan v. Rumsfeld,* 415 F. 3d 33 (D.C. Cir. 2005), *cert. granted,* 74 U.S.L.W. 3108 (U.S. Nov. 7, 2005) (No. 05-184). Hamdan presented two questions for review by the Supreme Court: (1) "Whether the military commission established by the President to try petitioner and others similarly situated for alleged war crimes in the 'war on terror' is duly authorized under Congress's Authorization for the Use of Military Force (AUMF), Pub. L. No. 10740, 115 Stat. 224; the Uniform Code of Military Justice (UCMJ); or the inherent powers of the President?" and (2) "Whether petitioner and others similarly situated can obtain judicial enforcement from an Article III court of rights protected under the 1949 Geneva Convention

in an action for a writ of habeas corpus challenging the legality of their detention by the Executive branch?" Petition for Writ of Certiorari, *Hamdan v. Rumsfeld,* 2005 WL 1874691 (August 8, 2005) (No. 05-184).

4. Later on in the day on November 7, 2005, after the granting of *certiorari* in *Hamdan* had been announced by the Supreme Court, Respondents, for the first time in over three years of custody of Petitioner, announced formal charges against O.K.

5. On November 23, 2005, these charges were referred by Respondent Alternburg to a military commission. The referral states that military commission proceedings against O.K. are to commence "[a]s soon as practicable." The presiding officer appointed to the commission against O.K. has subsequently required counsel for O.K., including the undersigned, to be available to attend conferences with the presiding officer from January 9 to January 12, 2006. *See* Exhibit A, *Trial Term for Commissions Sessions, Week of 9 Jan 2006, Guantanamo Bay, Cuba,* Email from Keith Hodges dated December 9, 2006. A session in O.K.'s case is scheduled for 10:00 a.m. on January 11, 2006. *Id.*

6. On December 14, 2005, counsel for Petitioner filed with this court a motion for leave of Court permitting to file a supplemental petition, in accordance with Rule 15(d) of the Federal Rules of Civil Procedure [Dkt. Nos.142, 143]. That motion was granted by the Court on December 19, 2005, following which Petitioner filed his Supplemental Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief ("Supplemental Petition") [Dkt. No. 145]. In the Supplemental Petition, Petitioner argues, *inter alia,* that the military commission has been illegally constituted, in violation of U.S. statutory and constitutional law and international law, that the commission lacks jurisdiction over the charges that have been brought against O.K., and that the procedures of the military commission violate O.K.'s rights of equal protection and due process under U.S. and international law.

II. ARGUMENT

Injunctive relief is appropriate where, as here, (i) petitioner likely would suffer irreparable injury if this Court does not grant injunctive relief, (ii) the injunction would cause no irreparable harm to the respondents, (iii) such an injunction would serve the public interest, and (iv) petitioner's claims have a substantial likelihood of success on the merits. *See, e.g., Al Fayed v. CIA,* 254 F.3d 300, 303 (D.C. Cir. 2001); *Serono Labs. Inc. v. Shalala,* 158 F.3d 1313, 1317-18 (D.C. Cir. 1998). These factors are to be balanced against one another, with a recognition that all four need not be equally strong. *Serono Labs,* 158 F.3d at 1318; *CityFed Fin. Corp. v. Office of Thrift Supervision,* 58 F.3d 738, 746 (D.C. Cir.1995) ("If the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak").

Assuming that the Court finds that a stay is appropriate in light of the four-factor, sliding scale analysis, it may, under the All Writs Act, 28 U.S.C. § 1651(a), stay the military commission proceedings pending a final decision from the Supreme Court in *Hamdan.* As the D.C. Circuit made clear in *Hamdan,* challenges to the jurisdiction of a military commission over a petitioner are properly considered by the district court *prior* to the adjudication by military commission of that petitioner. *Hamdan,* 415 F. 3d at 36-37; *accord Hicks,* 397 F. Supp. 2d at 41. The All Writs Act, which empowers the Court to issue writs "necessary or appropriate in aid of [its] jurisdiction[]," therefore provides the court with the authority to stay the commission proceedings against Petitioner, in order to preserve the Court's jurisdiction over Petitioner's substantial jurisdictional challenges to the military commission.

///

A. O.K. Will be Irreparably Harmed if He is Subjected to a Military Commission Which Lacks Jurisdiction Over Him

A stay is necessary in order to protect O.K. from irreparable harm. Irreparable harm is the keystone to injunctive relief, and the harm faced by the petitioner must be "both certain and great," and "'of such imminence that there is a "clear and present" need for equitable relief to prevent irreparable harm.'" *Wisconsin Gas Co. v. FERC,* 758 F.2d 699, 674 (D.C. Cir. 1985) (quoting *Ashland Oil, Inc. v. FTC,* 409 F. Supp. 297, 307 (D.D.C.), *aff'd,* 548 F.2d 977 (D.C. Cir. 1976) (internal citation omitted). The injury faced by O.K. if the military commission proceeds meets this exacting standard.

The D.C. Circuit's decision in *Hamdan* articulates the type and magnitude of harm that Petitioner faces if the military commission goes forward. As the Court stated, a decision by a court to overturn the judgment and conviction of a tribunal after the fact "insufficiently redresses the defendant's right not to be tried by a tribunal that has no jurisdiction." *Hamdan,* 415 F.3d at 36 (citing *Abney v. United States,* 431 U.S. 651, 662 (1977). As used by the D.C. Circuit, the phrase "insufficient[] redress[]" is, at base, a statement of irreparable harm. The injury that would be done to Petitioner if the military commission proceeded against him could not be cured if the Supreme Court reversed in *Hamdan.* As Judge Kollar-Kotelly has noted, the crux of that injury is "the fact that [Petitioner] would have been tried by a tribunal without any authority to adjudicate the charges against him in the first place, potentially subjecting him to a second trial before a different tribunal." *Hicks,* 397 F. Supp. 2d at 42.

As Judge Kollar-Kotelly suggests, the nature and magnitude of the injury that Petitioner would face is akin to that of double jeopardy. Indeed, the *Abney* case cited by the D.C. Circuit was a double jeopardy case. As the Supreme Court stated in *Abney*, "the guarantee against double jeopardy assures an individual that, among other things, he will not be forced, with certain exceptions, to endure the personal strain, public embarrassment, and expense of a

criminal trial more than once for the same offense." *Abney,* 431 U.S. at 661. This injury—so great as to undergird a constitutional right, and to find deep precedential support in Anglo-American common law—is indisputably sufficient to support a finding of irreparable harm to Petitioner.[2]

Similarly, the injury faced by O.K. if he is denied pre-commission adjudication of his jurisdictional challenges can be analogized to a claim of immunity. As with double jeopardy, interlocutory orders denying claims of official immunity are properly heard pre-trial. *See Mitchell v. Forsyth,* 472 U.S. 511 (1985). To do otherwise would obviate the very right of immunity claimed by the defendant. O.K.'s jurisdictional challenges constitute a claim to jurisdictional immunity with respect to the military commission. To allow the military commission to proceed against O.K. before these challenges are resolved would obviate the very rights that Petitioner claims, and specifically, the "right not to be tried by a tribunal that has no jurisdiction." *Hamdan,* 415 U.S. F.3d at 36.

---

[2] Notably, the sparse and ever-changing rules of the military commission provide no guarantee against double jeopardy. The current incarnation of the rules does provide that an accused detainee "shall not again be tried by any Commission for a charge once a Commission's finding on that charge becomes final." *See* Department of Defense Military Commission Order No. 1 (August 31, 2005) (superseding Military Commission Order No. 1 issued March 21, 2002) ¶ 5(P), *available at* http://www.defenselink.mil/news/Sep2005/d20050902order.pdf. However, there is nothing in the rules to prevent Respondents from retrying a defendant at any time if the Commission conviction is not deemed "final" (by the President or the Secretary of Defense), or from removing Petitioner from military custody and seeking to try him in federal court, as Respondents are presently attempting in the case of José Padilla. *See Padilla v. Hanft,* -- F. 3d. -- (4th Cir. December 21, 2005) (No. 05-6396), *available at* http://pacer.ca4.uscourts.gov/opinion.pdf/056396R1.P.pdf (denying government motion to transfer Padilla, an "enemy combatant" as designated by the President, from military custody in South Carolina to civilian law enforcement custody in Florida). Moreover, Respondents have argued throughout this litigation that the detainees at Guantánamo Bay are not entitled to any constitutional protections whatsoever, including due process under the Fifth Amendment (a position rejected by Judge Green with respect to Petitioner O.K., *see In re. Guantanamo Detainee Cases,* 355 F.Supp.2d 443 (D.D.C. 2005)), and presumably would argue that Petitioner is not entitled to the Fifth Amendment's protection against double jeopardy either. However, O.K. need not demonstrate here that he is entitled to a constitutional right against double jeopardy; rather, the fact that the injury he faces is equivalent to that for which the Constitution provides specific protection establishes the requisite harm for injunctive relief to be granted. And if Respondents are correct that Petitioner is not entitled to assert a right against double jeopardy, then the injury he would suffer is all the more irreparable.

O.K. faces additional irreparable harm if he is required to participate in a military commission that is structurally biased in favor of Respondents. O.K. has made exactly this claim in his Supplemental Petition, and this issue is on review before the Supreme Court in *Hamdan.* As the D.C. Circuit held in *Cobell v. Norton,* 33 F. 3d 1128 (D.C. Cir. 2003), post-trial review of partial proceedings is inadequate because the injury done by a partial judicial authority is irreparable:

> "The remedy by appeal is inadequate. It comes after the trial and, if prejudice exist, it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient."

Cobell, 33 F.3d at 1139 (quoting *Berger v. United States,* 255 U.S. 22, 36, (1921)).

Just as the magnitude of the harm faced by O.K. cannot be disputed, nor can its imminence. Respondent Altenburg, the Appointing Authority for the military commissions, has ordered that commission proceedings against O.K. commence "[a]s soon as practicable." The presiding officer of the commission constituted in O.K.'s case has since required counsel for O.K., including the undersigned, to be available to attend conferences at Guantánamo Bay with the presiding officer from January 9 to January 12, 2006, and has scheduled a formal hearing for January 11, 2005. Thus, the harm faced by O.K. is on the immediate horizon, thereby necessitating a stay.

Any suggestion that the harm faced by O.K. is speculative must be rejected. If, as Petitioner has argued and the Supreme Court is now considering in *Hamdan,* the military commission is illegitimate and lacks jurisdiction over O.K., then the harm done to him, as recognized by the D.C. Circuit, commences with the first commission proceeding. To permit the commission proceedings to go forward before adjudicating the jurisdictional claims would subject O.K. to exactly the injury for which, according to the D.C. Circuit, post-commission

review would provide insufficient redress. The only way that this harm can be avoided is by having Petitioner's substantial jurisdictional claims adjudicated by the Court pre-commission, and in light of Respondents' decision to initiate commission proceedings during the week of January 9, 2006, such adjudication can only be done if the commission process against O.K. is stayed.

B. Staying the Military Commission Proceeding Against O.K. Will Not Prejudice Respondents

The staying of the military commission proceeding against O.K. pending a final decision in *Hamdan* would not prejudice Respondents. Respondents have incarcerated O.K. for nearly three and a half years without initiating military commission proceedings against him. Thus, while O.K. is eager to bring his indefinite detention to an end, in light of this long delay on Respondents' part it is difficult to see how Respondents would be prejudiced by awaiting a decision by the Supreme Court in a case already pending there. Moreover, in the past Respondents themselves have expressed a desire to stay Guantánamo proceedings in order to permit an appeal in the *Hamdan* case to be decided. Specifically, in the case of *Hicks v. Bush,* 1:02-cv-00299 (CKK), Respondents asked for an abeyance of proceedings in Guantánamo detainee David Hicks's habeas case pending a decision by the D.C. Circuit in *Hamdan,* arguing that judicial economy so warranted because the D.C. Circuit's decision might require reevaluation of issues by the habeas court if it were to act in the interim. *See* Exhibit B, Response to Order to Show Cause, No. 1:02-cv-00299 (CKK)) (D.D.C. filed 11/29/2004).

In *Hamdan* itself (filed as *Swift v. Rumsfeld*), Respondents moved to hold the original habeas petition in abeyance on the grounds of judicial economy in light of then-pending Supreme Court Cases that might effect the outcome. *See* Exhibit C, Motion for Order Holding Petition in Abeyance, *Swift v. Rumsfeld,* No. C04-777RSL, at 8-9 (W.D. Wash. Filed April 23, 2004)

(exhibits excluded). Respondents' earlier appeals to judicial economy in *Hicks* and *Hamdan* justify the issuance of a stay here just as they did in those cases. The argument in favor of a stay is made only stronger by the fact that *Hamdan* is now pending before the Supreme Court, such that the highest court in the land is now poised to rule upon, and may well invalidate, the commission process.

C. The Public Interest Favors Awaiting a Decision From the Supreme Court on the Exact Issues to Be Litigated in the Present Case

Just as Respondents have argued previously in *Hicks* and *Hamdan,* it is in the public interest for the military commission to await guidance from the Supreme Court on issues relating directly to the legality of the commissions. Not only are the interests of judicial economy served by a stay, so, too, is a broader interest in ensuring the legitimacy of the commission process.

While the granting of *certiorari* does not tell us the ultimate outcome of the issues in *Hamdan,* the fact that the case is now pending before the Supreme Court does create the possibility that the commission process will be held illegal. The legitimacy of the commission process therefore hangs in the balance. If the Supreme Court has granted *certiorari,* it is fair to conclude that there is at least reason to believe that the commission may be illegal. For the commission against O.K. to go forward with *Hamdan* in its current posture would necessarily raise questions about the fairness of the process, thereby doing damage to a public interest in maintaining the integrity of American judicial processes. Indeed, the granting of *certiorari* in *Hamdan* has intensified concerns, both domestically and internationally, regarding standards of justice at Guantánamo, concerns that previously have been fueled by Respondents' insistence on their right to hold indefinitely those individuals designated as "enemy combatants," and by the numerous, substantiated allegations of torture and abuse of detainees at Guantánamo. As Judge Kollar-Kotelly concluded, "It would not be in the public interest to subject Petitioner to a process

which the highest court in the land may determine to be invalid. It is in the public interest to have a final decision, leaving no doubts as to this key jurisdictional issue, before Petitioner's military commission proceedings begin." *Hicks,* 397 F. Supp. 2d at 43.

D. The D.C. Circuit's Decision in *Hamdan* Does Not Preclude the Staying of the Military Commission Against O.K.

Although the D.C. Circuit has decided the merits of *Hamdan* against the petitioner, this does not preclude the staying of the military commission against O.K. As noted previously, the present request for a stay is to be adjudicated along a sliding scale. Thus, an injunction may issue "where there is a particularly strong likelihood of success on the merits even if there is a relatively slight showing of irreparable injury," *CityFed Financial Corp. v. Office of Thrift Supervision,* 58 F.3d 738, 745 (D.C. Cir. 1995), but may also issue in "a case in which the other three factors strongly favor interim relief ... if the movant has made a *substantial* case on the merits." *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.,* 559 F.2d 841, 843 (D. C. Cir. 1977) (emphasis added).

While the D.C. Circuit ruled against petitioner on the merits in *Hamdan,* it stated explicitly that the arguments raised by petitioner were substantial. *Hamdan,* 415 F.3d at 36-37. The fact that the Supreme Court has granted *certiorari* further supports the view that petitioner's case on the merits is substantial. *See Hicks,* 397 F. Supp. 2d at 44 ("Recognizing the importance of the D.C. Circuit's ruling in *Hamdan* and the 'substantial' issues raised by those challenging the military commission's jurisdiction, the Supreme Court has already granted *certiorari* in the case for immediate briefing and oral argument this term."). Even if the Court were to conclude that the likelihood of success on the merits is weak, injunctive relief is still warranted in light of the overwhelming strength of the other three factors.

A weighing of all four factors for injunctive relief therefore favors granting the request to stay the military commission proceeding against O.K. Such relief fulfills the purpose of interim injunctive relief, "to maintain the status quo pending a final determination of the merits of the suit," *Holiday Tours,* 559 F.2d at 844, and is especially appropriate in light of the impending, ultimate determination of the issues by the Supreme Court.

III. CONCLUSION

Based on the foregoing analysis, Petitioner O.K. respectfully requests that this court stay the military commission proceedings against him pending a final decision from the Supreme Court in *Hamdan v. Bush,* and order an expedited briefing schedule in light of the impending commission hearings scheduled for the week of January 9, 2006.

Respectfully submitted,

/s/ Muneer I. Ahmad

Muneer I. Ahmad, Bar No. 438131
Richard J. Wilson, Bar No. 425026

INTERNATIONAL HUMAN RIGHTS LAW
CLINIC, AMERICAN UNIVERSITY
WASHINGTON COLLEGE OF LAW
4801 Massachusetts Ave., NW
Washington, DC 20016
(202) 274-4004
(202) 274-0659 (fax)

Counsel for Petitioner

Hodges, Keith

From: Hodges, Keith
Sent: Friday, December 09, 2005 3:36 PM
To: [redacted]
Cc: [redacted]
Subject: Trial Term for Commissions Sessions, Week of 9 Jan 2006, Guantanamo Bay, Cuba

1. Colonels Brownback and Chester have scheduled a trial term for Military Commissions during the week of 9 Jan 2006 at Guantanamo Bay, Cuba.

2. Counsel in US v. al Bahlul and US v. Khadr will be prepared to attend conferences at the call of the respective Presiding Officers during the period 1200 hours, 9 Jan through 12 Jan.

3. A session will be held in the case of United States v. al Bahlul at 1000, 10 Jan 2006. This will be the earliest session for that case during the trial term. Other sessions may be held during the trial term.

4. A session will be held in the case of United States v. Khadr at 1000, 11 Jan 2006. This will be the earliest session for that case during the trial term. Other sessions may be held during the trial term.

5. This trial term docket is subject to change, however the first session in a specific case will not be held earlier than as indicated in paragraphs 3 and 4 above.

6. The Presiding Officers anticipate that if sessions other than those indicated in paragraphs 3 and 4 above are held, the latest session would be on 12 Jan. However, all parties must realize that the trial term will not end until each Presiding Officer is satisfied that a further session during the trial term would be of no additional benefit.

7. Parties will be kept advised of any changes so that travel and other logistical arrangements can be made.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID M. HICKS,	)	
Petitioner,	)	
v.	)	**Civil Action No. 1:02-CV-00299 (CKK)**
	)	**ECF**
GEORGE WALKER BUSH,	)	
President of the United States,	)	
***et al.*,**	)	
Respondents.	)	

RESPONSE TO ORDER TO SHOW CAUSE REGARDING RESPONDENTS' MOTION TO DISMISS OR FOR JUDGMENT AS A MATTER OF LAW WITH RESPECT TO CHALLENGES TO THE MILITARY COMMISSION PROCESS

On November 18, 2004, this Court ordered that "counsel for petitioners and respondents shall file written submissions on or before November 29, 2004 showing cause why the respondents' Motion to Dismiss or for Judgment as a Matter of Law with Respect to Challenges to the Military Commission Process should not be held in abeyance pending resolution of all appeals in Hamdan v. Rumsfeld." Order to Show Cause Regarding Respondents' Motion to Dismiss or for Judgment as a Matter of Law with Respect to Challenges to the Military Commission Process at 2 (dkt. no. 123) ("Order"). For the following reasons, respondents do not oppose the suggestion that their pending Motion to Dismiss on military commission issues be held in abeyance.

It is not in the interest of the efficient administration of justice for this Court to review the legality of military commission proceedings at this time. As this Court has stated, "respondents recently filed a notice of appeal in Hamdan seeking expedited review of the legality of the

military commission proceedings that are also at issue in this case." Order at 1. Briefing in the Hamdan appeal is proceeding on an expedited basis and is scheduled to be completed by January 10, 2005.[1] Holding the military commission issues in abeyance is warranted in the instant case because a decision from the D.C. Circuit in Hamdan would provide guidance on how to address these issues. Any decision on the military commission issues in this case that came before the D.C. Circuit's ruling in Hamdan would need to be reevaluated in light of the D.C. Circuit's decision. In the interests of judicial efficiency, the resolution of these issues should be stayed pending the Hamdan decision.

Further, the trial in Mr. Hicks' military commission proceeding is not until March 15, 2005, as currently scheduled. No additional proceedings in the military commission matter are scheduled; thus, it does not appear that the Court needs to resolve the issues raised in this case concerning the military commission proceedings anytime soon. It is quite possible that the D.C. Circuit, working on an expedited review schedule, will make a decision in Hamdan before March 15, 2004. Respondents are willing to notify this Court if the situation regarding the scheduling of the military commission proceedings or the appeal changes.

Therefore, there is currently no reason for this Court not to wait for the D.C. Circuit's decision in Hamdan before addressing these significant issues.

DATED this 29th day of November, 2004.

[1] The petitioner in Hamdan has petitioned the Supreme Court to grant certiorari before judgment in the Court of Appeals, and has sought expedited consideration of the matter. To date, the Supreme Court has not ruled on petitioner's requests.

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

KENNETH L. WAINSTEIN
United States Attorney

BRIAN D. BOYLE
Principal Deputy Associate Attorney General

JONATHAN L. MARCUS
DAVID B. SALMONS
Assistants to the Solicitor General

DOUGLAS N. LETTER
Terrorism Litigation Counsel

ROBERT D. OKUN
Assistant United States Attorney
Chief, Special Proceedings Section

/s/ Nicholas J. Patterson

JOSEPH H. HUNT (D.C. Bar No. 431134)
VINCENT M. GARVEY (D.C. Bar No. 127191)
TERRY M. HENRY
NICHOLAS J. PATTERSON
Attorneys
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W., Room 7220
Washington, D.C. 20530
Telephone: (202) 514-4523
Fax: (202) 616-8470

Attorneys for Defendants

Judge Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Lieutenant Commander CHARLES SWIFT, as next friend for SALIM AHMED HAMDAN, Military Commission Detainee, Camp Echo, Guantanamo Bay Naval Base, Guantanamo, Cuba,

Petitioner,

v.

DONALD H. RUMSFELD, United States Secretary of Defense; JOHN D. ALTENBURG, Jr., Appointing Authority for Military Commissions, Department of Defense; Brigadier General THOMAS L. HEMINGWAY, Legal Advisor to the Appointing Authority for Military Commissions; Brigadier General JAY HOOD, Commander Joint Task Force, Guantanamo, Camp Echo, Guantanamo Bay, Cuba; GEORGE W. BUSH, President of the United States,

Respondents.

NO. C04-0777RSL

NOTICE OF MOTION AND MOTION FOR ORDER HOLDING PETITION IN ABEYANCE; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

(Note on Motion Calendar for: May 14, 2004)

Respondents, through their attorneys, hereby move this Court for an order that the petition filed herein be held in abeyance. This motion is made on the ground that prior practice, principles of judicial economy, and considerations of inter-branch comity and separation of powers, strongly support respondents' request.

This motion is made and based on the accompanying memorandum of points and authorities, the pleadings and papers filed herein, and such oral argument as the Court may entertain.

DATED this 23 day of April, 2004.

Respectfully submitted,

JOHN McKAY
United States Attorney

PAUL C. CLEMENT
Deputy Solicitor General

GREGORY G. GARRE
Assistant to the Solicitor General

JONATHAN L. MARCUS
Attorney
Appellate Section, Criminal Division
U.S. Department of Justice
601 D. Street, N.W. Suite 6206
Washington, D.C. 20530
Telephone: (202) 305-3210
Fax: (202) 305-2121
E-mail: jonathan.marcus@usdoj.gov

s/ Brian C. Kipnis
BRIAN C. KIPNIS
Assistant United States Attorney
601 Union Street, Suite 5100
Seattle, WA 98101-3903
Telephone: (206) 553-7970
Fax: (206) 553-0116
E-mail: brian.kipnis@usdoj.gov

Attorneys for Respondents

MEMORANDUM OF POINTS AND AUTHORITIES

Respondents respectfully request that this Court hold in abeyance the above-captioned petition for writ of mandamus pursuant to 28 U.S.C. 1361 or, in the alternative, writ of habeas corpus ("petition"), pending the Supreme Court's disposition of Rasul v. Bush, S. Ct. No. 03-334 and Al Odah v. United States, S. Ct. No. 03-343 (argued Apr. 20, 2004), and Rumsfeld v. Padilla, S. Ct. No. 03-1027 (to be argued Apr. 28, 2004). As explained below, prior practice, principles of judicial economy, and considerations of inter-branch comity and separation of powers, strongly support respondents' request.[1]

STATEMENT OF FACTS

1. In response to the September 11 attacks, the President dispatched the U.S. armed forces to Afghanistan to seek out and subdue the al Qaeda terrorist network and the Taliban regime that had supported it. U.S. and coalition forces have captured or taken control of thousands of individuals in connection with the ongoing hostilities in Afghanistan. As in virtually every other armed conflict in the Nation's history, the military has determined that many of those individuals should be detained during the conflict as enemy combatants. Such detention serves the vital military objectives of preventing captured combatants from rejoining the conflict and gathering intelligence to further the overall war effort and prevent additional attacks.

Individuals taken into U.S. control in connection with the ongoing hostilities undergo a multi-step screening process to determine if their detention is necessary. Detainees whom the U.S. military determines, after conducting this screening process, have a high potential intelligence value or pose a particular threat may be transferred to the U.S. Naval Base at Guantanamo Bay, Cuba. Only a small fraction of those captured in connection with the current conflict and subjected to the screening process have been designated for detention at

[1] This response is limited to respondents' request to hold the petition in abeyance. By filing this request, respondents do not waive any grounds for dismissal of the petition, including but not limited to lack of jurisdiction, lack of venue, failure to exhaust remedies, and failure to state a claim on which relief could be granted. Respondents propose that, in the event this Court determines that a response to the petition is warranted, it direct respondents to file their response 30 days after the Supreme Court's ruling in Rasul/Al-Odah and Padilla, whichever comes later.

Guantanamo. Upon their arrival at Guantanamo, detainees are subject to an additional assessment by military commanders regarding the need for their detention. The military is currently detaining about 595 aliens at Guantanamo.

Pursuant to the November 13, 2001 military order, the President may exercise his authority as Commander in Chief to subject to trial before a military commission any non-citizen detained at Guantanamo or elsewhere who the President has reason to believe (1) is a member of al Qaeda; (2) is engaged in international terrorism aimed at harming the United States; or (3) has knowingly harbored an individual who fits into one of the first two categories. Military Order (Ex. B to Declaration of Lieutenant Commander Charles Swift ("Swift Decl.") § 2(a).

2. On July 3, 2003, the President designated Salim Ahmed Hamdan, on whose behalf this petition has been filed, for trial by military commission, upon determining that there was reason to believe that Hamdan was a member of al Qaeda or otherwise involved in terrorism against the United States. July 3, 2003 Background Briefing on Military Commissions (Ex. A to Swift Decl.), at 1. As a result of this designation, the Department of Defense (DOD) assigned Lieutenant Commander Charles Swift to meet with and defend Hamdan, whom DOD may charge with a violation of the laws of war before a military commission. In addition, Hamdan, who had been housed with other enemy combatants at Guantanamo, was moved in December 2003 to a different facility at Guantanamo, Camp Echo, where he has his own cell in which he may have private discussions with his lawyer. Briefing on Detainee Operations at Guantanamo Bay (Ex. C to Swift Decl.), at 10.

3. On April 6, 2004, Swift filed this next-friend habeas petition on behalf of Hamdan challenging Hamdan's pre-trial confinement, prospective trial, and continued detention on multiple constitutional, statutory, and treaty-based grounds. Pet. 15-23 (Claims For Relief). The petition requests, among other things, an order mandating Hamdan's release from confinement in Camp Echo, enjoining respondents from enforcing the Military Order of November 13, 2001, compelling respondents to justify Hamdan's continued detention as an enemy combatant, and mandating Hamdan's release from U.S. custody in the absence of

adequate justification. Pet. 24-25 (Prayer For Relief).

4. Hamdan is not the first Guantanamo detainee to have a federal court challenge filed on his behalf. On February 19, 2002, the parents of four British and Australian nationals at Guantanamo filed in District Court for the District of Columbia a next-friend petition for habeas corpus on behalf of those detainees. On May 1, 2002, the family members of 12 Kuwaiti nationals detained at Guantanamo filed in Washington, D.C. a civil action on their behalf. And on June 10, 2002, the wife of another Guantanamo detainee, Mamdouh Habib, also filed in Washington, D.C. a petition for habeas corpus on his behalf.

The government moved to dismiss all three actions for lack of subject- matter jurisdiction under Johnson v. Eisentrager, 339 U.S. 763 (1950), where the Supreme Court held that neither the Constitution nor the federal habeas statutes conferred jurisdiction to consider a habeas petition filed on behalf of German nationals who had been seized overseas following the German surrender in World War II, tried by a military commission, and imprisoned at a U.S.-controlled facility in Germany. As the government explained in its motions to dismiss, under the principles recognized by the Supreme Court in Eisentrager, the U.S. courts lack jurisdiction over claims filed on behalf of Guantanamo detainees because all of them are aliens with no connection to the United States, and they are being detained outside of the sovereign territory of the United States. The district court agreed with the government and dismissed the challenges for lack of jurisdiction. Rasul v. Bush, 215 F. Supp. 2d 55, 65-73 (D.D.C. 2002).

The D.C. Circuit affirmed. Al Odah v. United States, 321 F.3d 1134 (D.C. Cir.), cert. granted sub nom., Rasul v. Bush, 124 S. Ct. 435 (2003). The court of appeals concluded that "the detainees [in this case] are in all relevant respects in the same position as the prisoners in Eisentrager" and thus held that, under the fundamental principles established by the Supreme Court in Eisentrager, "the [United States] courts are not open to them." Id. at 1145. As the court explained, like the prisoners in Eisentrager, the Guantanamo detainees "too are aliens, they too were captured during military operations, they were in a foreign country when captured, they are now abroad, they are in the custody of the American

military, and they have never had any presence in the United States." Id. at 1140.

The D.C. Circuit's decision is now before the Supreme Court, which granted certiorari to consider "[w]hether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba." Rasul v. Bush, 124 S. Ct. 534 (2003) (S. Ct. No. 03-334); Al Odah v. United States, 124 S. Ct. 534 (2003) (S. Ct. No. 03-343). A copy of the government's brief in Rasul/Al Odah is attached as Exhibit A.

The Supreme Court heard argument in Rasul and Al-Odah on April 20, 2004, and a decision is expected by late June 2004 before the Court's summer recess. If the Supreme Court upholds the D.C. Circuit's ruling that aliens held abroad cannot access the U.S. courts, then this petition must be dismissed for lack of jurisdiction.[2]

5. Additional federal court challenges have been filed on behalf of Guantanamo detainees and have been stayed pending the Supreme Court's decision in Rasul/Al Odah. For example, following the Ninth Circuit's ruling that the District Court for the Central District of California had jurisdiction to consider a petition for a writ of habeas corpus filed on behalf of Salim Gherebi, a Guantanamo detainee, Gherebi v. Bush, 352 F.3d 1278 (9th Cir. 2003), the Ninth Circuit stayed its mandate and then the Supreme Court granted the government's application for a stay of proceedings in the case pending the filing and disposition of a petition for a writ of certiorari asking the Supreme Court to hold Gherebi for the decision in Rasul/Al Odah. Bush v. Gherebi, No. 03A637, 124 S. Ct. 1197 (Feb. 5, 2004). That stay is still in effect.

Similarly, on April 9, 2004, the District Court for the Central District of California stayed a second action filed on behalf of Gherebi "in light of the Supreme Court's imminent decision in [Rasul and Al Odah] raising the same threshold jurisdictional issue as this case."

---

[2] Petitioner in this case filed an amicus brief in the Supreme Court in Al-Odah urging the Court "to preserve the option of case-by-case review to assess jurisdiction" rather than issue a broad ruling foreclosing access to the federal courts by all those held in Guantanamo regardless of the nature of the challenge. Brief Of The Military Attorneys Assigned To The Defense In The Office Of Military Commissions As Amicus Curiae In Support Of Neither Party, Al-Odah v. United States, No. 03-343, at 4.

Gherebi v. Bush, CV 04-0210-RSWL (MANX), Order Granting Application For A Stay And Extension Of Time (attached as Exhibit B), at 2.

6. The case of Jose Padilla, a U.S. citizen enemy combatant detained at the naval brig in Charleston, South Carolina, raises an issue that this Court would face if the Supreme Court held in Rasul/Al Odah that aliens captured, detained, and prosecuted outside the United States during wartime are permitted to file habeas challenges in federal court – namely, whether this Court's habeas jurisdiction under 28 U.S.C. 2241 extends to respondents who are located outside its territorial jurisdiction.

In Padilla, the government argued before the federal district court in New York and the court of appeals that even if Secretary Rumsfeld were a proper respondent, the district court for the Southern District of New York did not have habeas jurisdiction over him because he is located in the Eastern District of Virginia. That issue is now before the Supreme Court, which will hear argument in the case on April 28, 2004. See Brief For The Petitioner, Rumsfeld v. Padilla, S. Ct. No. 03-1027, at (I), 21-26 (attached as Ex. C). If the government prevails on that issue in Padilla, then this Court would be obliged to dismiss or transfer this petition, because none of the respondents that petitioner has named is located in the Western District of Washington. Moreover, however the Supreme Court ultimately resolves Rasul/Al Odah and Padilla, its decisions almost certainly will shed additional light on, inter alia, the jurisdiction of the federal courts to entertain a habeas challenge to the detention of enemy combatants.

ARGUMENT

A federal court has "broad discretion to stay proceedings as an incident to its power to control its own docket." Clinton v. Jones, 520 U.S. 681, 706 (1997). "Especially in cases of extraordinary public moment, [a plaintiff] may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted." Landis v. North American Co., 299 U.S. 248, 256 (1936); see also Leyva v. Certified Grocers of Cal., Ltd., 593 F.2d 857, 863 (9th Cir. 1979) (Kennedy, J.) (It is well-settled that "trial court may, with propriety, find it is efficient for its own docket and

the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case.").

Federal courts routinely exercise their discretion to hold cases in abeyance when an impending decision from the Supreme Court is likely to shed light on the issue(s) before them. See, e.g., United States v. Toliver, 351 F.3d 423, 429 n.3 (9th Cir. 2003) ("[W]e deferred consideration of the defendants' consolidated appeals pending [Supreme Court decision]."); Hensala v. Dep't of the Air Force, 343 F.3d 951, 955 (9th Cir. 2003) ("We ordered the submission of this case deferred pending [Supreme Court decision]."); Majors v. Abell, 361 F.3d 349, 352 (7th Cir. 2004) (deferring consideration of challenge to constitutionality of state statute until the Supreme Court decided challenge to constitutionality of "rather similar" federal law); Marshel v. AFW Fabric Corp., 552 F.2d 471, 472 (2d Cir. 1977) (per curiam) (directing district court to stay further proceedings pending Supreme Court's resolution of "closely related case" that will "in all likelihood" decide question presented).

Because the Supreme Court's impending decision in Rasul/Al Odah will be potentially dispositive of the threshold jurisdictional issue presented by the petition, and because Padilla will be potentially dispositive of the propriety of filing the petition in the Western District of Washington, this Court should hold the petition in abeyance until those cases are decided. Indeed, it would be an unnecessary expenditure of resources for the parties to litigate – and for this Court to adjudicate – the very same jurisdictional issues the Supreme Court is virtually certain to address over the next two months and resolve in a manner that will dispose of this petition or, at a minimum, provide substantial guidance regarding its viability in the federal courts and the Western District of Washington in particular.

Not only do the interests in judicial economy and conservation of resources tip decidedly in favor of temporarily suspending these proceedings, but the prejudice to Hamdan is also minimal. The Supreme Court is expected – in accordance with its custom of deciding argued cases before its summer recess – to hand down its decisions in Rasul/Al Odah and Padilla by the end of June, little more than two months from now. Those decisions either will require the outright dismissal or transfer of the petition or, if they do not, will considerably

narrow the issues that this Court must address in the motion to dismiss that respondents intend to file. Either way, Hamdan suffers little by deferring proceedings briefly until the Supreme Court rules. And, at the same time, both parties, not to mention the Court, are likely to benefit from the guidance provided by those decisions in framing and resolving the threshold issues presented by the petition in this case.

Finally, especially where these matters are pending before the Supreme Court, requiring the Executive to respond at this time to the petition in this case filed on behalf of an alien held abroad in connection with ongoing hostilities raises inter-branch comity and separation-of-powers concerns. The Court may avoid those concerns simply by holding this case in abeyance for the relatively brief period until the Supreme Court issues its decisions in Al Odah/Rasul and Padilla.

CONCLUSION

For the foregoing reasons, respondents respectfully urge this Court to hold the petition in abeyance pending the Supreme Court's decisions in Rasul/Al Odah and Padilla.

DATED this 23 day of April, 2004.

Respectfully submitted,

JOHN McKAY
United States Attorney

PAUL C. CLEMENT
Deputy Solicitor General

GREGORY G. GARRE
Assistant to the Solicitor General

JONATHAN L. MARCUS
Attorney
Appellate Section, Criminal Division
U.S. Department of Justice
601 D. Street, N.W. Suite 6206
Washington, D.C. 20530
Telephone: (202) 305-3210
Fax: (202) 305-2121
E-mail: jonathan.marcus@usdoj.gov

s/ Brian C. Kipnis
BRIAN C. KIPNIS
Assistant United States Attorney
601 Union Street, Suite 5100
Seattle, WA 98101-3903
Telephone: (206) 553-7970
Fax: (206) 553-0116
E-mail: brian.kipnis@usdoj.gov

Attorneys for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 23, 2004, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following CM/ECF participant(s):

David Roy East

Joseph McMillan

Harry H. Schneider

Charles Christian Sipos

and I further certify that on the same date I caused to be mailed by United States Postal Service the document to the following non-CM/ECF participants:

Neal Katyal
Georgetown University Law Center
600 New Jersey Avenue
Washington, D.C. 20001

Charles Davidson Swift
Office of the Chief Defense Counsel for Military Commissions
1931 Jefferson Davis Hwy, Suite 103
Arlington, VA 22202

s/ Christine Leininger
CHRISTINE LEININGER
Supervisory Legal Assistant
United States Attorney's Office

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

O.K., **Petitioner,** **v.** **GEORGE W. BUSH, *et al.*,** **Respondents.**	**Case No. 1:04-CV-01136 (JDB)**

[PROPOSED] ORDER

Petitioner's Motion to Stay Military Commission Proceedings and for Expedited Briefing Schedule is hereby GRANTED.

Dated: _____, 2005

_____
Hon. John D. Bates
United States District Court Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

O.K.,[*] et al., **Petitioners,** **v.** **GEORGE W. BUSH, et al.,** **Respondents.**	**Civil Action No. 04-1136 (JDB)**

ORDER

Upon consideration of petitioners' Motion to Stay Military Commission Proceedings and request for expedited consideration of the motion, it is this 30th day of December, 2005, hereby

ORDERED that petitioners shall, by not later than January 5, 2006, file a memorandum that addresses the following: (1) the extent to which the Court retains jurisdiction to consider the motion while this case is before the United States Court of Appeals for the District of Columbia Circuit; (2) assuming that there is no bar to considering the motion due to the pendency of the appeal, whether this motion nonetheless is covered by the February 3, 2005, order that stayed proceedings in this case "for all purposes," pending resolution of the appeal; and (3) assuming that the Detainee Treatment Act of 2005 ("DTA"), H.R. 1815, 109th Cong. §§ 1401-06 (2005), is enacted into law, whether -- and if so, to what extent -- the DTA affects the jurisdiction of the Court to consider this motion; it is further

[*] Because petitioner O.K. was a minor when the habeas petition in this case was filed, the Court uses his initials, consistent with the rules of this Court and the practice of the parties throughout this litigation. See L.Civ.R. 5.4(f)(2).

ORDERED that respondents shall, by not later than January 9, 2006, file a memorandum that addresses the same issues and that further provides an anticipated timetable for O.K.'s trial by military commission and any other pertinent information that may affect the extent to which expedited consideration of petitioners' motion would be warranted were the Court to determine that the motion is properly before it; and it is further

ORDERED that respondents' obligation to respond to the merits of petitioners' Motion to Stay Military Commission Proceedings is continued pending the Court's consideration of these threshold jurisdictional and prudential questions.

/s/ John D. Bates
JOHN D. BATES
United States District Judge

Copies to:

Muneer I. Ahmad
Richard J. Wilson
AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW
4801 Massachusetts Avenue, NW
Washington, DC 20016
Email: mahmad@wcl.american.edu
Email: rwilson@wcl.american.edu

Clive A. Stafford Smith
636 Baronne Street
New Orleans, LA 70113
Email: clivess@mac.com

Counsel for petitioners

Terry Marcus Henry
Robert J. Katerberg
Preeya M. Noronha
Lisa Ann Olso
UNITED STATES DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, NW
Washington, DC 20001
Email: terry.henry@usdoj.gov
Email: robert.katerberg@usdoj.gov
Email: preeya.noronha@usdoj.gov
Email: lisa.olson@usdoj.gov

Counsel for respondents

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Hicks (Rasul) v. Bush	)	Case No. 02-CV-0299 (CKK)
Al Odah v. United States	)	Case No. 02-CV-0828 (CKK)
Habib v. Bush	)	Case No. 02-CV-1130 (CKK)
Kurnaz v. Bush	)	Case No. 04-CV-1135 (ESH)
Khadr v. Bush	)	Case No. 04-CV-1136 (JDB)
Begg v. Bush	)	Case No. 04-CV-1137 (RMC)
El-Banna v. Bush	)	Case No. 04-CV-1144 (RWR)
Gherebi v. Bush	)	Case No. 04-CV-1164 (RBW)
Anam v. Bush	)	Case No. 04-CV-1194 (HHK)
Almurbati v. Bush	)	Case No. 04-CV-1227 (RBW)
Abdah v. Bush	)	Case No. 04-CV-1254 (HHK)
Hamdan v. Bush	)	Case No. 04-CV-1519 (JR)
Al-Qosi v. Bush	)	Case No. 04-CV-1937 (PLF)
Paracha v. Bush	)	Case No. 04-CV-2022 (PLF)
Al-Marri v. Bush	)	Case No. 04-CV-2035 (GK)
Zemiri v. Bush	)	Case No. 04-CV-2046 (CKK)
Deghayes v. Bush	)	Case No. 04-CV-2215 (RMC)
Mustapha v. Bush	)	Case No. 05-CV-0022 (JR)
Abdullah v. Bush	)	Case No. 05-CV-0023 (RWR)
Al-Mohammed v. Bush	)	Case No. 05-CV-0247 (HHK)

El-Mashad v. Bush	)	Case No. 05-CV-0270 (JR) (consolidated with 05-CV-833)
Al-Adahi v. Bush	)	Case No. 05-CV-0280 (GK)
Al-Joudi v. Bush	)	Case No. 05-CV-0301 (GK)
Doe 1-570 v. Bush	)	Case No. 05-CV-0313 (CKK)
Al-Wazan v. Bush	)	Case No. 05-CV-0329 (PLF)
Al-Anazi v. Bush	)	Case No. 05-CV-0345 (JDB)
Alhami v. Bush	)	Case No. 05-CV-0359 (GK)
Ameziane v. Bush	)	Case No. 05-CV-0392 (ESH)
Batarfi v. Bush	)	Case No. 05-CV-0409 (EGS)
Sliti v. Bush	)	Case No. 05-CV-0429 (RGL)
Kabir v. Bush	)	Case No. 05-CV-0431 (RGL)
Qayed v. Bush	)	Case No. 05-CV-0454 (RMU)
Al-Shihry v. Bush	)	Case No. 05-CV-0490 (PLF)
Aziz v. Bush	)	Case No. 05-CV-0492 (JR)
Al-Oshan v. Bush	)	Case No. 05-CV-0520 (RMU)
Tumani v. Bush	)	Case No. 05-CV-0526 (RMU)
Al-Oshan v. Bush	)	Case No. 05-CV-0533 (RJL)
Salahi v. Bush	)	Case No. 05-CV-0569 (JR) (Consolidated with 05-CV-0881) (Consolidated with 05-CV-0995)
Mammar v. Bush	)	Case No. 05-CV-0573 (RJL)
Al-Sharekh v. Bush	)	Case No. 05-CV-0583 (RJL)

Magram v. Bush	)	Case No. 05-CV-0584 (CKK)
Al Rashaidan v. Bush	)	Case No. 05-CV-0586 (RWR)
Mokit v. Bush	)	Case No. 05-CV-0621 (PLF)
Al Daini v. Bush	)	Case No. 05-CV-0634 (RWR)
Errachidi v. Bush	)	Case No. 05-CV-0640 (EGS)
Ahmed v. Bush	)	Case No. 05-CV-0665 (RWR)
Battayav v. Bush	)	Case No. 05-CV-0714 (RBW)
Adem v. Bush	)	Case No. 05-CV-0723 (RWR)
Aboassy v. Bush	)	Case No. 05-CV-0748 (RMC)
Hamlily v. Bush	)	Case No. 05-CV-0763 (JDB)
Imran v. Bush	)	Case No. 05-CV-0764 (CKK)
Al Habashi v. Bush	)	Case No. 05-CV-0765 (EGS)
Al Hamamy v. Bush	)	Case No. 05-CV-0766 (RJL)
Hamoodah v. Bush	)	Case No. 05-CV-0795 (RJL)
Khiali-Gul v. Bush	)	Case No. 05-CV-0877 (JR)
Rahmattullah v. Bush	)	Case No. 05-CV-0878 (CKK)
Mohammad v. Bush	)	Case No. 05-CV-0879 (RBW)
Nasrat v. Bush	)	Case No. 05-CV-0880 (ESH)
Rahman v. Bush	)	Case No. 05-CV-0882 (GK)
Bostan v. Bush	)	Case No. 05-CV-0883 (RBW)
Muhibullah v. Bush	)	Case No. 05-CV-0884 (RMC)
Mohammad v. Bush	)	Case No. 05-CV-0885 (GK)

Wahab v. Bush	)	Case No. 05-CV-0886 (EGS)
Chaman v. Bush	)	Case No. 05-CV-0887 (RWR)
Gul v. Bush	)	Case No. 05-CV-0888 (CKK)
Basardh v. Bush	)	Case No. 05-CV-0889 (ESH)
Khan v. Bush	)	Case No. 05-CV-0890 (RMC)
Nasrullah v. Bush	)	Case No. 05-CV-0891 (RBW)
Shaaban v. Bush	)	Case No. 05-CV-0892 (CKK)
Sohail v. Bush	)	Case No. 05-CV-0993 (RMU)
Tohirjanovich v. Bush	)	Case No. 05-CV-0994 (JDB)
Khudaidad v. Bush	)	Case No. 05-CV-0997 (PLF)
Al Karim v. Bush	)	Case No. 05-CV-0998 (RMU)
Al-Khalaqi v. Bush	)	Case No. 05-CV-0999 (RBW)
Sarajuddin v. Bush	)	Case No. 05-CV-1000 (PLF)
Kahn v. Bush	)	Case No. 05-CV-1001 (ESH)
Mohammed v. Bush	)	Case No. 05-CV-1002 (EGS)
Mangut v. Bush	)	Case No. 05-CV-1008 (JDB)
Hamad v. Bush	)	Case No. 05-CV-1009 (JDB)
Khan v. Bush	)	Case No. 05-CV-1010 (RJL)
Zuhoor v. Bush	)	Case No. 05-CV-1011 (JR)
Ali Shah v. Bush	)	Case No. 05-CV-1012 (ESH)
Salaam v. Bush	)	Case No. 05-CV-1013 (JDB)
Al-Hela v. Bush	)	Case No. 05-CV-1048 (RMU)

Mousovi v. Bush	)	Case No. 05-CV-1124 (RMC)
Khalifh v. Bush	)	Case No. 05-CV-1189 (JR)
Zalita v. Bush	)	Case No. 05-CV-1220 (RMU)
Ahmed v. Bush	)	Case No. 05-CV-1234 (EGS)
Baqi v. Bush	)	Case No. 05-CV-1235 (PLF)
Aminullah v. Bush	)	Case No. 05-CV-1237 (ESH)
Ghalib v. Bush	)	Case No. 05-CV-1238 (CKK)
Al Khaiy v. Bush	)	Case No. 05-CV-1239 (RJL)
Bukhari v. Bush	)	Case No. 05-CV-1241 (RMC)
Pirzai v. Bush	)	Case No. 05-CV-1242 (RCL)
Peerzai v. Bush	)	Case No. 05-CV-1243 (RCL)
Alsawam v. Bush	)	Case No. 05-CV-1244 (CKK)
Mohammadi v. Bush	)	Case No. 05-CV-1246 (RWR)
Al Ginco v. Bush	)	Case No. 05-CV-1310 (RJL)
Ullah v. Bush	)	Case No. 05-CV-1311 (RCL)
Al Bihani v. Bush	)	Case No. 05-CV-1312 (RJL)
Mohammed v. Bush	)	Case No. 05-CV-1347 (GK)
Saib v. Bush	)	Case No. 05-CV-1353 (RMC)
Hatim v. Bush	)	Case No. 05-CV-1429 (RMU)
Al-Subaiy v. Bush	)	Case No. 05-CV-1453 (RMU)
Dhiab v. Bush	)	Case No. 05-CV-1457 (GK)
Ahmed Doe v. Bush	)	Case No. 05-CV-1458 (ESH)

Sadkhan v. Bush	)	Case No. 05-CV-1487 (RMC)
Faizullah v. Bush	)	Case No. 05-CV-1489 (RMU)
Faraj v. Bush	)	Case No. 05-CV-1490 (PLF)
Khan v. Bush	)	Case No. 05-CV-1491 (JR)
Ahmad v. Bush	)	Case No. 05-CV-1492 (RCL)
Amon v. Bush	)	Case No. 05-CV-1493 (RBW)
Al Wirghi v. Bush	)	Case No. 05-CV-1497 (RCL)
Nabil v. Bush	)	Case No. 05-CV-1504 (RMC)
Al Hawary v. Bush	)	Case No. 05-CV-1505 (RMC)
Shafiiq v. Bush	)	Case No. 05-CV-1506 (RMC)
Kiyemba v. Bush	)	Case No. 05-CV-1509 (RMU)
Idris v. Bush	)	Case No. 05-CV-1555 (JR) (Consolidated with 05-CV-1725)
Attash v. Bush	)	Case No. 05-CV-1592 (RCL)
Al Razak v. Bush	)	Case No. 05-CV-1601 (GK)
Mamet v. Bush	)	Case No. 05-CV-1602 (ESH)
Rabbani v. Bush	)	Case No. 05-CV-1607 (RMU)
Zahir v. Bush	)	Case No. 05-CV-1623 (RWR) (Consolidated with 05-CV-01236)
Akhtiar v. Bush	)	Case No. 05-CV-1635 (PLF)
Ghanem v. Bush	)	Case No. 05-CV-1638 (CKK)
Albkri v. Bush	)	Case No. 05-CV-1639 (RBW)
Al-Badah v. Bush	)	Case No. 05-CV-1641 (CKK)

Almerfedi v. Bush	)	Case No. 05-CV-1645 (PLF)
Zaid v. Bush	)	Case No. 05-CV-1646 (JDB)
Al-Bahooth v. Bush	)	Case No. 05-CV-1666 (ESH)
Al-Siba'i v. Bush	)	Case No. 05-CV-1667 (RBW)
Al-Uwaidah v. Bush	)	Case No. 05-CV-1668 (GK)
Al-Jutaili v. Bush	)	Case No. 05-CV-1669 (TFH)
Ali Ahmed v. Bush	)	Case No. 05-CV-1678 (GK)
Khandan v. Bush	)	Case No. 05-CV-1697 (RBW)
Kabir (Sadar Doe) v. Bush	)	Case No. 05-CV-1704 (JR)
Al-Rubaish v. Bush	)	Case No. 05-CV-1714 (RWR)
Qasim v. Bush	)	Case No. 05-CV-1779 (JDB)
Sameur v. Bush	)	Case No. 05-CV-1806 (CKK)
Al-Harbi v. Bush	)	Case No. 05-CV-1857 (CKK)
Aziz v. Bush	)	Case No. 05-CV-1864 (HHK)
Mamet v. Bush	)	Case No. 05-CV-1886 (EGS)
Hamoud v. Bush	)	Case No. 05-CV-1894 (RWR)
Al-Qahtani v. Bush	)	Case No. 05-CV-1971 (RMC)
Alkhemisi v. Bush	)	Case No. 05-CV-1983 (RMU)
Gamil v. Bush	)	Case No. 05-CV-2010 (JR)
Al-Shabany v. Bush	)	Case No. 05-CV-2029 (JDB)
Zakirjan v. Bush	)	Case No. 05-CV-2053 (HHK)
Muhammed v. Bush	)	Case No. 05-CV-2087 (RMC)

Othman v. Bush	)	Case No. 05-CV-2088 (RWR)
Ali Al Jayfi v. Bush	)	Case No. 05-CV-2104 (RBW)
Jamolivich v. Bush	)	Case No. 05-CV-2112 (RBW)
Al-Mudafari v. Bush	)	Case No. 05-CV-2185 (JR)
Al-Mithali v. Bush	)	Case No. 05-CV-2186 (ESH)
Al-Asadi v. Bush	)	Case No. 05-CV-2197 (HHK)
Alhag v. Bush	)	Case No. 05-CV-2199 (HHK)
Nakheelan v. Bush	)	Case No. 05-CV-2201 (ESH)
Al Subaie v. Bush	)	Case No. 05-CV-2216 (RCL)
Ghazy v. Bush	)	Case No. 05-CV-2223 (RJL)
Al Khatemi v. Bush	)	Case No. 05-CV-2248 (ESH)
Al-Shimrani v. Bush	)	Case No. 05-CV-2249 (RMC)
Amin v. Bush	)	Case No. 05-CV-2336 (PLF)
Al Sharbi v. Bush	)	Case No. 05-CV-2348 (EGS)
Ben Bacha v. Bush	)	Case No. 05-CV-2349 (RMC)
Zadran v. Bush	)	Case No. 05-CV-2367 (RWR)
Alsaaei v. Bush	)	Case No. 05-CV-2369 (RWR)
Razakah v. Bush	)	Case No. 05-CV-2370 (EGS)
Al Darby v. Bush	)	Case No. 05-CV-2371 (RCL)
Haleem v. Bush	)	Case No. 05-CV-2376 (RBW)
Al-Ghizzawi v. Bush	)	Case No. 05-CV-2378 (JDB)
Awad v. Bush	)	Case No. 05-CV-2379 (JR)

Al-Baidany v. Bush	)	Case No. 05-CV-2380 (CKK)
Al Rammi v. Bush	)	Case No. 05-CV-2381 (JDB)
Said v. Bush	)	Case No. 05-CV-2384 (RWR)
Mohammon v. Bush	)	Case No. 05-CV-2386 (RBW)
Al-Quhtani v. Bush	)	Case No. 05-CV-2387 (RMC)
Thabid v. Bush	)	Case No. 05-CV-2398 (ESH)
Al Yafie v. Bush	)	Case No. 05-CV-2399 (RJL)
Rimi v. Bush	)	Case No. 05-CV-2427 (RJL)
Almjrd v. Bush	)	Case No. 05-CV-2444 (RMC)
Al Salami v. Bush	)	Case No. 05-CV-2452 (PLF)
Al Shareef v. Bush	)	Case No. 05-CV-2458 (RWR)
Khan v. Bush	)	Case No. 05-CV-2466 (RCL)
Hussein v. Bush	)	Case No. 05-CV-2467 (PLF)
Al-Delebany v. Bush	)	Case No. 05-CV-2477 (RMU)
Al-Harbi v. Bush	)	Case No. 05-CV-2479 (HHK)

NOTICE OF SUPPLEMENTAL AUTHORITY

Respondents hereby give notice of the recent enactment of legislation that, among other things, amends 28 U.S.C. § 2241 to remove court jurisdiction to hear or consider applications for writs of habeas corpus and other actions brought in this Court by or on behalf of aliens detained at Guantanamo Bay, Cuba. See Department of Defense Appropriations Act, 2006, Pub. L. No. ___, § 1005 (2005) (signed by President Bush on Dec. 30, 2005) (copy of relevant excerpts attached).[1] No sooner than the week of January 9, 2006, respondents anticipate filing in each of the above-captioned cases a motion to dismiss or for other appropriate relief based on the new legislation. Prior to or shortly after filing of such motion, respondents will consult with petitioners' counsel in an effort to agree upon a briefing schedule that can be proposed to the Court.

Dated: January 3, 2006

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

KENNETH L. WAINSTEIN
United States Attorney

DOUGLAS N. LETTER
Terrorism Litigation Counsel

[*signature block continued on following page*]

[1] Section 1005 is part of Title X of the Department of Defense Appropriations Act, 2006. Title X is also know as the Detainee Treatment Act of 2005. See Department of Defense Appropriations Act, 2006, Pub. L. No. ___, § 1001 (2005).

/s/ *Joseph H. Hunt*
JOSEPH H. HUNT (D.C. Bar No. 431134)
VINCENT M. GARVEY (D.C. Bar No. 127191)
TERRY M. HENRY
JAMES J. SCHWARTZ
PREEYA M. NORONHA
EDWARD H. WHITE
ROBERT J. KATERBERG
ANDREW I. WARDEN
NICHOLAS J. PATTERSON
MARC A. PEREZ
Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, DC 20044
Tel: (202) 514-2000

Attorneys for Respondents

H. R. 2863

One Hundred Ninth Congress of the United States of America

AT THE FIRST SESSION

Begun and held at the City of Washington on Tuesday, the fourth day of January, two thousand and five

An Act

Making appropriations for the Department of Defense for the fiscal year ending September 30, 2006, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

DIVISION A

DEPARTMENT OF DEFENSE APPROPRIATIONS ACT, 2006

That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending September 30, 2006, for military functions administered by the Department of Defense and for other purposes, namely:

TITLE I

MILITARY PERSONNEL

MILITARY PERSONNEL, ARMY

For pay, allowances, individual clothing, subsistence, interest on deposits, gratuities, permanent change of station travel (including all expenses thereof for organizational movements), and expenses of temporary duty travel between permanent duty stations, for members of the Army on active duty, (except members of reserve components provided for elsewhere), cadets, and aviation cadets; for members of the Reserve Officers' Training Corps; and for payments pursuant to section 156 of Public Law 97–377, as amended (42 U.S.C. 402 note), and to the Department of Defense Military Retirement Fund, $28,191,287,000.

MILITARY PERSONNEL, NAVY

For pay, allowances, individual clothing, subsistence, interest on deposits, gratuities, permanent change of station travel (including all expenses thereof for organizational movements), and expenses of temporary duty travel between permanent duty stations, for members of the Navy on active duty (except members of the Reserve provided for elsewhere), midshipmen, and aviation cadets; for members of the Reserve Officers' Training Corps; and for payments pursuant to section 156 of Public Law 97–377, as amended (42 U.S.C. 402 note), and to the Department of Defense Military Retirement Fund, $22,788,101,000.

(J) An assessment, in a classified annex if necessary, of United States military requirements, including planned force rotations, through the end of calendar year 2006.

SEC. 9011. Supervision and administration costs associated with a construction project funded with appropriations available for operation and maintenance, and executed in direct support of the Global War on Terrorism only in Iraq and Afghanistan, may be obligated at the time a construction contract is awarded: *Provided,* That for the purpose of this section, supervision and administration costs include all in-house Government costs.

SEC. 9012. Amounts appropriated or otherwise made available in this title are designated as making appropriations for contingency operations related to the global war on terrorism pursuant to section 402 of H. Con. Res. 95 (109th Congress), the concurrent resolution on the budget for fiscal year 2006.

TITLE X—MATTERS RELATING TO DETAINEES

SEC. 1001. SHORT TITLE.

This title may be cited as the "Detainee Treatment Act of 2005".

SEC. 1002. UNIFORM STANDARDS FOR THE INTERROGATION OF PERSONS UNDER THE DETENTION OF THE DEPARTMENT OF DEFENSE.

(a) IN GENERAL.—No person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation.

(b) APPLICABILITY.—Subsection (a) shall not apply with respect to any person in the custody or under the effective control of the Department of Defense pursuant to a criminal law or immigration law of the United States.

(c) CONSTRUCTION.—Nothing in this section shall be construed to affect the rights under the United States Constitution of any person in the custody or under the physical jurisdiction of the United States.

SEC. 1003. PROHIBITION ON CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT OF PERSONS UNDER CUSTODY OR CONTROL OF THE UNITED STATES GOVERNMENT.

(a) IN GENERAL.—No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.

(b) CONSTRUCTION.—Nothing in this section shall be construed to impose any geographical limitation on the applicability of the prohibition against cruel, inhuman, or degrading treatment or punishment under this section.

(c) LIMITATION ON SUPERSEDURE.—The provisions of this section shall not be superseded, except by a provision of law enacted after the date of the enactment of this Act which specifically repeals, modifies, or supersedes the provisions of this section.

(d) CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT DEFINED.—In this section, the term "cruel, inhuman, or degrading treatment or punishment" means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.

SEC. 1004. PROTECTION OF UNITED STATES GOVERNMENT PERSONNEL ENGAGED IN AUTHORIZED INTERROGATIONS.

(a) PROTECTION OF UNITED STATES GOVERNMENT PERSONNEL.—In any civil action or criminal prosecution against an officer, employee, member of the Armed Forces, or other agent of the United States Government who is a United States person, arising out of the officer, employee, member of the Armed Forces, or other agent's engaging in specific operational practices, that involve detention and interrogation of aliens who the President or his designees have determined are believed to be engaged in or associated with international terrorist activity that poses a serious, continuing threat to the United States, its interests, or its allies, and that were officially authorized and determined to be lawful at the time that they were conducted, it shall be a defense that such officer, employee, member of the Armed Forces, or other agent did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful. Good faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful. Nothing in this section shall be construed to limit or extinguish any defense or protection otherwise available to any person or entity from suit, civil or criminal liability, or damages, or to provide immunity from prosecution for any criminal offense by the proper authorities.

(b) COUNSEL.—The United States Government may provide or employ counsel, and pay counsel fees, court costs, bail, and other expenses incident to the representation of an officer, employee, member of the Armed Forces, or other agent described in subsection (a), with respect to any civil action or criminal prosecution arising out of practices described in that subsection, under the same conditions, and to the same extent, to which such services and payments are authorized under section 1037 of title 10, United States Code.

SEC. 1005. PROCEDURES FOR STATUS REVIEW OF DETAINEES OUTSIDE THE UNITED STATES.

(a) SUBMITTAL OF PROCEDURES FOR STATUS REVIEW OF DETAINEES AT GUANTANAMO BAY, CUBA, AND IN AFGHANISTAN AND IRAQ.—

(1) IN GENERAL.—Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall submit to the Committee on Armed Services and the Committee on the Judiciary of the Senate and the Committee on Armed Services and the Committee on the Judiciary of the House of Representatives a report setting forth—

(A) the procedures of the Combatant Status Review Tribunals and the Administrative Review Boards established by direction of the Secretary of Defense that are

in operation at Guantanamo Bay, Cuba, for determining the status of the detainees held at Guantanamo Bay or to provide an annual review to determine the need to continue to detain an alien who is a detainee; and

(B) the procedures in operation in Afghanistan and Iraq for a determination of the status of aliens detained in the custody or under the physical control of the Department of Defense in those countries.

(2) DESIGNATED CIVILIAN OFFICIAL.—The procedures submitted to Congress pursuant to paragraph (1)(A) shall ensure that the official of the Department of Defense who is designated by the President or Secretary of Defense to be the final review authority within the Department of Defense with respect to decisions of any such tribunal or board (referred to as the "Designated Civilian Official") shall be a civilian officer of the Department of Defense holding an office to which appointments are required by law to be made by the President, by and with the advice and consent of the Senate.

(3) CONSIDERATION OF NEW EVIDENCE.—The procedures submitted under paragraph (1)(A) shall provide for periodic review of any new evidence that may become available relating to the enemy combatant status of a detainee.

(b) CONSIDERATION OF STATEMENTS DERIVED WITH COERCION.—

(1) ASSESSMENT.—The procedures submitted to Congress pursuant to subsection (a)(1)(A) shall ensure that a Combatant Status Review Tribunal or Administrative Review Board, or any similar or successor administrative tribunal or board, in making a determination of status or disposition of any detainee under such procedures, shall, to the extent practicable, assess—

(A) whether any statement derived from or relating to such detainee was obtained as a result of coercion; and

(B) the probative value (if any) of any such statement.

(2) APPLICABILITY.—Paragraph (1) applies with respect to any proceeding beginning on or after the date of the enactment of this Act.

(c) REPORT ON MODIFICATION OF PROCEDURES.—The Secretary of Defense shall submit to the committees specified in subsection (a)(1) a report on any modification of the procedures submitted under subsection (a). Any such report shall be submitted not later than 60 days before the date on which such modification goes into effect.

(d) ANNUAL REPORT.—

(1) REPORT REQUIRED.—The Secretary of Defense shall submit to Congress an annual report on the annual review process for aliens in the custody of the Department of Defense outside the United States. Each such report shall be submitted in unclassified form, with a classified annex, if necessary. The report shall be submitted not later than December 31 each year.

(2) ELEMENTS OF REPORT.—Each such report shall include the following with respect to the year covered by the report:

(A) The number of detainees whose status was reviewed.

(B) The procedures used at each location.

(e) JUDICIAL REVIEW OF DETENTION OF ENEMY COMBATANTS.—

(1) IN GENERAL.—Section 2241 of title 28, United States Code, is amended by adding at the end the following:

"(e) Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider—

"(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or

"(2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who—

"(A) is currently in military custody; or

"(B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.".

(2) REVIEW OF DECISIONS OF COMBATANT STATUS REVIEW TRIBUNALS OF PROPRIETY OF DETENTION.—

(A) IN GENERAL.—Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant.

(B) LIMITATION ON CLAIMS.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to claims brought by or on behalf of an alien—

(i) who is, at the time a request for review by such court is filed, detained by the Department of Defense at Guantanamo Bay, Cuba; and

(ii) for whom a Combatant Status Review Tribunal has been conducted, pursuant to applicable procedures specified by the Secretary of Defense.

(C) SCOPE OF REVIEW.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on any claims with respect to an alien under this paragraph shall be limited to the consideration of—

(i) whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence); and

(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.

(D) TERMINATION ON RELEASE FROM CUSTODY.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit with respect to the claims of an alien under this paragraph shall cease upon the

release of such alien from the custody of the Department of Defense.

(3) REVIEW OF FINAL DECISIONS OF MILITARY COMMISSIONS.—

(A) IN GENERAL.—Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision rendered pursuant to Military Commission Order No. 1, dated August 31, 2005 (or any successor military order).

(B) GRANT OF REVIEW.—Review under this paragraph—

(i) with respect to a capital case or a case in which the alien was sentenced to a term of imprisonment of 10 years or more, shall be as of right; or

(ii) with respect to any other case, shall be at the discretion of the United States Court of Appeals for the District of Columbia Circuit.

(C) LIMITATION ON APPEALS.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to an appeal brought by or on behalf of an alien—

(i) who was, at the time of the proceedings pursuant to the military order referred to in subparagraph (A), detained by the Department of Defense at Guantanamo Bay, Cuba; and

(ii) for whom a final decision has been rendered pursuant to such military order.

(D) SCOPE OF REVIEW.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on an appeal of a final decision with respect to an alien under this paragraph shall be limited to the consideration of—

(i) whether the final decision was consistent with the standards and procedures specified in the military order referred to in subparagraph (A); and

(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States.

(4) RESPONDENT.—The Secretary of Defense shall be the named respondent in any appeal to the United States Court of Appeals for the District of Columbia Circuit under this subsection.

(f) CONSTRUCTION.—Nothing in this section shall be construed to confer any constitutional right on an alien detained as an enemy combatant outside the United States.

(g) UNITED STATES DEFINED.—For purposes of this section, the term "United States", when used in a geographic sense, is as defined in section 101(a)(38) of the Immigration and Nationality Act and, in particular, does not include the United States Naval Station, Guantanamo Bay, Cuba.

(h) EFFECTIVE DATE.—

(1) IN GENERAL.—This section shall take effect on the date of the enactment of this Act.

(2) REVIEW OF COMBATANT STATUS TRIBUNAL AND MILITARY COMMISSION DECISIONS.—Paragraphs (2) and (3) of subsection

(e) shall apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this Act.

SEC. 1006. TRAINING OF IRAQI FORCES REGARDING TREATMENT OF DETAINEES.

(a) REQUIRED POLICIES.—

(1) IN GENERAL.—The Secretary of Defense shall ensure that policies are prescribed regarding procedures for military and civilian personnel of the Department of Defense and contractor personnel of the Department of Defense in Iraq that are intended to ensure that members of the Armed Forces, and all persons acting on behalf of the Armed Forces or within facilities of the Armed Forces, ensure that all personnel of Iraqi military forces who are trained by Department of Defense personnel and contractor personnel of the Department of Defense receive training regarding the international obligations and laws applicable to the humane detention of detainees, including protections afforded under the Geneva Conventions and the Convention Against Torture.

(2) ACKNOWLEDGMENT OF TRAINING.—The Secretary shall ensure that, for all personnel of the Iraqi Security Forces who are provided training referred to in paragraph (1), there is documented acknowledgment of such training having been provided.

(3) DEADLINE FOR POLICIES TO BE PRESCRIBED.—The policies required by paragraph (1) shall be prescribed not later than 180 days after the date of the enactment of this Act.

(b) ARMY FIELD MANUAL.—

(1) TRANSLATION.—The Secretary of Defense shall provide for the United States Army Field Manual on Intelligence Interrogation to be translated into arabic and any other language the Secretary determines appropriate for use by members of the Iraqi military forces.

(2) DISTRIBUTION.—The Secretary of Defense shall provide for such manual, as translated, to be provided to each unit of the Iraqi military forces trained by Department of Defense personnel or contractor personnel of the Department of Defense.

(c) TRANSMITTAL OF REGULATIONS.—Not less than 30 days after the date on which regulations, policies, and orders are first prescribed under subsection (a), the Secretary of Defense shall submit to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives copies of such regulations, policies, or orders, together with a report on steps taken to the date of the report to implement this section.

(d) ANNUAL REPORT.—Not less than one year after the date of the enactment of this Act, and annually thereafter, the Secretary of Defense shall submit to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives a report on the implementation of this section.

This division may be cited as the "Department of Defense Appropriations Act, 2006".

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

O.K., **Petitioner,** **v.** **GEORGE W. BUSH, *et al.*,** **Respondents.**	**Case No. 1:04-CV-01136 (JDB)**

[PROPOSED] ORDER

The parties' Joint Motion to Vacate the Court's Order of December 30, 2005 and Petitioner's Unopposed Motion to Defer Consideration of the Detainee Treatment Act is hereby GRANTED. The Court will defer consideration of the Detainee Treatment Act until after Respondents have filed their intended dispositive motions and have consulted with Petitioner regarding a proposed briefing schedule.

Dated: _____, 2006

_____
Hon. John D. Bates
United States District Court Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

O.K., **Petitioner,** **v.** **GEORGE W. BUSH, *et al.*,** **Respondents.**	**Case No. 1:04-CV-01136 (JDB)**

JOINT MOTION TO VACATE THE COURT'S ORDER OF DECEMBER 30, 2005 AND PETITIONER'S UNOPPOSED MOTION TO DEFER CONSIDERATION OF THE DETAINEE TREATMENT ACT

Petitioner and Respondents jointly file this motion to vacate the Court's Order of December 30, 2005 ("December 30 Order") [Dkt. No. 148], in light of recent developments related to the newly enacted Detainee Treatment Act of 2005 ("Detainee Treatment Act").[1] Petitioner requests that the Court defer consideration of the Detainee Treatment Act until after Respondents have filed a planned dispositive motion in the case and have consulted with Petitioners regarding a proposed schedule. Respondents do not oppose this latter request. By separate notice to be filed with the Court today, Petitioner also withdraws his Motion to Stay Military Commission Proceedings and for Expedited Briefing Schedule ("Motion to Stay") [Dkt. No. 147] In support of this motion, the parties state the following:

1. On December 23, 2005, Petitioner O.K. filed with this Court a Motion to Stay Military Commission Proceedings and for Expedited Briefing Schedule ("Motion to Stay") [Dkt. Nos.

[1] The relevant statutory language is contained in section 1005 of the Department of Defense Appropriations Act of 2006, included in Pub. L. No. 109-148, § 1005 (signed by President Bush on Dec. 30, 2005).

146, 147], seeking to stay the commission proceedings that had recently been initiated against him until the Supreme Court has issued a final decision in *Hamdan v. Rumsfeld*, 415 U.S. F.3d 33 (D.C. Cir. 2005), *cert. granted,* 74 U.S.L.W. 3108 (U.S. Nov. 7, 2005) (No. 05-184).

2. On December 30, 2005, this Court issued an Order ("December 30 Order") [Dkt. No. 148] in relation to Petitioner's Motion to Stay, requiring the parties to brief three issues, among them: "assuming that the Detainee Treatment Act of 2005 ('DTA'), H.R. 1815, 109th Cong. §§ 1401-06 (2005), is enacted into law, whether -- and if so, to what extent -- the DTA affects the jurisdiction of the Court to consider this motion." Petitioner was ordered to brief these issues by January 5, 2006, and Respondents were ordered to brief these and additional issues by January 9, 2006. The Detainee Treatment Act was enacted into law later that day.
3. On January 3, 2006, Respondents filed with the D.C. Court of Appeals a notice, pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, calling the Court's attention to the enactment of section 1005 of the Department of Defense Appropriations Act of 2006, included in Pub. L. No. 109-148, § 1005 (signed by President Bush on Dec. 30, 2005), also known as the Detainee Treatment Act of 2005. (A copy of the 28(j) notice is attached hereto as Exhibit A.) As the Court is aware, Petitioner's case, as well as those of several other Guantánamo detainees, is currently pending before the D.C. Circuit Court of Appeals. Respondents' 28(j) notice states that "[t]he Government anticipates filing with the Court no later than the week of January 9, 2006, a motion to govern further proceedings in these cases in light of the new legislation."
4. On January 4, 2006, Respondents filed with this Court a Notice of Supplemental Authority [Dkt. No. 149] regarding the Detainee Treatment Act of 2005. In that filing, Respondents state: "No sooner than the week of January 9, 2006, respondents anticipate filing in each of the above-captioned cases a motion to dismiss or for other appropriate relief based on the

new legislation. Prior to or shortly after filing of such motion, respondents will consult with petitioners' counsel in an effort to agree upon a briefing schedule that can be proposed to the Court."

5. Also on January 4, 2006, the D.C. Circuit Court of Appeals issued an order, on its own motion, requiring the parties in Al *Odah et al. v. Bush* and *Boumedine et al. v. Bush* to "parties file, within 14 days of the date of this order, supplemental briefs of no more than 15-pages addressing the effect of section 1005 of the Department of Defense Appropriations Act of 2006, Pub. L. No. 109- , §1005 (signed by the President on December 30, 2005) on these appeals." Petitioner O.K. (A copy of the order is attached hereto as Exhibit B.) Petitioner O.K. is one of the *Al Odah* petitioners before the D.C. Circuit.
6. In light of the D.C. Circuit's Order and Respondents' stated intention to file dispositive motions as early as the week of January 9, 2006, the parties jointly request that the Court vacate its December 30 Order. In addition, Petitioner requests that the Court defer consideration of the Detainee Treatment Act until after Respondents have filed their motions and have consulted with Petitioner regarding a proposed briefing schedule. Respondents do not oppose this latter request. In view of these recent developments, Petitioner is filing a separate notice of withdrawal of his Motion to Stay.

Dated: January 5, 2006

Respectfully submitted,

/s/ Muneer I. Ahmad

Muneer I. Ahmad, Bar No. 438131
Richard J. Wilson, Bar No. 425026
INTERNATIONAL HUMAN RIGHTS LAW CLINIC, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW
4801 Massachusetts Ave., NW
Washington, DC 20016

(202) 274-4004
(202) 274-0659 (fax)

Counsel for Petitioner

/s/ Terry M. Henry
Terry M. Henry
Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W. Room 7144
Washington, DC 20530
Tel: (202) 514-4107
Fax: (202) 616-8470

Counsel for Respondents

U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Ave., N.W., Rm. 7513
Washington, D.C. 20530-0001

Tel: (202) 514-3602
Fax: (202) 307-2551

January 3, 2006

Mr. Mark Langer
Clerk, U.S. Court of Appeals for the D.C. Circuit
333 Constitution Ave., N.W.
Washington, D.C. 20001

Re: *Al Odah* v. *United States*, Nos. 05-5064, 05-5095 through 05-5116
Boumediene v. *Bush*, Nos. 05-5062, 05-5063
Oral argument held on September 8, 2005

Dear Mr. Langer:

Pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, appellants, the United States, *et al.*, in *Al Odah*, and appellees, Bush, *et al.*, in *Boumediene,* write to inform this Court of the enactment of section 1005 of the Department of Defense Appropriations Act of 2006, Pub. L. No. 109-___, § 1005 (signed by President Bush on Dec. 30, 2005) (copy attached), also known as the Detainee Treatment Act of 2005.

Section 1005(e)(1) of the Detainee Treatment Act of 2005 amends the habeas statute, 28 U.S.C. § 2241, to state that "no court, justice, or judge shall have jurisdiction to hear or consider" any habeas claim filed by an alien detainee held by the Department of Defense at Guantanamo Bay. It further bars jurisdiction over "any other action against the United States or its agents relating to any aspect of the detention," if the detainee is currently in military custody or has been determined to an enemy combatant (after review by the D.C. Circuit). Section 1005 provides in subsection (e)(2) for "exclusive" jurisdiction in the D.C. Circuit to review the validity of final enemy combatant determinations of the Combatant Status Review Tribunal (CSRT), and in subsection (e)(3) grants the D.C. Circuit "exclusive" jurisdiction over the final decisions of any military commission rulings "rendered pursuant to Military Commission Order No. 1, dated August 31, 2005 (or any successor military order)." The exclusive jurisdiction of the D.C. Circuit over all CSRT rulings and military commission decisions applies to all pending cases, § 1005(h)(2). The statute, including its elimination of statutory habeas jurisdiction, is effective immediately, § 1005(h)(1).

The Government anticipates filing with the Court no later than the week of January 9, 2006, a motion to govern further proceedings in these cases in light of the new legislation.

Respectfully submitted,

Robert M. Loeb
Counsel for the United States, *et al.*
and Bush, *et al.*

Enclosure

cc: Jon W. Norris
641 Indiana Avenue, N.W.
Washington, DC 20004
(202) 842-2695, Fax: (202) 842-2627
Email: jonnorrislaw@hotmail.com

Thomas B. Wilner
SHEARMAN & STERLING
801 Pennsylvania Avenue, NW, Suite 900
Washington, DC 20004-2634
(202) 508-8050, Fax: 202-508-8100
Email: twilner@shearman.com

L. Barrett Boss
COZEN O'CONNOR, P.C.
1667 K Street, NW, Suite 500
Washington, DC 20006-1605
(202) 912-4800, Fax: (202) 912-4830
Email: bboss@cozen.com

Neil H. Koslowe
SHEARMAN AND STERLING LLP
801 Pennsylvania Avenue, NW, Suite 900
Washington, DC 20004
(202) 508-8000, Fax: (202) 508-8100
Email: neil.koslowe@shearman.com

Joseph Margulies
MACARTHUR JUSTICE CENTER
University of Chicago Law School
1111 East 60th Street
Chicago, IL 60657
(773) 702-9560, Fax: (773) 702-0771
Email: jmarguli@uchicago.edu

Adrian Lee Steel, Jr.
MAYER, BROWN ROWE & MAW LLP
1909 K Street, NW
Washington, DC 20006-1152
(202) 263-3237, Fax: 202-263-3300
Email: asteel@mayerbrownrowe.com

Baher Azmy
SETON HALL LAW SCHOOL
CENTER FOR SOCIAL JUSTICE
833 McCarter Highway
Newark, NJ 07102
(973) 642-8700, Fax: (973) 642-8295
Email: azmybahe@shu.edu

Barry J. Pollack
COLLIER SHANNON SCOTT, PLLC
3050 K Street, NW, Suite 400
Washington, DC 20007
(202) 342-8472, Fax: (202) 342-8451
Email: BPollack@colliershannon.com

Eric M. Freedman
250 West 94th Street
New York, NY 10025
(212) 665-2713, Fax: (212) 665-2714
Email: lawemf@hofstra.edu

Muneer I. Ahmad
AMERICAN UNIVERSITY WASHINGTON
COLLEGE OF LAW
4801 Massachusetts Avenue, NW
Washington, DC 20016
(202) 274-4140, Fax: (202) 274-0659
Email: mahmad@wcl.american.edu

Richard J. Wilson
4801 Massachusetts Avenue, NW
Washington, DC 20016
(202) 274-4147
Email: rwilson@wcl.american.edu

Barbara J. Olshansky
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
(212) 614-6439
Email: bjo@ccr-ny.org

Clive Stafford Smith
JUSTICE IN EXILE
636 Baronne Street
New Orleans, LA 70113
(504) 558-9867
Email: clivessgb@aol.com

John J. Gibbons
Gitanjali Gutierrez
Lawrence S. Lustberg
GIBBONS, DEL DEO, DOLAN, GRIFFINGER & VECCHIONE
One Riverfront Plaza
Newark, NJ 07102
(973) 596-4493, Fax: (973) 639-6243
Email: ggutierrez@gibbonslaw.com
Email: jgibbons@gibbonslaw.com
Email: llustberg@gibbonslaw.com

George Brent Mickum, IV
KELLER & HECKMAN, LLP
1001 G Street, NW, Suite 500
Washington, DC 20001-4545
(202) 434-4245, Fax: (202) 434-4646
Email: mickum@khlaw.com

Douglas James Behr
KELLER & HECKMAN, LLP
1001 G Street, NW
Washington, DC 20001
(202) 434-4100, Fax: 202-434-4646
Email: behr@khlaw.com

Erwin Chemerinsky
DUKE LAW SCHOOL
Corner of Science Drive & Towerview Road
Durham, NC 27708
(919) 613-7173
Email: CHEMERINSKY@law.duke.edu

Karen Lee
Adrian Raiford Stewart
Andrew Bruce Matheson
Nathan Reilly
Pamela Rogers Chepiga
ALLEN & OVERY
1221 Avenue of the Americas
New York, NY 10020
(212) 610-6300, Fax: (212) 610-6399
Email: karen.lee@newyork.allenovery.com

Ralph A. Taylor
DORSEY & WHITNEY LLP
1001 Pennsylvania Avenue, NW
Suite 300 South
Washington, DC 20004
(202) 442-3562
Fax: (202) 442-3199
Email: taylor.ralph@dorseylaw.com

Christopher G. Karagheuzoff
Joshua Colangelo-Bryan
Mark S. Sullivan
Stewart D. Aaron
DORSEY & WHITNEY LLP
250 Park Avenue
New York, NY 10177
(212) 415-9200
Email: karagheuzoff.christopher@dorsey.com
Email: colangelo.bryan.joshua@dorsey.com
Email: sullivan.mark@dorsey.com
Email: aaron.stewart@dorsey.com

Stephen H. Oleskey
Louis R. Cohen
Robert C. Kirsch

Douglas F. Curtis
Melissa A. Hoffer
Wilmer Cutler Pickering Hale and Dorr LLP
60 State Street
Boston, MA 02109
(617) 526-6000

Wesley R. Powell
James Hosking
Christopher Land
Clifford Chance US LLP
31 West 52nd Street
New York, NY 10019-6131
(212) 878-8000

Kevin B. Bedell
DORSEY & WHITNEY LLP
1001 Pennsylvania Avenue, NW
Suite 400 South
Washington, DC 20004
(202) 442-3543, Fax: (202) 442-3199
Email: bedell.kevin@dorsey.com

David H. Remes
COVINGTON & BURLING
1201 Pennsylvania Avenue, NW
Suite 803E
Washington, DC 20004-2494
(202) 662-5212, Fax: (202) 778-5212
Email: dremes@cov.com

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-5062 **September Term, 2005**

04cv01142
04cv01166

Filed On: January 4, 2006 [940538]

Lakhdar Boumediene, Detainee, Camp Delta, et al.,
Appellants

v.

George W. Bush, President of the United States, et al.,
Appellees

Consolidated with 05-5063

05-5064

02cv00299
02cv00828
02cv01130
04cv01135
04cv01136
04cv01137
04cv01144
04cv01164
04cv01194
04cv01227
04cv01254

Khaled A. F. Al Odah, Next Friend of Fawzi Khalid Abdullah Fahad Al Odah, et al.,
Appellants

v.

United States of America, et al.,
Appellees

Consolidated with 05-5095, 05-5096, 05-5097, 05-5098, 05-5099, 05-5100, 05-5101, 05-5102, 05-5103, 05-5104, 05-5105, 05-5106, 05-5107,

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-5062 **September Term, 2005**

05-5108, 05-5109, 05-5110, 05-5111, 05-5112,
05-5113, 05-5114, 05-5115, 05-5116

BEFORE: Sentelle, Randolph, and Rogers; Circuit Judges

O R D E R

It is **ORDERED** by the Court, on its own motion, that the parties file, within 14 days of the date of this order, supplemental briefs of no more than 15-pages addressing the effect of section 1005 of the Department of Defense Appropriations Act of 2006, Pub. L. No. 109-__, §1005 (signed by the President on December 30, 2005) on these appeals.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

O.K.,	)	
	)	**Case No. 1:04-CV-01136 (JDB)**
Petitioner,	)	
	)	
v.	)	
	)	
GEORGE W. BUSH, *et al.*,	)	
	)	
Respondents.	)	
	)	
	)	

PETITIONER'S NOTICE OF WITHDRAWAL OF
MOTION TO STAY MILITARY COMMISSION PROCEEDINGS
AND FOR EXPEDITED BRIEFING SCHEDULE

Petitioner hereby withdraws his Motion to Stay Military Commission Proceedings and for Expedited Briefing Schedule [Dkt. No. 14__].

Dated: January 5, 2006

Respectfully submitted,

/s/ Muneer I. Ahmad

Muneer I. Ahmad, Bar No. 438131
Richard J. Wilson, Bar No. 425026
INTERNATIONAL HUMAN RIGHTS LAW CLINIC, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW
4801 Massachusetts Ave., NW
Washington, DC 20016
(202) 274-4004
(202) 274-0659 (fax)

Counsel for Petitioner

[ORAL ARGUMENT HELD OCTOBER 8, 2005]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

KHALED A.F. AL ODAH, et al., Petitioners-Appellees/ Cross-Appellants, v. UNITED STATES OF AMERICA, et al., Respondents-Appellants/ Cross-Appellees.	Nos. 05-5064, 05-5095 through 05-5116
LAKHDAR BOUMEDIENE, et al., Petitioners-Appellants, v. GEORGE W. BUSH, et al., Respondents-Appellees.	Nos. 05-5062, 05-5063

SUPPLEMENTAL BRIEF ADDRESSING SECTION 1005 OF THE DETAINEE TREATMENT ACT OF 2005

PAUL D. CLEMENT
Solicitor General

PETER D. KEISLER
Assistant Attorney General

GREGORY G. KATSAS
Deputy Assistant Attorney General

DOUGLAS N. LETTER
(202) 514-3602
ROBERT M. LOEB
(202) 514-4332
Attorneys, Appellate Staff
Civil Division, Room 7268
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

TABLE OF CONTENTS

Page

ARGUMENT 1

CONCLUSION 14

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

ADDENDUM

TABLE OF AUTHORITIES

Cases:

Alvarez-Barajas v. Gonzales, 418 F.3d 1050 (9th Cir. 2005) 13

Assessors v. Osbornes, 76 U.S. (9 Wall) 567 (1870) 7

Bonhometre v. Gonzales, 414 F.3d 442 (3d Cir. 2005) 13

**Bruner v. United States*, 343 U.S. 112 (1952) 6, 7, 8, 10

Exxon Mobil Corp. v. Allapattah Services, Inc., 125 S.Ct. 2611 (2005) 4

* FCC v. ITT World Communications, Inc., 466 U.S. 463 (1984) 3

Gallardo v. Santini Fertilizer Co., 275 U.S. 62 (1927) 7

Gittens v. Menifee, 428 F.3d 382 (2d Cir. 2005) 13

Hallowell v. Commons, 239 U.S. 506 (1916) 7, 9

Hamdan v. Rumsfeld, No. 05-184 (Jan. 6, 2006) 10

Hughes Aircraft Co. v. U.S. ex rel. Schumer, 520 U.S. 939 (1997) 9

---

* Authorities on which we chiefly rely are marked with an asterisk.

Insurance Co. v. Ritchie, 72 U.S. (5 Wall.) 541 (1867) 7-8

John Does 1-570 v. Bush, No. 05-00313 (CKK) (D.D.C. Feb. 10, 2005) 12

Kline v. Burke Const. Co., 260 U.S. 226 (1922) 2

LaFontant v. INS, 135 F.3d 158 (D.C. Cir. 1998) 9

Laing v. Ashcroft, 370 F.3d 994 (9th Cir. 2004) 3

**Landgraf v. USI Film Products*, 511 U.S. 244 (1994) 2, 6, 11

Lindh v. Murphy, 521 U.S. 320 (1997) 10, 11

Lopez v. Heinauer, 332 F.3d 507 (8th Cir. 2003) 3

**Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869) 5, 6, 7, 8

North Star Steel Co. v. Thomas, 515 U.S. 29 (1995) 8

Rasul v. Bush, 542 U.S. 466 (2004) 11

Republic Nat'l Bank v. United States, 506 U.S. 80 (1992) 6

**Republic of Austria v. Altmann*, 541 U.S. 677 (2004) 6

Rosles v. BICE, 426 F.3d 733 (5th Cir. 2005) 13

Santos v. Territory of Guam, 2005 WL 3579022 (9th Cir. Jan. 3, 2006) 8

Sherman v. Grinnell, 123 U.S. 679 (1887) 7

* *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998) 2

Telecommunications Research and Action Center v. FCC, 750 F.2d 70 (D.C. Cir. 1984) 3

Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994) 3

**United States v. Wells*, 519 U.S. 482 (1997) 8

Constitution:

Fifth Amendment 2, 13

Statutes:

Detainee Treatment Act of 2005, Pub. L. No. 109-148:

§§ 1001-1006 (2005) 1
§ 1005 ..... *passim*
§ 1005(e)(1) 1, 5, 9, 11
§ 1005(e)(2) ..... *passim*
§ 1005(e)(2)(A) 3
§ 1005(e)(2)(C) 13
§ 1005(e)(2)(C)(i) 2
§ 1005(e)(2)(C)(ii) 2
§ 1005(e)(2)(c)(i) 14
§ 1005(e)(2)(c)(ii) 14
§ 1005(e)(3) 8, 11

§ 1005(h)(1) 1, 5, 8, 11
§ 1005(h)(2) ..... passim

28 U.S.C. § 2241 ..... 1, 3, 11

Act of Mar. 27, 1868, ch. 34, § 2, 15 Stat. 44 5

Legislative Materials:

151 Cong. Rec. S14257 (Dec. 21, 2005) 4

151 Cong. Rec. S14263-1469 (Dec. 21, 2005) 4, 8

On January 5, 2006, this Court ordered the parties to file supplemental briefs addressing the effect of section 1005 of the Detainee Treatment Act of 2005 on these appeals. For the reasons set forth below, this Court should hold that, under section 1005, it lacks jurisdiction over the above-captioned appeals, should dismiss the appeals except to the extent they raise claims that are within the scope of this Court's jurisdiction under section 1005(e)(2), and, to that limited extent, should convert the appeals into petitions for review under section 1005(e)(2) and proceed to decide the legal issues presented therein within the scope of section 1005(e)(2) forthwith. In the alternative, the Court should dismiss the appeals in their entireties for want of jurisdiction and permit the detainees who wish to file petitions for review pursuant to section 1005(e)(2) to do so.

A. On December 30, 2005, President Bush signed the Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-1006 (2005). Section 1005(e)(1) of the Act amends the habeas statute, 28 U.S.C. § 2241, to state that "no court, justice, or judge shall have jurisdiction to hear or consider" any habeas claim filed by an alien detainee held by the Department of Defense at Guantanamo Bay, Cuba, except as provided by the Act itself. It further bars jurisdiction over "any other action against the United States or its agents relating to any aspect of the detention," if the detainee is currently in military custody or has been determined under special review procedures established by the Act to have been properly detained as an enemy combatant. Section 1005(e)(2) grants this Court "exclusive" jurisdiction to review the validity of any final determination of a Combatant Status Review Tribunal ("CSRT"), and subsection (e)(3) grants this Court "exclusive" jurisdiction over challenges to any final decision of a military commission "rendered pursuant to Military Commission Order No. 1, dated August 31, 2005 (or any successor military order)." The statute, including its elimination of statutory habeas jurisdiction, is effective immediately (§ 1005(h)(1)), and the

exclusive jurisdiction of this Court over challenges to all final CSRT determinations and military commission decisions expressly applies to all pending claims (§ 1005(h)(2)).

Petitioners in these cases are alien detainees within the scope of section 1005. Thus, the statute places exclusive jurisdiction in this Court to review the final decisions of the CSRTs and precludes all courts from exercising other jurisdiction to review petitioners' claims relating to any aspect of petitioners' detention. Accordingly, as we explain below, except to the extent their claims can be asserted under section 1005(e)(2), this Court should dismiss the appeals for want of jurisdiction. To that limited extent, however, this Court should convert the appeals into petitions for review under section 1005(e)(2) and exercise jurisdiction over these cases under that provision, which expressly applies to all pending cases (*see* § 1005(h)(2)), including these. This Court's exclusive jurisdiction over these cases is now limited by the scope-of-review provision within section 1005(e)(2), which expressly permits federal constitutional and statutory claims. *See* § 1005(e)(2)(C)(ii). Accordingly, this Court can still resolve the primary legal questions presented in these appeals: whether the detainees have Fifth Amendment rights, and, if so, whether the CSRT process comports with those rights; and whether the Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), and Article II authorize petitioners' detention. Those important issues have already been thoroughly briefed and argued to this Court, which should exercise jurisdiction under section 1005(e)(2) and expeditiously decide those threshold issues, after which petitioners could then raise any additional appropriate claims under section 1005(e)(2)(C)(i).

1. "Without jurisdiction [a] court cannot proceed at all in any cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). "Every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under

review." *Id.* at 95. In conducting this jurisdictional inquiry, this Court must examine the effect of the jurisdictional changes put into place by the Detainee Treatment Act. *See Landgraf v. USI Film Products*, 511 U.S. 244, 274 (1994) (a court must take into account jurisdictional rules change during the pendency of a case because jurisdictional statutes "speak to the power of the court rather than to the rights or obligations of the parties"). This requirement applies whether the changed jurisdictional rule withdraws or confers jurisdiction. *Ibid.* Accordingly, where Congress has eliminated the jurisdiction of the district court by statute while a case is pending, the proper result, generally, is for this Court to dismiss the case for want of jurisdiction. *Kline v. Burke Const. Co.*, 260 U.S. 226, 234 (1922); *The Assessors v. Osbornes*, 76 U.S. 567 (1869). Here, where Congress has removed jurisdiction over all existing actions and created an exclusive review procedure in this Court, this Court should now order the dismissal of the underlying district court cases, convert the appeals asserting claims governed by section 1005(e)(2) to petitions for review, and permit petitioners to assert their legal claims directly in this Court under section 1005(e)(2).

2. As noted above, section 1005 of the Detainee Treatment Act not only establishes both a specific forum for review of CSRT and military commission rulings and the rules that will govern the scope and nature of the review in that forum, it also expressly states that the specified forum, this Court, shall have "exclusive jurisdiction." § 1005(e)(2)(A), (e)(3)(A).

Creation by Congress of such an exclusive review mechanism forecloses courts from asserting jurisdiction over the matter under more general grants of jurisdiction, including habeas jurisdiction. *See FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984) ("The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute, or, in the absence or inadequacy thereof, any applicable form

of legal action, including actions for * * * writs of * * * habeas corpus."); *Lopez v. Heinauer*, 332 F.3d 507, 511 (8th Cir. 2003) ("Because judicial review was available to [the noncriminal alien], the district court was not authorized to hear this § 2241 habeas petition"); *Laing v. Ashcroft*, 370 F.3d 994, 999-1000 (9th Cir. 2004) ("§ 2241 is ordinarily reserved for instances in which no other judicial remedy is available").[1] *See also Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200 (1994).

Because this statute establishes the scope of review under this Court's new exclusive jurisdiction, Congress recognized that there could be questions about whether its newly-articulated standard of review should be read to apply to the pending cases. Congress eliminated any ambiguity over that question by expressly extending this Court's exclusive jurisdiction – for both CSRT and military commission review – to *"any"* pending claims. *See* § 1005(h)(2) (emphasis added). Thus, the cases pending in the district court under more general jurisdictional statutes now must be brought to the designated exclusive forum, this Court, to be governed there by the standard of review set out in section 1005(e)(2). Legislative history confirms that section 1005(h)(2), which makes the exclusive-review and scope-of-review provisions of the Act applicable to pending cases, means exactly what it says. *See* 151 Cong. Rec. S14263 (Dec. 21, 2005) (Sen. Graham) ("regarding the modification of the jurisdiction of those courts currently hearing individual habeas or other actions

[1] This rule is fully applicable even where Congress does not specifically state that the more specific review mechanism is exclusive. *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70, 77 (D.C. Cir. 1984) ("even where Congress has not expressly stated that statutory jurisdiction is exclusive * * *, a statute which vests jurisdiction in a particular court cuts off original jurisdiction in other courts in all cases covered by that statute") (footnote and internal quotation marks omitted).

that have been filed by the detainees, we wanted those cases to be recast as appeals of their CSRT determinations").[2]

3. Section 1005 of the Detainee Treatment Act not only created an exclusive judicial review forum and expressly made that exclusivity apply to all pending cases, it also explicitly eliminated *all* other statutory jurisdiction, including habeas jurisdiction, over such claims. *See* § 1005(e)(1). That provision takes effect immediately. *See* § 1005(h)(1)("[t]his section shall take effect on the date of enactment of this Act").

Statutes that remove or extend jurisdiction apply to pending cases and ordinarily are given immediate effect. More than 100 years ago, the Supreme Court held that an Act of Congress repealed its jurisdiction to review a circuit court decision denying a habeas corpus petition filed by a Mississippi resident, McCardle, who sought release from "custody by military authority for trial before a military commission." *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 508 (1869).[3] Although the Supreme Court had asserted jurisdiction over the matter and heard oral argument before the new

---

[2] Senator Levin made contrary statements -- in his opinion the Act does not "apply to or alter any habeas case pending in the courts at the time of enactment." 151 Cong. Rec. S14257 (Dec. 21, 2005). Two of the main authors of the Act, Senators Graham and Kyl, expressly rejected that view. *See* 151 Cong. Rec. S14263-14269 (Dec. 21, 2005). More importantly, Senator Levin's view contradicts the plain statutory text, which designates an exclusive forum for review of the CSRT cases and *expressly* makes that exclusive review mechanism applicable "to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this Act." § 1005(h)(2). Moreover, as explained below, Senator Levin's statements cannot be squared with the long established rule that, when an Act of Congress repeals statutory jurisdiction of a court and does not contain a saving clause, the elimination of jurisdiction applies to all pending actions.

[3] The 1868 Act provided "[t]hat so much of the act approved February 5, 1867, * * * as authorized an appeal from the judgment of the Circuit Court to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court on appeals which have been, or may hereafter be taken, be, and the same is hereby repealed." Act of Mar. 27, 1868, ch. 34, § 2, 15 Stat. 44.

law was passed, it nonetheless concluded that, after the law was enacted, it could not "proceed at all" with the case and dismissed the appeal for "want of jurisdiction." *Id*. at 515. As the Court explained, "[j]urisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Id*. at 514. Moreover, the Court continued, application of the new law to a pending matter flowed from "the general rule" that, "when an act of the legislature is repealed, it must be considered, except as to transactions past and closed, as if it never existed." *Ibid*. (citation omitted).

The Supreme Court has "regularly" applied that rule to "intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." *Landgraf*, 511 U.S. at 274; *see ibid*. (describing "consistent practice") (internal quotation marks and bracket omitted); *accord id*. at 292 (Scalia, J., concurring in the judgments) (noting "consistent practice of giving immediate effect to statutes that alter a court's jurisdiction"). The Court reaffirmed that rule just two Terms ago. *Republic of Austria* v. *Altmann*, 541 U.S. 677, 693 (2004) (noting that in *Landgraf*, "we sanctioned the application to all pending and future cases 'intervening' statutes that merely 'confe[r] or ous[t] jurisdiction' ") (quoting *Landgraf*, 511 U.S. at 274). As the Supreme Court has explained, "jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.' " *Ibid*. (quoting *Republic Nat'l Bank* v. *United States*, 506 U.S. 80, 100 (1992) (Thomas, J., concurring)).

Because statutes removing jurisdiction presumptively apply to pending cases, Congress must expressly exempt pending cases in order to preserve the federal courts' jurisdiction over them. In *Bruner* v. *United States*, 343 U.S. 112 (1952), the Supreme Court explained that the "rule * * * adhered to consistently by this Court" is "that, when a law conferring jurisdiction is repealed without

any reservation as to pending cases, all cases fall with the law." *Id*. at 116-117 & n.8 (citing *McCardle* and other cases). That is true no matter how far the pending litigation has progressed. *Bruner* involved a statute that was enacted after the Court had granted certiorari in the case, and that repealed federal district court jurisdiction over certain claims. The Court held that, "[a]bsent such a reservation [as to pending cases]," the district court lacked jurisdiction, "even though [the court] had jurisdiction * * * when petitioner's action was brought." *Id.* at 115. Accordingly, the Court concluded that the case must be dismissed for want of jurisdiction. *Id*. at 117.

Numerous other cases are to the same effect. *See Gallardo* v. *Santini Fertilizer Co.*, 275 U.S. 62, 63 (1927) (Holmes, J.) (ordering that suit brought to enjoin the collection of taxes in Puerto Rico "be dismissed for want of jurisdiction" because, after the district court issued an injunction, Congress passed a law "that took away the jurisdiction of the District Court in this class of cases"); *Hallowell* v. *Commons*, 239 U.S. 506, 508-509 (1916) (Holmes, J.) (affirming dismissal of action seeking to establish equitable title to decedent's property "for want of jurisdiction" because, while the action was pending, Congress enacted law that "made [the Secretary of the Interior's] jurisdiction exclusive in terms" and "made no exception for pending litigation"); *Sherman* v. *Grinnell*, 123 U.S. 679, 680 (1887) (dismissing writ for lack of jurisdiction based on law that repealed Court's jurisdiction to review pre-repeal circuit court order remanding case to state court); *see also Assessors* v. *Osbornes*, 76 U.S. (9 Wall.) 567, 575 (1870) ("[I]nasmuch as the [jurisdiction] repealing act contained no saving clause, all pending actions fell, as the jurisdiction depended entirely upon the act of Congress."); *Insurance Co.* v. *Ritchie*, 72 U.S. (5 Wall.) 541, 544-546 (1867)

(dismissing appeal for want of jurisdiction because statute eliminated jurisdictional basis for underlying suit).[4]

Congress "expects its statutes to be read in conformity with this Court's precedents." *United States* v. *Wells*, 519 U.S. 482, 495 (1997); *see North Star Steel Co.* v. *Thomas*, 515 U.S. 29, 34 (1995). Accordingly, because the relevant provision of the Detainee Treatment Act does not contain any reservation saving pending cases, "all cases fall with the law." *Bruner*, 343 U.S. at 116-117.[5] That conclusion is underscored by the fact that the Act explicitly provides—without reservation—that it "shall take effect on the date of the enactment." § 1005(h)(1). Because subject-matter jurisdiction must exist throughout the litigation, that language effects an immediate elimination of jurisdiction. In addition, Congress not only declined to include a reservation saving pending cases, but it expressly provided that the exclusive procedures established by the Act for review of challenges to completed CSRTs and military commission trials apply to cases "pending on or after" the Act's enactment. § 1005(h)(2). Thus, Congress made clear that the federal courts no longer have habeas jurisdiction over actions filed on behalf of Guantanamo detainees, and it reinforced that result by providing that, without regard to whether an action is "pending on or after"

---

[4] *See also Santos* v. *Territory of Guam*, __ F.3d __, 2005 WL 3579022 (9th Cir. Jan. 3, 2006) (holding that, under *Bruner* and *McCardle*, court lacked jurisdiction to consider petition from the Guam Supreme Court over which it had previously asserted jurisdiction because Congress passed law withdrawing its jurisdiction while the case was pending); *id*. at *4 (Wallace, J., concurring) ("[b]ecause there was no 'reservation as to pending cases' in the statute at issue here, we lack jurisdiction") (quoting *Bruner*, 343 U.S. at 116).

[5] The legislative history establishes that members of Congress were aware of the Supreme Court's rule that jurisdiction-ousting provisions extend to pending cases. *See*, *e.g.* 151 Cong. Rec. S14,263 (daily ed. Dec. 21, 2005) (Sen. Kyl) ("The courts' rule of construction for these types of statutes is that legislation ousting the courts of jurisdiction is applied to pending cases. It has to. We're not just changing the law governing the action. We are eliminating the forum in which that action can be heard.").

the date of enactment, the exclusive review procedures in sections 1005(e)(2) and (3) provide the only avenue for judicial relief.

4. In *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939 (1997), the Supreme Court explained that amendments to jurisdictional provisions generally apply to all pending cases because such a statute affects "where a suit may be brought, not whether it may be brought at all." *Id.* at 951. Notably, here, the withdrawal of jurisdiction does not deprive the detainees of the ability to obtain review of CSRT rulings. Rather, the statute establishes when and under what circumstances such claims can be heard, and sets the scope and standards for review for the claims. *See ibid.* ("Statutes merely addressing which court shall have jurisdiction to entertain a particular cause of action can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties").

Even if the review is more limited in this Court under section 1005, that fact would not provide a basis for failing to give full effect to the clear statutory language applying this Court's exclusive jurisdiction to pending cases. Notably, in *Hallowell v. Commons*, *supra*, the Supreme Court gave immediate effect, in a pending case, to a jurisdiction-ousting statute addressed to certain claims respecting the allocation of an Indian decedent's property. 239 U.S. at 508-509. Similarly, in *LaFontant v. INS*, 135 F.3d 158 (D.C. Cir. 1998), this Court gave immediate effect to a jurisdiction-ousting statute that addressed review of certain deportation orders. *Id.* at 159, 164-165. In both cases, the litigant was left only with the opportunity to seek discretionary relief from the Executive Branch. Nonetheless, both this Court and the Supreme Court recognized that the new, jurisdiction-ousting statutes were properly read to apply to pending cases. Accordingly, there can

be no question that the elimination of jurisdiction in the district court, and the application of the exclusive jurisdiction of this Court to pending cases, are properly applied to all pending matters.[6]

5. Petitioners have argued that pending cases are wholly unaffected by section 1005 because subsection (h)(2), which provides that the exclusive jurisdiction of this Court is to apply to "any pending" claims, does not directly speak to subsection (e)(1), which withdraws district court habeas jurisdiction over the detainee claims.[7] Petitioners conclude that, because Congress did not expressly provide that subsection (e)(1) applies to pending cases, the district courts may continue to assert jurisdiction over the more than 200 cases pending on behalf of more than 300 Guantanamo detainees challenging the validity of their detention, as if the Detainee Treatment Act had never been enacted.

This argument ignores the well-established rule "that, when a law conferring jurisdiction is repealed *without any reservation* as to pending cases, all cases fall with the law." *Bruner*, 343 U.S. at 116-117 & n.8 (emphasis added). Moreover, *Lindh v. Murphy,* 521 U.S. 320 (1997), cited by petitioners, is inapposite. *Lindh* did not involve a jurisdiction-ousting provision like subsection (e)(1), but rather modifications of the "standards of proof and persuasion in a way favorable to a State." *Id.* at 327. In the former context, the law has been clear for at least 140 years that, absent a savings clause, a jurisdiction-ousting provision takes immediate effect. Indeed, the Supreme Court has reiterated that settled authority post-*Lindh*. *See Altmann*, 541 U.S. at 613 (quoting *Landgraf*, 511 U.S. at 274).

---

[6] Moreover, to the extent the Act has substantive effects, those effects arise not from the elimination of prior bases for jurisdiction in section 1005(e)(1), which Congress made immediately effective, but from the scope-of-review provision within the new exclusive review scheme, which Congress made expressly applicable to pending cases. Thus, all relevant provisions of the statute reinforce the conclusion that section 1005 governs these appeals.

[7] Petitioners presented this argument in their Supreme Court amicus brief filed in *Hamdan v. Rumsfeld*, No. 05-184, on January 6, 2006.

In *Lindh*, the Supreme Court refused to apply to a pending case certain amendments to the habeas corpus statute because those amendments revised prior law "to change standards of proof and persuasion," 521 U.S. at 327, and because Congress had not expressly provided that those particular amendments applied to pending cases, whereas it had so provided with respect to other amendments in the same legislation. After *Lindh,* the law remained clear concerning jurisdictional provisions like subsection (e)(1), but less clear as to provisions that modified procedures and remedies, like subsection (e)(2), and so it was prudent for Congress to make clear that new rules and procedures in subsection (e)(2) apply to pending cases.

Thus, as of December 30, 2005, "no court, justice, or judge" may exercise "jurisdiction to hear or consider" any Guantanamo detainee habeas claim brought under § 2241 or "any other action against the United States or its agents relating to any aspect of the detention" if the detainee is currently in military custody or has been determined to be an enemy combatant under the special review procedures created by the Act. *See* § 1005(e)(1). The only exception to this jurisdictional bar, which takes effect immediately (§ 1005(h)(1)), is the exclusive review of this Court, which expressly applies to all pending detainee cases (§ 1005(h)(2)).

6. Any contrary reading of section 1005 would be wholly untenable. The Detainee Treatment Act clearly evinces Congress's intent in the wake of the Supreme Court's decision in *Rasul v. Bush*, 542 U.S.466 (2004), strictly to limit the judicial review available to aliens detained at Guantanamo Bay, Cuba during the ongoing conflict. Reading the statute to permit pending cases to survive in district court would be manifestly at odds with that purpose because it would permit hundreds of pending habeas cases—collectively involving the vast majority of Guantanamo detainees and countless challenges to the operation of Guantanamo—to proceed in district court,

while they could also proceed simultaneously in this Court (under section 1005(e)(2)). This nonsensical result cannot be squared with the expressed intent of Congress to have that exclusive jurisdiction apply to all pending cases, *see* § 1005(h)(2), rather than to the virtually null set of habeas or other actions that Guantanamo detainees might file in the future.[8] Nothing in the statute remotely suggests such a strange outcome. To the contrary, Congress expressly designated a specialized forum for these claims and provided clear direction that this Court would have exclusive jurisdiction over detainee claims, and that the exclusive jurisdiction would apply to all pending cases (which obviously included these cases).

B. As we have explained above, no court has jurisdiction over the claims asserted in the present appeals, except as provided under subsections (e)(2) and (e)(3). This Court can give effect to the provisions of section 1005 by dismissing the appeals for want of jurisdiction, except to the extent that they raise claims that come within this Court's jurisdiction under subsection (e)(2). As to those claims, this Court should convert the appeals into actions filed directly in this Court under subsection (e)(2). In the alternative, the Court could dismiss all of the appeals for want of jurisdiction and then allow the detainees who wish to refile under the new statute to do so. But in the interests of judicial economy, the better course would be to convert the cases, which appears to be the resolution most consistent with subsection (h)(2)'s instructions to apply this Court's subsection (e)(2) review to pending claims.

---

[8] Habeas petitions have been filed on behalf of a purported 600 detainees. Because more than 100 of those appear to be duplicate filings, and others identify names that cannot be matched with actual detainees, the precise number of detainees with cases pending is unknown, although the number is well over 300. Moreover, a petition was filed purporting (erroneously, for a number of reasons) to seek relief on behalf of *every* Guantanamo detainee who has not already filed an action. Petition for Writ of Habeas Corpus, *John Does 1-570 v. Bush*, No. 05-00313 (CKK) (D.D.C. Feb. 10, 2005). These actions collectively have consumed enormous resources and disrupted the operation of the Guantanamo Naval Base during time of war.

Under subsection (e)(2)(C), this Court's scope of review includes:

> (i) whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence); and
>
> (ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.

§ 1005(e)(2)(C).

The legal issues subject to review under subsection (e)(2)(C)(ii), including whether the alien detainees have any enforceable statutory or constitutional rights, and whether the CSRT procedures satisfy any such rights, have already been fully briefed and argued to this Court. Just as four of this Court's sister Circuits recently did in an analogous circumstance, this Court should simply proceed to decide those issues based upon its new jurisdiction. *See Bonhometre v. Gonzales*, 414 F.3d 442, 444-445 (3d Cir. 2005) (holding that, even though the Real ID Act of 2005 eliminated district court habeas jurisdiction and "was silent as to what to do with an appeal from a district court habeas decision," the court of appeals could maintain jurisdiction over pending habeas appeals by treating them as petitions for review under the broadened exclusive jurisdiction granted to the court of appeals under that Act); *Gittens v. Menifee*, 428 F.3d 382, 384-386 (2d Cir. 2005) (same); *Alvarez-Barajas v. Gonzales*, 418 F.3d 1050, 1053 (9th Cir. 2005) (same); *Rosles v. BICE*, 426 F.3d 733, 736 (5th Cir. 2005) (same).

In particular, the questions of whether the detainees have Fifth Amendment rights, and, if so, whether the CSRT process comports with those rights, raise threshold questions that will apply to *all* of the more than 200 cases pending on behalf of more than 300 Guantanamo detainees

challenging the validity of their detention, which will soon be before this Court under section 1005. Judicial economy calls for immediate and expedited resolution of those threshold legal issues, which have been fully briefed and were argued to this Court more than four months ago.[9]

CONCLUSION

For the foregoing reasons, this Court should order dismissal of the underlying district court cases for want of jurisdiction, dismiss the appeals for want of jurisdiction, except to the limited extent that they may be converted into petitions for review under subsection (e)(2), exercise jurisdiction over these claims under that subsection, and proceed to decide the legal issues presented therein, and within the scope of subsection (e)(2)(c)(ii), forthwith.

Respectfully submitted,

PAUL D. CLEMENT
Solicitor General

PETER D. KEISLER
Assistant Attorney General

GREGORY G. KATSAS
Deputy Assistant Attorney General

DOUGLAS N. LETTER
(202) 514-3602
ROBERT M. LOEB
(202) 514-4332
Attorneys, Appellate Staff
Civil Division, Room 7268
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

January 18, 2006

[9] After the Court resolves the legal issues within the scope of section 1005(e)(2)(c)(ii), it can provide petitioners an opportunity to raise any additional claims they may have under section 1005(e)(2)(c)(i).

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C)
OF THE FEDERAL RULES OF APPELLATE PROCEDURE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), that the foregoing brief is proportionally spaced, has a typeface of 12 point. The brief is 14 pages (which is within the page limit set out in this Court's January 5, 2006 order).

_____
Robert M. Loeb

CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2006, I served the foregoing "SUPPLEMENTAL BRIEF ADDRESSING SECTION 1005 OF THE DETAINEE TREATMENT ACT OF 2005" upon lead counsel of record by causing copies to be sent by both first-class mail and by e-mail transmission:

Neil H. Koslowe
SHEARMAN AND STERLING LLP
801 Pennsylvania Avenue, NW, Suite 900
Washington, DC 20004
(202) 508-8000
Email: neil.koslowe@shearman.com

Stephen H. Oleskey
Robert C. Kirsch
Melissa A. Hoffer
Mark Fleming
Wilmer Cutler Pickering Hale and Dorr LLP
60 State Street
Boston, MA 02109
(617) 526-6000
Melissa.Hoffer@wilmerhale.com
Mark.Fleming@wilmerhale.com

Douglas F. Curtis
Wilmer Cutler Pickering Hale and Dorr LLP
339 Park Ave.
New York, NY 10022
(212) 230-8800
Douglas.Curtis@wilmerhale.com

_____
Robert M. Loeb,
Attorney

[ORAL ARGUMENT HELD SEPTEMBER 8, 2005]

Nos. 05-5064, 05-5095 through 05-5116

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

KHALED A.F. AL ODAH, et al.,

Plaintiffs-Petitioners-Appellees/Cross-Appellants,

v.

UNITED STATES OF AMERICA, et al.,

Defendants-Respondents-Appellants/Cross-Appellees.

ON CONSOLIDATED APPEALS FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

THE GUANTANAMO DETAINEES' SUPPLEMENTAL BRIEF ADDRESSING THE EFFECT OF SECTION 1005 OF THE DETAINEE TREATMENT ACT OF 2005 ON THESE APPEALS

THOMAS B. WILNER
NEIL H. KOSLOWE
KRISTINE A. HUSKEY

SHEARMAN & STERLING LLP
801 PENNSYLVANIA AVE., N.W.
WASHINGTON, DC 20004
TELEPHONE: 202-508-8000

BARBARA J. OLSHANSKY
GITANJALI GUTIERREZ
TINA FOSTER
CENTER FOR CONSTITUTIONAL
RIGHTS
666 BROADWAY, 7th FLOOR
NEW YORK, NY 10012
TELEPHONE: 212-614-6439

JOSEPH MARGULIES
MACARTHUR JUSTICE
UNIVERSITY OF CHICAGO
LAW SCHOOL
1111 EAST 60TH STREET
CHICAGO, IL 60637
TELEPHONE: 773-702-9560

ADRIAN LEE STEEL, JR.
MAYER, BROWN ROWE & MAW LLP
1909 K STREET, NW
WASHINGTON, DC 20006
TELEPHONE: 202-263-3237

BAHER AZMY
SETON HALL LAW SCHOOL
CENTER FOR SOCIAL JUSTICE
833 MCCARTER HIGHWAY
NEWARK, NJ 07102
TELEPHONE: 973-642-8700

CLIVE STAFFORD SMITH
JUSTICE IN EXILE
636 BARONNE STREET
NEW ORLEANS, LA 70113
TELEPHONE: 504-558-9867

JOHN J. GIBBONS
LAWRENCE S. LUSTBERG
GIBBONS, DEL DEO, DOLAN,
GRIFFINGER & VECCHIONE
ONE RIVERFRONT PLAZA
NEWARK, NJ 07102
TELEPHONE: 973-596-4493

GEORGE BRENT MICKUM, IV
DOUGLAS JAMES BEHR
KELLER & HECKMAN, LLP
1001 G STREET, NW, SUITE 500
WASHINGTON, DC 20001
TELEPHONE: 202-434-4245

ERWIN CHEMERINSKY
DUKE LAW SCHOOL
SCIENCE DRIVE & TOWERVIEW RD.
DURHAM, NC 27708
TELEPHONE: 919-613-7173

RICHARD J. WILSON
MUNEER I. AHMAD
AMERICAN UNIVERSITY
WASHINGTON COLLEGE OF LAW
4801 MASSACHUSETTS AVENUE, NW
WASHINGTON, DC 20016
TELEPHONE: 202-274-4140

PAMELA ROGERS CHEPIGA
KAREN LEE
ADRIAN RAIFORD STEWART
ANDREW BRUCE MATHESON
NATHAN REILLY
ALLEN & OVERY
1221 AVENUE OF THE AMERICAS
NEW YORK, NY 10020
TELEPHONE: 212-610-6300

CHRISTOPHER G. KARAGHEUZOFF
JOSHUA COLANGELO-BRYAN
MARK S. SULLIVAN
STEWART D. AARON
DORSEY & WHITNEY LLP
250 PARK AVENUE
NEW YORK, NY 10177
TELEPHONE: 212-415-9200

DOUGLAS JAMES BEHR
KELLER & HECKMAN, LLP
1001 G STREET, NW
WASHINGTON, DC 20001
TELEPHONE: 202-434-4100

DAVID H. REMES
MARC FALKOFF
COVINGTON & BURLING
1201 PENNSYLVANIA AVENUE, NW
SUITE 803E
WASHINGTON, DC 20004
TELEPHONE: 202-662-5212

BARRY J. POLLACK
COLLIER SHANNON SCOTT, PLLC
3050 K STREET, NW, SUITE 400
WASHINGTON, DC 20007
TELEPHONE: 202-342-8472

ERIC M. FREEDMAN
250 WEST 94th STREET
NEW YORK, NY 10025
TELEPHONE: 212-665-2713

JON W. NORRIS
641 INDIANA AVENUE, NW
WASHINGTON, DC 20004
TELEPHONE: 202-842-2695

L. BARRETT BOSS
COZEN O'CONNOR, P.C.
1667 K STREET, NW, SUITE 500
WASHINGTON, DC 20006-1605
TELEPHONE: 202-912-4800

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION AND SUMMARY 1

ARGUMENT 3

I. The Language And Drafting History Of The Detainee Act Demonstrate That Section 1005(e)(1) Does Not Apply To Pending Cases 3

A. The Text of the Act 3

B. The Drafting History 5

C. Any Ambiguity Should be Resolved Against Retroactive Repeal of Habeas 8

II. There Is A Strong Presumption Against The Retroactive Application Of Section 1005(e)(1) To Habeas Petitions Filed Before The Detainee Act Was Enacted 9

III. If Section 1005(e)(1) Were Construed To Apply To Habeas Petitions Filed Before The Detainee Act Was Enacted, It Violates The Suspension Clause And Is Unconstitutional 11

CONCLUSION 15

TABLE OF AUTHORITIES

CASES

Ex parte Bollman, 8 U.S. (4 Cranch) 75 (1807) 13

In re Guantanamo Detainees, 355 F. Supp. 2d 443 (D.D.C. 2005) 14

Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004) 13

Harris v. Nelson, 394 U.S. 286 (1969) 13, 14

**Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997) 1, 10

**INS v. St. Cyr*, 533 U.S. 289 (2001) ..... *passim*

KP Permanent Make-Up v. Lasting Impressions I, Inc., 543 U.S. 111 (2004) 8

**LaFontant v. INS*, 135 F.3d 158 (D.C. Cir. 1998) 1, 10

**Landgraf v. USI Film Products*, 511 U.S. 244 (1994) 2, 5, 9, 10

Lindh v. Murphy, 521 U.S. 320 (1997) 5, 8, 9

Rasul v. Bush, 542 U.S. 466 (2004) 2, 11, 12

Republic of Austria v. Altmann, 541 U.S. 677 (2004) 10

Russello v. United States, 464 U.S. 16 (1983) 8

Swain v. Pressley, 430 U.S. 372 (1977) 12

Weinberger v. Rossi, 456 U.S. 25 (1982) 8

STATUTES

28 U.S.C. § 2241 4

28 U.S.C. § 2243 13

28 U.S.C. § 2246 13

28 U.S.C. § 2247 13

28 U.S.C. § 2248 13

151 Cong. Rec. H12 (daily ed. Dec. 18, 2005) 7, 8

151 Cong. Rec. H13 (daily ed. Dec. 18, 2005) 8

151 Cong. Rec. S12 (daily ed. Nov. 10, 2005) 5, 6

151 Cong. Rec. S12 (daily ed. Nov. 14, 2005) 6, 7

151 Cong. Rec. S12 (daily ed. Nov. 15, 2005) 6, 7

151 Cong. Rec. S14 (daily ed. Dec. 21, 2005) 8

Department of Defense Appropriations Act, 2006, H.R. 2863, 109th Cong. (2005) 8

*Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 ..... *passim*

H.R. Conf. Rep. No. 109-359 8

H.R. Conf. Rep. No. 109-360 8

U.S. Const. art I, § 9, cl. 2 11

*Authorities chiefly relied upon

INTRODUCTION AND SUMMARY

The government argues that section 1005(e)(1) of the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (the "Act" or the "Detainee Act"), which removes jurisdiction from the federal courts to hear and consider habeas petitions filed by detainees at Guantanamo, divests this Court of jurisdiction over the pending consolidated appeals. Although the Act says it became effective "on" December 30, 2005, and there is a strong presumption against the retroactive application of statutes, the government argues that section 1005(e)(1) applies to the pre-Act habeas petitions filed by appellants-cross-appellees (the "*Al Odah* petitioners") because it is "jurisdictional" in nature and "jurisdictional" statutes apply to cases filed before the statutes were enacted.

The government's argument rests on a false premise. As a unanimous Supreme Court held in *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 951 (1997), a statute that affects *whether* a suit may be brought rather than *where* it may be brought, "speaks not just to the power of a particular court but to the substantive rights of the parties as well." Accordingly, "[s]uch a statute, even though phrased in 'jurisdictional' terms, is as much subject to our presumption against retroactivity as any other." *Id.*; *see LaFontant v. INS*, 135 F.3d 158, 163 (D.C. Cir. 1998) ("in determining retroactivity, jurisdictional statutes are to be evaluated in the same manner as any other statute"). Section 1005(e)(1), which affects whether habeas petitions may be brought *at all* by Guantanamo detainees, plainly speaks to the substantive rights of the *Al Odah* petitioners and is subject to the presumption against retroactive application to petitions filed before section 1005(e)(1) was enacted.

The Supreme Court has made clear that no statute may be applied retroactively to bar habeas claims that were pending before the statute was enacted unless Congress has "articulate[d] specific and unambiguous statutory directives to effect a repeal" and given "a clear indication . . . that it intended such a result." *INS v. St. Cyr*, 533 U.S. 289, 299, 316 (2001). Congress articulated no such specific statutory directive in the Detainee Act. To the contrary, section 1005(h)(1) says the Act takes effect on the "date of [its] enactment." Effective-upon-enactment terminology "does not even arguably suggest" that the statute

applies to cases filed before the statute was enacted. *Landgraf v. USI Film Products,* 511 U.S. 244, 257, 258 n.10 (1994).

The drafting history of the Detainee Act confirms that section 1005(e)(1) does not apply to pending habeas cases. The original version of the Act contained language expressly making the habeas-stripping provision now in section 1005(e)(1) applicable to pending cases. That language was deliberately dropped from the final version.

Construing the Act to deprive the *Al Odah* petitioners of the right to obtain habeas relief, as guaranteed to them by the Supreme Court in *Rasul v. Bush*, 542 U.S. 466 (2004), would raise serious questions as to whether the habeas-stripping provision in section 1005(e)(1) violates the Suspension Clause of the Constitution. The Court should construe that section in accordance with accepted canons of statutory construction to avoid such a grave constitutional problem.

In that regard, and contrary to the government's contention, the Act does not provide the *Al Odah* petitioners with an effective alternative to habeas review. It is at best uncertain whether the alternative proposed by the government, namely, review in this Court under section 1005(e)(2) of the Act, even applies to the *Al Odah* petitioners. Section 1005(e)(2) confers jurisdiction on this Court to review the validity of designated final decisions by Combatant Status Review Tribunals ("CSRTs"), provided they operated under procedures mandated by the Act. The *Al Odah* petitioners, however, were not subject to CSRT proceedings conducted under the procedures mandated by the Act. Rather, they were subjected to CSRT procedures that never were reported to Congress, that did not contain any of the safeguards mandated by the Act, and that the court below found did not provide them a fair opportunity to challenge the factual bases for their detentions and allowed for reliance on statements obtained by torture.

Moreover, the judicial review sought by the *Al Odah* petitioners is not based on CSRT decisions; the *Al Odah* petitioners are entitled under *Rasul* and have sought in their petitions a searching judicial inquiry into the lawfulness of their detentions. The CSRTs were created by the government nine days after *Rasul* in a failed effort to provide the detainees with some process *ex post facto*. Especially in light of the patently deficient procedures under which they were conducted, the CSRTs are no substitute for the

searching judicial inquiry required by habeas and the *Al Odah* petitioners do not accept their legitimacy. Even if limited appellate review were available to the *Al Odah* petitioners under section 1005(e)(2), it would be wholly inadequate because it could not remedy the inherent defects in the pre-Act CSRT proceedings or enable the *Al Odah* petitioners effectively to challenge the factual and legal bases for their detentions, as guaranteed by habeas.[1]

ARGUMENT

I. The Language And Drafting History Of The Detainee Act Demonstrate That Section 1005(e)(1) Does Not Apply To Pending Cases

A. The Text of the Act

The Detainee Act marks the first enactment by Congress of legislation relating to the treatment of detainees at Guantanamo. Section 1005(a)(1) of the Act directs the Secretary of Defense to submit within six months to the appropriate committees of Congress a report setting forth new procedures by which CSRTs shall determine the status of detainees at Guantanamo. The procedures specified by the Secretary must include certain safeguards. Section 1005(a)(2) requires that the procedures "ensure" that the "final review authority" with respect to CSRT decisions be a "Designated Civilian Official" appointed by the President, by and with the advice and consent of the Senate. Section 1005(a)(3) requires that the procedures "shall provide for periodic review of any new evidence that may become available relating to the enemy combatant status of a detainee." Section 1005(b), which applies "with respect to any proceeding beginning on or after the date of the enactment of this Act," requires that the procedures "ensure" that the CSRTs assess "whether any statement derived from or relating to such detainee was obtained as a result of coercion."

---

[1] Two of the *Al Odah* petitioners, David Hicks and O.K., have also challenged through habeas petitions the legality of the military commission proceedings that have been initiated against them. Because the present appeals do not encompass military commission issues, and because the habeas-stripping provisions of the Detainee Act are not identical with respect to CSRTs and military commissions, the Court's ruling on the application of the Detainee Act to the present appeals will not necessarily decide the military commission issues raised by Hicks and O.K.

Section 1005(e)(2)(A) of the Act confers exclusive jurisdiction upon this Court "to determine the validity of any final decision of a [CSRT] that an alien is properly detained as an enemy combatant." However, under section 1005(e)(2)(B), this jurisdiction "shall be limited to claims brought by or on behalf of an alien – (i) who is, at the time a request for review by such court is filed, detained by the Department of Defense at Guantanamo Bay, Cuba; and (ii) for whom a [CSRT] has been conducted, pursuant to applicable procedures specified by the Secretary of Defense." The scope of review also is limited under section 1005(e)(2)(C) to consideration of whether the CSRT's decision was consistent with the standards and procedures specified by the Secretary of Defense and whether their use was consistent with applicable provisions of the Constitution and laws of the United States. Section 1005(e)(3) vests this Court with jurisdiction to determine, within the same scope of review, the validity of any final decision made by a military commission pursuant to Military Commission Order No. 1, dated August 31, 2005.

Section 1005(e)(1) amends 28 U.S.C. § 2241 by adding a new subsection (e), removing authority from the federal courts to hear and consider habeas petitions by detainees at Guantanamo and other actions against the United States or its agents relating to the detentions at Guantanamo. New subsection (e) provides that, except as stated in section 1005:

> no court, justice, or judge shall have jurisdiction to hear or consider – (1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or (2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who – (A) is currently in military custody; or (B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of [the Detainee Act] to have been properly detained as an enemy combatant.

Finally, section 1005(h) sets forth the effective date of the Act. It says that, "[i]n general," the Act "shall take effect on the date of the enactment of this Act." Section 1005(h)(2) adds that section 1005(e)(2) and section 1005(e)(3), which provide for judicial review of designated CSRT and military commission decisions, "shall apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this Act."

By specifying in section 1005(h)(1) that the Act "shall take effect on the date of [its] enactment," Congress has directed that section 1005(e)(1) does not apply to habeas petitions that were filed and pending in court *before* the date of enactment. As the Supreme Court noted in *Landgraf*: "A statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date," and "the 'effective-upon-enactment' formula" is "an especially inapt way to reach pending cases." 511 U.S. at 257, 258 n.10. Congress presumably was aware of that observation when it enacted the Detainee Act, so that "its choice of language in [section 1005(h)(1)] would imply nonretroactivity." *Id.* at 258 n.10. Accordingly, section 1005(e)(1) by its terms does not divest the Court of jurisdiction over the pending appeals.

B. The Drafting History

The drafting history of the Detainee Act confirms what a simple reading of the unadorned text of section 1005(e)(1) already discloses: that section 1005(e)(1) does not apply to petitions filed before the Act was enacted. The original version of the Detainee Act was introduced on the Senate floor by Senator Graham on November 10, 2005, as proposed Amendment No. 2515 to the National Defense Authorization Act for Fiscal 2006, S. 1042, 109th Cong. (2005). *See* 151 *Cong. Rec.* S12, 655 (daily ed. Nov. 10, 2005). The proposed Graham amendment would have stripped the federal courts of jurisdiction over habeas claims by detainees at Guantanamo and would have conferred exclusive jurisdiction in the District of Columbia Circuit to determine, under a limited scope of review, the validity of a final CSRT decision that a detainee was properly detained as an enemy combatant. *Id.*

The proposed Graham amendment made *both* its habeas-stripping *and* its judicial review provisions applicable to pending claims. It said: "The amendment made by paragraph (1) [the habeas-stripping provision] shall apply to any application or other action that is pending on or after the date of the enactment of this Act. Paragraph (2) [the judicial review provision] shall apply with respect to any claim

regarding a decision covered by that paragraph that is pending on or after such date." *Id.* The Senate approved the Graham amendment on November 10, 2005, by a vote of 49-42. *Id.* at 667-68.[2]

The Graham amendment generated controversy and opposition. *See* 151 *Cong. Rec.* S12, 727-33 (daily ed. Nov. 14, 2005). On November 14, 2005, Senator Graham introduced Amendment No. 2524 on behalf of himself, Senator Levin, and Senator Kyl. *Id.* at 752-53. Senator Graham explained that in the new amendment "we have addressed some of the weaknesses in my original amendment." *Id.* at 753. Significantly, the proposed Graham-Levin-Kyl amendment eliminated the language in the Graham amendment that would have made the habeas-stripping provision applicable to pending claims. Instead, it made the provisions of the Act effective upon enactment and specified that only the provisions for judicial review of final CSRT and military commission decisions would apply to pending claims. The proposed Graham-Levin-Kyl amendment said:

> (e) EFFECTIVE DATE. –
>
> (1) IN GENERAL. – Except as provided in paragraph (2), this section shall take effect on the day after the date of the enactment of this Act.
>
> (2) REVIEW OF COMBATANT STATUS TRIBUNAL AND MILITARY COMMISSION DECISIONS. – Paragraphs (2) and (3) of subsection (d) shall apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this Act.

Id.

On November 15, 2005, the Senate considered the proposed Graham-Levin-Kyl amendment. *See* 151 *Cong. Rec.* S12, 799-804 (daily ed. Nov. 15, 2005). Immediately prior to the Senate vote, Senator Levin took the floor to emphasize one of the important changes made by the proposed Graham-Levin-Kyl amendment to the original Graham amendment, namely, the elimination of the language that would have made the habeas-stripping provisions applicable to pending claims. *See id.* at 802. Senator Levin said: "The habeas prohibition in the Graham amendment applied retroactively to all pending cases – this would have the effect of stripping the Federal courts, including the Supreme Court, of jurisdiction over all

---

[2] The amendment approved by the Senate actually was Amendment No. 2516, a version offered by Senator Graham whose relevant provisions were identical to Amendment No. 2515.

pending cases, including the Hamdan case." *Id.* However, "[u]nder the Graham-Levin-Kyl amendment, the habeas prohibition would take effect on the date of enactment of the legislation. Thus, this prohibition would apply only to new habeas cases filed after the date of enactment." *Id.* In this manner, said Senator Levin, the proposed Graham-Levin-Kyl amendment "preserves comity between the judiciary and legislative branches." *Id.* Senator Graham, who also spoke on the floor prior to the vote, said nothing to the contrary, while Senator Reid echoed Senator Levin's remarks. *Id.* at 800-03.

The Senate approved the Graham-Levin-Kyl amendment by a vote of 84-14. *See* 151 *Cong. Rec.* S12, 803 (daily ed. Nov. 15, 2005). The 70% increase in the number of Senators supporting Graham-Levin-Kyl, compared to the number supporting the original Graham amendment, plainly reflects widespread satisfaction with the changes made by Graham-Levin-Kyl, including the one specifically noted by Senator Levin prior to the vote that eliminated the language making the habeas-stripping provision applicable to pending cases.

The National Defense Authorization Act for Fiscal 2006, to which the Graham-Levin-Kyl amendment was attached, went to conference. The version of the amendment that emerged from conference, entitled the Detainee Treatment Act of 2005, differed in several respects from the Graham-Levin-Kyl amendment. *See* H.R. Conf. Rep. No. 109-360, *printed in* 151 *Cong. Rec.* H12, 833-35 (daily ed. Dec. 18, 2005). But no material change was made to the effective date language. It still said, in section 1005(h)(1), that: "[i]n general," the Act "shall take effect on the date of the enactment," and, in section 1005(h)(2), that only the judicial review provisions governed by sections 1005(e)(2) and (3) were applicable to pending claims. *Id.* An identical version of this legislation emerged from conference as part of the Department of Defense Appropriations Act, 2006, H.R. 2863, 109th Cong. (2005). *See* H.R. Conf. Rep. No. 109-359, *printed in* 151 *Cong. Rec.* H12, 309-11 (daily ed. Dec. 18, 2005). The President signed the Department of Defense Appropriations Act 2006, on December 30, 2005.[3]

---

[3] There are no committee reports for the Detainee Act because the legislation was not introduced in any committee or ventilated in any committee hearings, and the conference reports do not shed any light on the relevant provisions. The Joint Explanatory Statement in the conference report to the Appropriations Act simply states: "The conferees include a new title X concerning matters

The courts often look to differences between the language of an original bill and enacted legislation to help determine the meaning of that legislation. *See, e.g., Russello v. United States*, 464 U.S. 16, 23-24 (1983). Congress' deliberate elimination from the Detainee Act of language in the original bill that would have made section 1005(e)(1) applicable to petitions filed before the Act was enacted confirms the plain meaning of the statute – that section 1005(e)(1) does not apply to petitions filed and pending before the date of enactment. *Accord, Lindh v. Murphy*, 521 U.S. 320 (1997) (amendments to habeas corpus statute affecting noncapital cases do not apply to pending cases because Congress inserted language making amendments affecting capital cases applicable to pending cases and simultaneously omitted such language with respect to amendments affecting noncapital cases). *See KP Permanent Make-Up v. Lasting Impressions I, Inc.*, 543 U.S. 111, 119 (2004) ("'where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion'").

C. Any Ambiguity Should be Resolved Against Retroactive Repeal of Habeas

Even if the language in section 1005(h)(1) were ambiguous as to whether section 1005(e)(1) applied to habeas petitions filed before the Act was enacted, such ambiguity would have to be resolved against the retroactive application of section 1005(e)(1) to those petitions. As the Supreme Court has emphasized, the protections of the Great Writ of Habeas Corpus "have been strongest" in the context of judicial review of the legality of executive detention. *St. Cyr*, 533 U.S. at 301. It is in that context that

---

relating to detainees, the "Detainee Treatment Act of 2005." H.R. Conf. Rep. No. 109-359, *printed in* 151 *Cong. Rec.* H12, 610 (daily ed. Dec. 18, 2005). The Joint Explanatory Statement of the Committee of Conference in the conference report to the Authorization Act simply states: "Subsection (h) would establish the effective date of the provision." H.R. Conf. Rep. No. 109-360, *printed in* 151 *Cong. Rec.* H13, 112 (daily ed. Dec. 18, 2005). The government cites a long colloquy that Senators Graham and Kyl inserted into the record *after* the conference reports were issued in which, among other things, they claimed that section 1005(e)(1) of the Detainee Act does apply to pending cases. *See* 151 *Cong. Rec.* S14, 260-68 (daily ed. Dec. 21, 2005). But these *post hoc* remarks provide no coherent explanation for the elimination of the prior proposed language making section 1005(e)(1) applicable to pending claims, and they are not entitled to any weight. *See Weinberger v. Rossi*, 456 U.S. 25, 35 (1982). Furthermore, to the extent these remarks reflect a difference of opinion about the meaning of the Act, they underscore the absence of any clear and unambiguous intent to effect a retroactive repeal of habeas and non-habeas jurisdiction. *See St. Cyr*, 533 U.S. at 299, 316.

the issue of the applicability of section 1005(e)(1) to the *Al Odah* petitioners' pre-Act habeas petitions arises and must be decided.

The *Al Odah* petitioners' habeas petitions are not collateral challenges to prior determinations; rather, they are basic challenges to the legality of the executive detentions imposed upon the *Al Odah* petitioners. Consequently, any repeal of the *Al Odah* petitioners' right to challenge those detentions in habeas cannot be based on ambiguous statutory language. As the Supreme Court said in *St. Cyr*: "[i]mplications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction; instead, Congress must articulate specific and unambiguous statutory directives to effect a repeal" and give "a clear indication" that it intended such a result. 533 U.S. at 299, 316. The Supreme Court has found that a statute with retroactive effect was properly authorized by Congress only in cases that "have involved statutory language that was so clear that it could sustain only one interpretation." *Lindh v. Murphy*, 521 U.S. 320, 329 n.4 (1997).

Congress enacted no such language in the Detainee Act. Whatever ambiguity may exist in the Act concerning the temporal reach of section 1005(e)(1) – and the *Al Odah* petitioners see none – must be resolved against the retroactive repeal of the *Al Odah* petitioners' right to habeas corpus relief.

II. There Is A Strong Presumption Against The Retroactive Application Of Section 1005(e)(1) To Habeas Petitions Filed Before The Detainee Act Was Enacted

As the Supreme Court has observed, "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf*, 511 U.S. at 265. Congress' "responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." *Id.* at 266. "Requiring clear intent" to overcome the "default rule" of "prospectivity" assures that "Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." *Id.* at 272-73. "Because it accords with widely held intuitions about how statutes ordinarily operate, a presumption against retroactivity will generally coincide with legislative and public expectations." *Id.* at 272.

The government argues, however, that this normal presumption against retroactivity is displaced here because section 1005(e)(1) is a "jurisdictional" statute, and such statutes generally apply to suits arising before the statute was enacted, even absent specific legislative authorization. *See* Respondents' Supplemental Brief Addressing Section 1005 of the Detainee Treatment Act of 2005 ("Gov't Supp. Br.") at 5-12. That argument has no merit.

The reason the courts generally apply jurisdictional statutes to suits arising before the statutes were enacted is that, in general, jurisdictional statutes do not speak to or truncate the rights or obligations of the parties. *Landgraf*, 511 U.S. at 274. Thus, "[a]pplication of a new jurisdictional rule usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.'" *Id.* (quoting *Hallowell v. Commons*, 239 U.S. 506, 508 (1916)). The Supreme Court has recognized, however, that when statutes addressing jurisdiction *do* create or take away substantive rights, they should not be construed to apply to suits filed before the statutes were enacted, absent express legislative direction. In the words of this Court: "[T]he Supreme Court has clearly established the principle that in determining retroactivity, jurisdictional statutes are to be evaluated in the same manner as any other statute. Thus, in order to determine whether a statute applies to a case that was filed prior to passage of the statute, courts must determine whether the statute is 'procedural' in nature, or whether it affects 'substantive entitlement to relief.'" *LaFontant*, 135 F.3d at 163.

In *Hughes Aircraft*, the Supreme Court explained that "[s]tatutes merely addressing *which* court shall have jurisdiction to entertain a particular cause of action can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties." 520 U.S. at 950. "Such statutes affect only *where* a suit may be brought, not *whether* it may be brought at all." *Id.* In *Hughes Aircraft*, however, the Supreme Court found that the statute before it "does not merely allocate jurisdiction among forums. Rather, it *creates* jurisdiction where none previously existed; it thus speaks not just to the power of a particular court but to the substantive rights of the parties as well." *Id.* The Supreme Court unanimously concluded that "[s]uch a statute, even though phrased in 'jurisdictional' terms, is as much subject to our presumption against retroactivity as any other." *Id. Accord, Republic of*

Austria v. Altmann, 541 U.S. 677, 695 n.15 (2004) ("[w]hen a 'jurisdictional' limitation adheres to the cause of action in this fashion – when it applies by its terms regardless of where the claim is brought – the limitation is essentially substantive"). The reasons weighing against retroactive application of a statute that creates jurisdiction weigh equally strongly against retroactive application of a statute that ousts jurisdiction: in both cases the balance of settled substantive rights between the parties is upended.

Section 1005(e)(1) prohibits habeas claims by Guantanamo detainees "regardless of where the claim is brought." It thus speaks to the "substantive rights" of the *Al Odah* petitioners, and is as much subject to the presumption against retroactivity as any other statute. Therefore, because the Act does not contain any express language applying section 1005(e)(1) to habeas petitions filed before the Act was enacted, it does not.

III. If Section 1005(e)(1) Were Construed To Apply To Habeas Petitions Filed Before The Detainee Act Was Enacted, It Violates The Suspension Clause And Is Unconstitutional

Article I, § 9, cl. 2, of the Constitution provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." The Supreme Court held in *Rasul* that the detainees at Guantanamo, "no less than American citizens," are entitled to the privilege of habeas corpus. 542 U.S. at 481. "[A]t the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789,'" and, as it existed in 1789, the writ unquestionably "served as a means of reviewing the legality of Executive detention." *St. Cyr*, 533 U.S. at 301. Importantly, historical precedents "contain no suggestion that habeas relief in cases involving Executive detention was only available for constitutional error." *Id.* at 302. Rather, such review encompasses the full range of detentions based on errors of law or fact. *Id.* Because Congress made no findings in the Detainee Act that the Nation is confronting a "Rebellion" or "Invasion" such that "the public Safety may require" the suspension of the Guantanamo detainees' right to the privilege of habeas corpus, the Act cannot constitutionally suspend that right.

To be sure, "Congress could, without raising any constitutional questions, provide an adequate substitute [for habeas] through the courts of appeals." *St. Cyr*, 533 U.S. at 314 n.38. But the substitution

of a collateral remedy for habeas comports with the Suspension Clause only if it is "neither inadequate nor ineffective to test the legality of a person's detention." *Swain v. Pressley*, 430 U.S. 372, 381 (1977). The Detainee Act provides neither an adequate nor an effective alternative to resolve and remedy the *Al Odah* petitioners' pending habeas claims.

First, there is substantial doubt whether the *Al Odah* petitioners may obtain judicial review under section 1005(e)(2) of the validity of any final CSRT decision that they are properly detained as enemy combatants. Section 1005(e)(2)(B) expressly limits the jurisdiction of this Court under section 1005(e)(2) to claims filed by detainees "for whom a [CSRT] has been conducted, pursuant to applicable procedures specified by the Secretary of Defense." The "applicable procedures specified by the Secretary of Defense" are those mandated by the Detainee Act. Indeed, one of those procedures, that this Court is required to review under section 1005(e)(2)(C), requires the CSRT to consider whether any statement derived from or related to the detainee was obtained as a result of coercion. That requirement applies under section 1005(b)(2) only "with respect to any proceeding *beginning on or after the date of the enactment of the Act* (emphasis added)." Section 1005(e)(2)(C) similarly requires this Court to consider whether the status determination by the CSRT "was consistent with the standards and procedures specified by the Secretary of Defense." Because the Secretary of Defense has not yet issued the procedures mandated by the Detainee Act, the *Al Odah* petitioners have not been subjected to CSRTs conducted under those procedures. Accordingly, judicial review of CSRT decisions under section 1005(e)(2) does not appear to be available to them.[4]

---

[4] Although section 1005(h)(2) of the Act provides that section 1005(e)(2) and section 1005(e)(3) shall apply to claims "pending on or after the date of the enactment of this Act," it limits that to claims "whose review is governed" by those sections. Thus, judicial review of a final CSRT decision under section 1005(e)(2) is permissible only if the detainee *both* was afforded a CSRT proceeding that was conducted under the procedures mandated by the Act *and* his claim for review was pending on or after December 30, 2005. Congress, unable to predict the exact date that the Act would be passed by both Houses and signed by the President, rationally could have supposed that some CSRT claims would meet these criteria between the time it drafted the Act and the time it became effective. This is especially so given that it took the Defense Department only *nine days* after the Supreme Court decided *Rasul* to issue the pre-Act CSRT procedures and only *two weeks* to open 150 CSRT proceedings and decide 21 of them. In any event, whatever uncertainty there may be about the words "pending on" in section 1005(h)(2) does not affect the

Second, even if judicial review under section 1005(e)(2) were available to the *Al Odah* petitioners, section 1005(e)(2) does not confer on the *Al Odah* petitioners the rights guaranteed by the habeas statutes that are necessary to challenge the legality of executive detention effectively. In claiming that section 1005(e)(2) is an adequate substitute for plenary adjudication of the *Al Odah* petitions, the government reveals its fundamental misunderstanding of habeas. The CSRTs were designed, *post hoc*, to avoid the habeas review to which the Supreme Court in *Rasul* held the detainees were entitled. They could not replace the substantive guarantees of habeas to challenge executive detention in the first instance and could never represent more than the government's "return" to the writ. Therefore, for example, the limited review provided by section 1005(e)(2) does not guarantee the *Al Odah* petitioners the opportunity to "traverse" the return or the right to a hearing, as provided by 28 U.S.C. §§ 2243, 2248. *See also Hamdi v. Rumsfeld*, 542 U.S. 507, 537-39 (plurality opinion) & 553 (2004) (concurring and dissenting opinion of Souter, J.) (describing outline of statutory procedures federal courts must follow in evaluating merits of habeas petitions filed under 28 U.S.C. § 2241). The Court has recognized that, at a minimum, "[p]etitioners in habeas corpus proceedings . . . are entitled to careful consideration and plenary processing of their claims including full opportunity for the presentation of the relevant facts." *Harris v. Nelson*, 394 U.S. 286, 298 (1969); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 112, 125 (1807) (Court sat for five days and fully examined and carefully considered the facts and testimony on which the habeas petitioners were imprisoned).

Section 1005(e)(2) also does not authorize the *Al Odah* petitioners to develop evidence for the court in their defense, or to seek leave to engage in discovery, including discovery aimed at proving that evidence against them was obtained through torture or undue coercion. *See* 28 U.S.C. §§ 2246, 2247; Rules Governing Section 2254 Cases in the United States District Courts, at Rule 1(b) ("[t]he district court may apply any or all of these rules to a habeas corpus petition not covered by Rule 1(a)"), Rules 6-8

---

absence in section 1005(h)(1) of any language making section 1005(e)(1) applicable to pending cases. The absence of such language directing retroactive application is dispositive.

(discovery, expanding the record, and evidentiary hearings). *See generally Harris*, 394 U.S. 286.[5] The rights not authorized by the judicial review provisions are essential to the *Al Odah* petitioners' challenges to the lawfulness of their detentions.[6]

Third, any review the *Al Odah* petitioners could obtain under section 1005(e)(2) would not be meaningful. As noted at the outset, none of the *Al Odah* petitioners was afforded CSRTs based on procedures mandated by the Detainee Act. Instead, they were subjected to CSRTs that used procedures the court below held "deprive[d] the detainees of sufficient notice of the factual bases for their detentions and den[ied] them a fair opportunity to challenge their incarceration," allowed for "reliance on statements possibly obtained through torture or other coercion," and employed a vague and overbroad definition of "enemy combatant." *In re Guantanamo Detainees*, 355 F. Supp. 2d 443, 468-78 (D.D.C. 2005), *appeals pending*. The limited appellate review provided under section 1005(e)(2) might be adequate following a hearing process if that process were itself sufficient to enable a petitioner to contest the factual accusations against him. It is clearly not adequate when the CSRT hearing process to which the *Al Odah* petitioners were subject denied them that opportunity.

Fourth, under section 1005(e)(2) judicial review may be obtained only of designated "final" decisions of the CSRTs. The government, by postponing or refusing to make "final" CSRT determinations with respect to the *Al Odah* petitioners, could circumvent indefinitely the judicial review provisions of section 1005(e)(2) and deny the *Al Odah* petitioners even the very limited access to the courts promised by the Detainee Act. Indeed, the Detainee Act does not require that the CSRTs ever render a "final" status determination with respect to a detainee. This omission is particularly significant for the *Al Odah* petitioners, who already have been the subject of CSRT determinations prior to the

---

[5] The Kuwaiti Detainees have a motion pending in the district court for leave to engage in limited discovery for the production of FBI documents already publicly disclosed in redacted form that include eyewitness accounts by FBI agents of torture and coercive techniques used during the interrogation of detainees at Guantanamo.

[6] For the same reasons, judicial review under section 1005(e)(2) also is not an adequate substitute for habeas review under the doctrine of primary jurisdiction, as the government contends. *See* Gov't Supp. Br. at 3-5.

enactment of the Detainee Act and who the government therefore could leave to languish without ever being the subject of a CSRT under the procedures that meet the standards of the Act.

In sum, if section 1005(e)(1) were construed to apply to the *Al Odah* petitioners' pre-Act habeas petitions, it would violate the Suspension Clause and be unconstitutional. Where, as here, an interpretation of a statute would raise serious constitutional problems, the Court is "obligated to construe the statute to avoid such problems." *St. Cyr*, 533 U.S. at 300. For this additional reason, the Court should hold that section 1005(e)(1) does not apply to the *Al Odah* petitioners' habeas petitions and does not divest the Court of jurisdiction over the pending appeals.

CONCLUSION

Section 1005(e)(1) of the Detainee Act does not divest the Court of jurisdiction over the pending consolidated appeals.[7]

Respectfully submitted,

Thomas B. Wilner
Neil H. Koslowe
Kristine A. Huskey
Shearman & Sterling, LLP
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: 202-508-8000
Facsimile: 202-508-8100
Counsel for Al Odah Petitioners

Dated: January 25, 2006

[7] The government argues that construing the Act to allow the *Al Odah* petitioners to continue to litigate their habeas claims in the district court and simultaneously proceed under section 1005(e)(2) in this Court would be a "nonsensical result" and leave for review under section 1005(e)(2) a "virtually null set of habeas or other actions that Guantanamo detainees might file in the future." Gov't Supp. Br. at 11-12. But the *Al Odah* petitioners do not suggest such a construction. Rather, the *Al Odah* petitioners contend that Congress, recognizing the impossibility of curing the pre-Act CSRT proceedings, preserved habeas review only for the Guantanamo detainees who were subject to those deficient proceedings and filed habeas petitions prior to the enactment of the Act, and intended the judicial review under section 1005(e)(2) to be available only to Guantanamo detainees who are afforded CSRT proceedings conducted under the new procedures mandated by the Act that include specified safeguards. The *Al Odah* petitioners do not concede, of course, that the deprivation of habeas rights for this second group of Guantanamo detainees comports with the Suspension Clause.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C) OF THE FEDERAL RULES OS APPELLATE PROCEDURE AND CIRCUIT RULE 32(a)

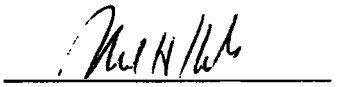
I certify that, in accordance with Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), the foregoing Guantanamo Detainees' Supplemental Brief Addressing the Effect of Section 1005 of the Detainee Treatment Act of 2005 on these Appeals is proportionally spaced and has a typeface of 11 point. This brief is 15 pages long (which is within the page limit authorized by this Court in its Order of January 4, 2006).

Neil H. Koslowe
Attorney.

CERTIFICATE OF SERVICE

I certify that today, January 25, 2006, I served the foregoing Guantanamo Detainees' Supplemental Brief Addressing the Effect of Section 1005 of the Detainee Treatment Act of 2005 on these Appeals on the government by causing copies to be sent by both first-class mail and email to the following counsel of record for the government:

Robert M. Loeb
Attorney
Appellate Staff
Civil Division, Room 7268
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001



Neil H. Koslowe
Attorney.

[ORAL ARGUMENT HELD SEPTEMBER 8, 2005]

Nos. 05-5062 & 05-5063

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LAKHDAR BOUMEDIENE, *ET AL.*,
APPELLANTS,
VS.
GEORGE W. BUSH, *ET AL.*,
APPELLEES.

RIDOUANE KHALID,
APPELLANT,
VS.
GEORGE W. BUSH, *ET AL.*,
APPELLEES.

ON APPEAL FROM A DECISION OF THE
U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL BRIEF OF PETITIONERS REGARDING SECTION 1005 OF THE DETAINEE TREATMENT ACT OF 2005

Attorneys for Lakhdar Boumediene, et al.

Stephen H. Oleskey
Robert C. Kirsch
Douglas F. Curtis (Practicing in N.Y., N.Y.)
Melissa A. Hoffer
Wilmer Cutler Pickering Hale and Dorr LLP
60 State Street
Boston, MA 02109
(617) 526-6000

Attorneys for Ridouane Khalid

Wesley Powell
Hunton & Williams
200 Park Avenue
New York, NY 10166
(212) 309-1013

James Hosking
Christopher Land
Clifford Chance US LLP
31 W. 52nd Street
New York, NY 10019
(212) 878-8000

January 25, 2006

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and Amici

Except for the following, all parties, interveners, and amici appearing before this Court are listed in the Corrected Joint Brief of Appellants, dated May 3, 2005.

British and American Habeas Scholars* appear as amici before this Court on issues of common law habeas rights:

RIGHT HONOURABLE HELENA ANN KENNEDY
BARONESS (LADY) KENNEDY OF THE SHAWS QC
England

DENIS GALLIGAN
Professor of Socio-Legal Studies and Fellow
WOLFSON COLLEGE
UNIVERSITY OF OXFORD
England

DR. BENJAMIN GOOLD
University Lecturer in Law and Fellow
SOMERVILLE COLLEGE
UNIVERSITY OF OXFORD
England

BERNARD HARCOURT
Professor of Law
THE UNIVERSITY OF CHICAGO LAW SCHOOL
Chicago, Illinois

RANDY HERTZ
Professor of Clinical Law
NEW YORK UNIVERSITY SCHOOL OF LAW
New York, New York

DR. CAROLYN HOYLE
University Lecturer in Criminology and Fellow
GREEN COLLEGE
UNIVERSITY OF OXFORD
England

---

* Affiliations of amici are listed for identification purposes only.

DR. LIORA LAZARUS
University Lecturer in Law and Fellow
ST. ANNE'S COLLEGE
UNIVERSITY OF OXFORD
England

OWEN REES
Stipendiary Lecturer
LADY MARGARET HALL
UNIVERSITY OF OXFORD
England

IRA P. ROBBINS
Bernard T. Welsch Scholar and Professor of Law & Justice
AMERICAN UNIVERSITY,
WASHINGTON COLLEGE OF LAW
Washington, D.C.

JORDAN M. STEIKER
Cooper H. Ragan Regents Professor in Law
UNIVERSITY OF TEXAS SCHOOL OF LAW
Austin, Texas

CHARLES D. WEISSELBERG
Professor of Law and Director of Center for Clinical Education
UNIVERSITY OF CALIFORNIA, BERKELEY
SCHOOL OF LAW
Berkeley, Califonia

LARRY W. YACKLE
Professor of Law
BOSTON UNIVERSITY SCHOOL OF LAW
Boston, Massachusetts

TABLE OF CONTENTS

Page

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES i

TABLE OF AUTHORITIES v

GLOSSARY viii

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. SECTION 1005(E)(1) IS PROSPECTIVE AND DOES NOT AFFECT JURISDICTION OVER PETITIONERS' PRE-ENACTMENT *HABEAS* PETITIONS 2

A. The Text and Structure of Section 1005 Support Prospective Application 2

B. The Presumption Against Retroactivity Applies Because Section 1005(e)(1) Would Eliminate All *Habeas* Jurisdiction, Not Transfer It To A Different Forum 4

C. Congress Intended That Section 1005(e)(1) Apply Prospectively 6

II. PETITIONERS' *HABEAS* CHALLENGES ARE NOT "GOVERNED BY" § 1005(E)(2) 8

A. Petitioners Challenge Their Unlawful Detention, Not A CSRT Decision 8

III. THE COURT SHOULD CONSTRUE SECTION 1005(E)(1) TO APPLY PROSPECTIVELY TO AVOID SERIOUS CONSTITUTIONAL QUESTIONS 10

A. Congress Made No Clear Statement Of Intent To Suspend The Writ 10

B. Congress Made No Finding That The Predicates For Suspension Were Present 11

C. There Is Serious Doubt That Section 1005(e)(2) Provides An Adequate Substitute For *Habeas* 11

CONCLUSION 15

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

CERTIFICATE OF SERVICE

ADDENDUM A1

TABLE OF AUTHORITIES

CASES

Page(s)

Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003), *rev'd, Rasul v. Bush*, 542 U.S. 466 (2004) 5

Binot v. Gonzales, 403 F.3d 1094 (9th Cir. 2005) 13

Brown v. Allen, 344 U.S. 443 (1953) 12

Bruner v. United States, 343 U.S. 112 (1952) 6

Clay v. United States, 537 U.S. 522 (2003) 3

Demore v. Kim, 538 U.S. 510 (2003) 14

Duncan v. Kahanamoku, 327 U.S. 304 (1946) 11

Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1868) 6

Ex Parte Yerger, 75 U.S. (8 Wall.) 85 (1868) 11

FCC v. ITT World Communications, Inc., 466 U.S. 463 (1984) 9

Gallardo v. Santini Fertilizer Co., 275 U.S. 62 (1927) 6

Hadjimehdigholi v. INS, 49 F.3d 642 (10th Cir. 1995) 14

Hallowell v. Commons, 239 U.S. 506 (1916) 6

Harris v. Nelson, 394 U.S. 286 (1969) 13

* *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997) 4, 5, 6

* *INS v. St. Cyr*, 533 U.S. 289 (2001) ..... 5, 10 , 11, 12, 14

Kuhali v. Reno, 266 F.3d 93 (2d Cir. 2001) 12

LaFontant v. INS, 135 F.3d 158 (D.C. Cir. 1998) 6

* *Landgraf v. USI Film Products*, 511 U.S. 244 (1994) 2, 4, 5

* *Lindh v. Murphy*, 521 U.S. 320 (1997) 3

Merchants' Insurance Co. v. Ritchie, 72 U.S. (5 Wall.) 541 (1866) 6

---

* Authorities upon which we chiefly rely are marked with an asterisk.

NLRB v. Catholic Bishop, 440 U.S. 490 (1979) 10

Ogbudimpka v. Ashcroft, 342 F.3d 207 (3d Cir. 2003) 12

* *Rasul v. Bush*, 542 U.S. 466 (2004) 1, 5, 9, 10, 11

* *Republic of Austria v. Altmann*, 541 U.S. 677 (2004) 1, 5, 6

Santos v. Territory of Guam, No. 03-70472, 2005 WL 3579022 (9th Cir. Jan. 3, 2006) 6

Sherman v. Grinnell, 123 U.S. 679 (1887) 6

Smallwood v. Gallardo, 275 U.S. 56 (1927) 6

* *Swain v. Pressley*, 430 U.S. 372 (1977) 12

The Assessors v. Osbornes, 76 U.S. (9 Wall.) 567 (1869) 6

Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994) 9

United States v. Hayman, 342 U.S. 205 (1952) 12

United States v. Jauregui, 314 F.3d 961 (8th Cir. 2003) 14

Wang v. Ashcroft, 320 F.3d 130 (2d Cir. 2003) 12

Weinberger v. Rossi, 456 U.S. 25 (1982) 7

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. art. 1, § 9, cl. 2 ..... 10, 11

28 U.S.C. § 2241 1

28 U.S.C. § 2243 13

Act of Mar. 3, 1863, ch. 81, 12 Stat. 755 11

Act of Apr. 20, 1871, ch. 22, 17 Stat. 14-15 11

Act of July 1, 1902, ch. 1369, 32 Stat. 691 11

Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 ..... 1, 2, 9, 10

LEGISLATIVE MATERIALS

151 Cong. Rec. S12,267 (daily ed. Nov. 10, 2005) 7

151 Cong. Rec. S12,655 (daily ed. Nov. 10, 2005) 7

151 Cong. Rec. S12,803 (daily ed. Nov. 15, 2005) 7

151 Cong. Rec. S14,257-S14,258 (daily ed. Dec. 21, 2005) 7, 8

151 Cong. Rec. S14,263-S14,268 (daily ed. Dec. 21, 2005) 7

OTHER AUTHORITIES

Neuman, Gerald L. & Hobson, Charlie F., *John Marshall and The Enemy Alien: A Case Missing from the Canon*, 9 Green Bag 40 (2005) 13

GLOSSARY

Combatant Status Review Tribunal ..... CSRT

Detainee Treatment Act of 2005, Pub. L. No. 109-148 ..... the Act

Lakhdar Boumediene, et al., and Ridouane Khalid ("Petitioners") submit this brief pursuant to this Court's January 4 and January 13, 2006 orders.[1]

SUMMARY OF ARGUMENT

Section 1005 of the Detainee Treatment Act of 2005, Pub. L. No. 109-148 ("the Act"), does not alter the jurisdiction of this Court or the district court over Petitioners' petitions. The plain language and structure of the Act show that § 1005(e)(1) applies only to post-enactment petitions. Those elements are reinforced by the presumption against retroactivity, which applies to any attempt to abolish *habeas* jurisdiction "regardless of where the claim is brought." *Republic of Austria v. Altmann*, 541 U.S. 677, 695 n.15 (2004). Finally, Congress expressly considered making § 1005(e)(1) applicable retroactively, but then made it prospective only.

Section 1005(e)(2) has no bearing on this *habeas* proceeding. Section 1005(e)(2) grants this Court jurisdiction to hear challenges to the "validity of any final decision of a Combatant Status Review Tribunal (CSRT)." Petitioners challenge not their 2004 CSRT decisions, but rather their illegal confinement by the Executive since 2002. *See* 28 U.S.C. § 2241(c)(1), (3); *Rasul v. Bush*, 542 U.S. 466, 124 S.Ct. 2686 (2004). By vesting this Court with jurisdiction over CSRT challenges, Congress did not alter Petitioners' rights to continue to adjudicate their pre-enactment *habeas* petitions.

Even if it finds the Act ambiguous with respect to the prospectivity of § 1005(e)(1), this Court should construe the Act to avoid the constitutional infirmities that would arise if Congress sought to eliminate Petitioners' right to seek federal *habeas* relief.

---

[1] Petitioners incorporate by reference the arguments of Petitioners/Appellants/Cross-Appellees in the supplemental brief filed in *Al Odah, et al. v. Bush, et al.*, Nos. 05-5064, 05-5095 through 05-5116.

ARGUMENT

I. SECTION 1005(E)(1) IS PROSPECTIVE AND DOES NOT AFFECT JURISDICTION OVER PETITIONERS' *HABEAS* PETITIONS

The text and structure of § 1005, the presumption against retroactivity, and the drafting history of the Act show that the government's contention is wrong, and that § 1005(e)(1) applies only prospectively. Section 1005(e)(1) does not deprive federal courts of jurisdiction to hear *habeas* petitions filed in 2004 by Guantanamo Bay prisoners.

A. The Text and Structure of Section 1005 Support Prospective Application

Section 1005(e)(1) provides, in relevant part, that "no court, justice, or judge shall have jurisdiction to hear or consider . . . an application for a writ of *habeas corpus* filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba." Section 1005(e)(1) is silent about its application to pending cases, but § 1005(h) addresses the "effective date" of the sub-parts of § 1005(e):

> (1) IN GENERAL—This section shall take effect on the date of the enactment of this Act.
>
> (2) REVIEW OF COMBATANT STATUS TRIBUNAL AND MILITARY COMMISSION DECISIONS—Paragraphs (2) and (3) of subsection (e) shall apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this Act.

Section 1005(h)(1) states only that § 1005(e)(1) "shall take effect on the date of the enactment of this Act." "A statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 257 (1994). In contrast, § 1005(h)(2) specifies that §§ 1005(e)(2) and (e)(3) apply to any claims "pending on or after the date of the enactment of this Act" "governed by" those paragraphs. By excluding § 1005(e)(1) from the provisions

applicable to pending cases, Congress expressed its intention that § 1005(e)(1) should apply only to post-enactment petitions.[2]

In *Lindh v. Murphy*, 521 U.S. 320 (1997), the Supreme Court considered an analogous statutory scheme. At issue there was whether amendments to chapter 153 of Title 28 imposing new limitations on the availability of federal *habeas corpus* in non-capital cases, enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), should apply to cases pending on the date of AEDPA's enactment. Although the relevant provisions of AEDPA did not expressly address the temporal applicability of the amendments to chapter 153, the Court emphasized that AEDPA had also amended chapter 154 of Title 28 by imposing limitations on *habeas corpus* in capital cases and had expressly provided that those amendments *would* apply to pending cases. *Lindh*, 521 U.S. at 327. The Court concluded that AEDPA's express application of chapter 154 "to all cases pending at enactment . . . indicat[ed] implicitly that the amendments to chapter 153 were assumed and meant to apply to the general run of *habeas* cases *only when those cases had been filed after the date of the Act.*" *Id.* (emphasis added).

The same reasoning applies here. "If Congress was reasonably concerned to ensure that [§§ 1005(e)(2) and (3)] be applied to pending cases, it should have been just as concerned about [§ 1005(e)(1)], unless it had the different intent that the latter [section] not be applied to the general run of pending cases." 521 U.S. at 329. This interpretation is supported by "the familiar rule that negative implications raised by disparate provisions are strongest when the portions of a statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted." *Id.* at 330.

---

[2] *See, e.g., Clay v. United States*, 537 U.S. 522, 528 (2003) ("When Congress includes particular language in one section of a statute but omits it in another section of the same Act, . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (citations omitted)).

Section 1005(h)(2) expressly applies only §§ (e)(2) and (e)(3) to pending cases, plainly indicating Congress's intent that § (e)(1) not strip Petitioners' *habeas* rights.

B. The Presumption Against Retroactivity Applies Because Section 1005(e)(1) Would Eliminate All *Habeas* Jurisdiction, Not Transfer It To A Different Forum

The language and structure of § 1005 show § (e)(1) applies only prospectively. Even were that section ambiguous, the presumption against retroactivity would foreclose the government's interpretation. "[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf*, 511 U.S. at 265. "[P]rospectivity remains the appropriate default rule . . . [b]ecause it accords with widely held intuitions about how statutes ordinarily operate[.]" *Id.* at 272. Accordingly, "'congressional enactments . . . will not be construed to have retroactive effect unless their language requires this result.'" *Id.* Nothing in § 1005(e)(1) suggests this Court should override the presumption against retroactivity. The disparate language used in §§ 1005(h)(1) and (h)(2) supports the opposite conclusion.

Although statutes that "affect only *where* a suit may be brought, not *whether* it may be brought at all," may not trigger the presumption against retroactivity, § 1005(e)(1) is not such a statute. *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 951 (1997) (emphasis in original). Rather, 1005(e)(1) speaks "not just to the power of a particular court but to the substantive rights of the parties as well. Such a statute, even though phrased in 'jurisdictional' terms, is as much subject to our presumption against retroactivity as any other." *Id.*; *see also Landgraf*, 511 U.S. at 274 (retroactive application of jurisdictional rule permissible only when it "'takes away no substantive right but simply changes the tribunal that is to hear the case'"). A limitation that applies "regardless of where the claim is brought" is "essentially

substantive," and therefore subject to the presumption against retroactive application. *Republic of Austria v. Altmann*, 541 U.S. 677, 695 n.15 (2004).

When it held in *Al Odah v. United States* that federal courts lacked jurisdiction over *habeas* claims of Guantanamo prisoners because the men had no constitutional rights, this Court recognized the inseparable nature of *habeas* jurisdiction and substantive *habeas* rights. *See* 321 F.3d 1134, 1141 (D.C. Cir. 2003), *rev'd, Rasul v. Bush*, 542 U.S. 466 (2004). *Rasul* confirmed that the right to a hearing to test the legal and factual basis for imprisonment attaches to *habeas* jurisdiction. *See Rasul*, 542 U.S. at 483, 485 ("We therefore hold that § 2241 confers on the District Court jurisdiction to hear petitioners' *habeas corpus* challenges to the legality of their detention at the Guantanamo Bay Naval Base. . . . We reverse the judgment of the Court of Appeals and remand for the District Court to consider in the first instance the merits of petitioners' claims."). Here, stripping *habeas* jurisdiction would condemn Petitioners to suffer the very fate *habeas* was created to avoid: indefinite executive imprisonment, without charge, with no chance to test the asserted basis for imprisonment. *Cf., INS v. St. Cyr*, 533 U.S. 289, 311 (2001) ("judicial review" has historically meant something different from *habeas* review).

The government urges an interpretation of § 1005, framed through the prism of *Landgraf* dicta about "statutes conferring or ousting jurisdiction," 511 U.S. at 274, and presses for a new rule—that statutes "removing jurisdiction" (not statutes transferring jurisdiction) "presumptively apply to pending cases." Gov. Supp. Br. 6. But the Supreme Court rejected this argument in *Hughes Aircraft*, noting that it "simply misread[s] our decision in *Landgraf*, for the only 'presumption' mentioned in that opinion is a general presumption *against* retroactivity." 520 U.S. at 950 (emphasis in original). Indeed, the government's own citations show a "jurisdictional" statute applies retroactively only if it changes where, not whether, a party may

bring a claim. *See, e.g., Bruner v. United States*, 343 U.S. 112, 115-117 (1952) (statute stripping District Court jurisdiction, but retaining Court of Claims jurisdiction, "has not altered the nature or validity of petitioner's rights . . . but has simply reduced the number of tribunals authorized to hear and determine such rights"). *Id.* at 117.[3]

Section 1005(e)(1) does not simply transfer *habeas* cases between forums. Rather, it purports to bar *habeas* claims, "regardless of where the claim is brought." *Altmann*, 541 U.S. at 695 n.15. Applied retroactively, that section would deprive Petitioners of both the right to have a court review the legal and factual basis for their imprisonment, and the remedy of *habeas* release from that unlawful detention. The presumption against retroactivity applies here; § 1005(e)(1) is prospective. *See Hughes Aircraft*, 520 U.S. at 951.

C. Congress Intended That Section 1005(e)(1) Apply Prospectively

The language of § 1005 and the presumption against retroactivity obviate the need to rely on drafting history. That history, however, further refutes the government's interpretation.

---

[3] *See also Smallwood v. Gallardo*, 275 U.S. 56, 61-62 (1927) (statute forbade suits to enjoin tax collection; taxpayer retained the "power to resist an unlawful tax"); *Gallardo v. Santini Fertilizer Co.*, 275 U.S. 62 (1927) (similar); *Sherman v. Grinnell*, 123 U.S. 679, 679-680 (1887) (statute removed appellate jurisdiction in Supreme Court over remand orders; jurisdiction remained in circuit courts); *The Assessors v. Osbornes*, 76 U.S. (9 Wall.) 567, 574 (1869) (statute forbade federal suits absent diversity; suits could "be commenced in the State courts"); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 515 (1868) (repealed Supreme Court appellate jurisdiction under the Act of 1867; jurisdiction remained in the circuits, and appellate jurisdiction "previously exercised" under other provisions remained); *Merchants' Ins. Co. v. Ritchie*, 72 U.S. (5 Wall.) 541, 542 (1866) (repealed circuit court jurisdiction; redress still possible in state court); *Santos v. Territory of Guam*, No. 03-70472, 2005 WL 3579022, at *2 (9th Cir. Jan. 3, 2006) (as the statute in *Bruner* preserved Court of Claims jurisdiction, this statute "preserve[d] jurisdiction over the same cases in the Guam court system and review by certiorari in the United States Supreme Court").

Statutes transferring jurisdiction from courts to non-judicial officials have been applied to pending cases when the official was empowered to decide all of the claims raised in court. None were *habeas* cases. *See, e.g., Hallowell v. Commons*, 239 U.S. 506, 507-508 (1916) (statute allowed Interior Secretary to decide whether plaintiff was heir to Indian's estate); *LaFontant v. INS*, 135 F.3d 158, 165 (D.C. Cir. 1998) (removing appellate jurisdiction over certain deportation orders gave "agency proceedings greater finality" over claims that would have been appealed). In contrast, § 1005(e)(1) would deprive Petitioners of all *habeas* claims.

The language of § 1005(h) differs significantly from earlier versions, which would have applied § 1005(e)(1)'s jurisdiction-stripping language to pending cases. As Senator Levin explained on the floor, Congress adopted the final language of § 1005(h) in lieu of at least three alternative versions, each of which would have stripped jurisdiction over pending *habeas* cases. *See* 151 Cong. Rec. S14,257 – S14,258 (daily ed. Dec. 21, 2005). A version which passed the Senate on November 10, 2005, would have eliminated *habeas* jurisdiction for "any application or other action that is pending on or after the date of the enactment of this act." *See id.* at S12,667 (daily ed. Nov. 10, 2005) (Amendment 2516, § (d)(3)); *see also id.* at S12,655 (virtually identical language in proposed Amendment 2515).

The Graham-Levin-Kyl Amendment, the direct predecessor of § 1005, changed the retroactive language. *See* 151 Cong. Rec. S12,803 (daily ed. Nov. 15, 2005) (vote on Amendment 2524). During the debate on that Amendment, Senator Levin stated that the restrictions on *habeas* petitions by Guantanamo Bay prisoners "would apply only to new *habeas* cases filed after the date of enactment." *Id.* at S12,802. No Senator offered a different view.[4] When the Senate voted on the final version of the Act, which retained the relevant Graham-Levin-Kyl language, Senator Levin, again, expressed his understanding that the Act would not deprive federal courts—including the Supreme Court—of jurisdiction over pending *habeas* cases, because Congress wanted to "avoid repeating the unfortunate precedent in *Ex Parte McCardle*, [74 U.S. (7 Wall.) 506 (1868)], in which Congress intervened to strip the Supreme

---

[4] Statements made in the Senate—*after* the definitive December 21 Senate vote on the Graham-Levin-Kyl Amendment, which became § 1005—suggest that some Senators advocated that § 1005(e)(1) apply to pending cases. *See* 151 Cong. Rec. S14,263 – S14,268 (daily ed. Dec. 21, 2005) (statements of Sen. Kyl and Sen. Graham). By contrast, Senator Levin's floor statement explaining that § (e)(1) would not apply to pending cases, was made during the debate on that Amendment, and immediately before that definitive vote. Senator Levin's statement is more probative of the meaning of that Amendment. *Cf. Weinberger v. Rossi*, 456 U.S. 25, 35 (1982) (declining to accord weight to "post hoc" congressional statements).

Court of jurisdiction over a case which was pending before the Court." 151 Cong. Rec. S14,257 – S14,258 (daily ed. Dec. 21, 2005).[5]

II. PETITIONERS' *HABEAS* CHALLENGES ARE NOT "GOVERNED BY" § 1005(E)(2)

That § 1005(e)(2) grants this Court original jurisdiction to hear a new category of claims does not alter the federal courts' jurisdiction to hear Petitioners' *habeas* petitions under 28 U.S.C. § 2241. Section 1005(e)(2) does not apply to the matter *sub judice*. *See* § 1005(h)(2) (providing that §§ 1005(e)(2) and (3) apply only to pending and future claims that are "governed by" those paragraphs).

A. Petitioners Challenge Their Unlawful Detention, Not A CSRT Decision.

Section 1005(e)(2) invests this Court with "exclusive jurisdiction to determine *the validity of any final decision* of a [CSRT] that an alien is properly detained as an enemy combatant." Section 1005(e)(2)(A) (emphasis added). Petitioners filed *habeas* petitions before any "final decision" by a CSRT. J.A. 0064-0081.[6] Petitioners had been imprisoned at Guantanamo for two and one-half years before any CSRT existed.

---

[5] The prospective nature of § 1005(e)(1) comports with the overall prospective character of § 1005. The first subsections of § 1005 impose several obligations on the Secretary of Defense regarding procedures for the treatment of persons held at Guantanamo. Those requirements are prospective and ensure that future procedures at Guantanamo will be subject to legislative as well as judicial oversight. Provisions regarding judicial access for persons held under those new procedures, *see* § 1005(e), are part of this new scheme. *See, e.g.*, § 1005(a)(1) (Secretary to report to Congress, within 180 days, the procedures he has established for CSRTs); § 1005(a)(2) (Secretary's procedures must include final review by a "Designated Civilian Official"); § 1005(a)(3) (Secretary's procedures must provide for "periodic review of any new evidence"); § 1005(b)(1) (Secretary's procedures must ensure that CSRTs assess whether statements were "obtained as a result of coercion"); § 1005(b)(2) (provisions of § 1005(b)(1) apply "any proceeding beginning on or after the date of the enactment of this Act"); § 1005(c) (Secretary to notify Congress of any modification to reported procedures); § 1005(d) (Secretary to submit annual reports to Congress).

[6] Amended petitions were filed for the Boumediene Petitioners on August 20, 2004. J.A. 0006. Their final CSRT decisions are dated between October 11 and October 28, 2004. J.A. 0335, 0354, 0394, 0454, 0511, 0575. Appellant Khalid's petition was filed on July 6, 2004. J.A. 1109. It was never amended. Mr. Khalid's final CSRT decision is dated October 15, 2004. J.A. 1170.

Had Congress wished to apply the procedures of § 1005(e)(2) to Petitioners' pending *habeas* cases, it easily could have done so. Section 1005(e)(1), which eliminates federal jurisdiction prospectively, applies to "an application for a writ of *habeas corpus*" and "any other action . . . relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay." Section 1005(e)(1). Congress chose narrower language in granting jurisdiction to this Court under § 1005(e)(2). That section permits challenges to the "validity of any final [CSRT] decision." Congress' use of disparate language in consecutive sections demonstrates that Petitioners' *habeas* petitions do not fall under § 1005(e)(2).[7]

The government's interpretation of § 1005(e)(2) would render § 1005(e)(1) meaningless. If § 1005(e)(2) "governs" all *habeas* petitions filed by Guantanamo detainees, there would have been no need to remove jurisdiction over post-enactment petitions in § 1005(e)(1). It is precisely because jurisdiction under § 1005(e)(2) does *not* govern traditional *habeas* claims that Congress sought to strip prospective *habeas* jurisdiction.[8]

---

[7] Amicus Washington Legal Foundation's (WLF) assertion that the language of § 1005(h)(2) constitutes a Congressional finding that claims "governed by" §§ 1005(e)(2) and (3) must have been pending on the date of enactment is nonsense. *See* WLF Amicus Br. 8. Section 1005(h)(2) also applies to § 1005(e)(3), and there were no "final decisions" of military commissions pending on the date of enactment. Section 1005 (h)(2) simply means that it applies to any claim, pending or future, that falls within its terms. Whether claims are "governed by" § 1005(e)(2) must be ascertained by reference to the language of § 1005(e)(2), not by reference to the "effective date" in § 1005(h)(2).

[8] The government's argument that "an exclusive review mechanism forecloses courts from asserting jurisdiction over the matter under more general grants of jurisdiction" (Gov. Br. 3), is irrelevant. First, the principle applies where the specific and general grants cover the same challenges. As set forth *infra* at Section III.C, *habeas* challenges require a searching review of the legal and factual bases for Executive detention, while, on its face, § 1005(e)(2) addresses only the validity of CSRT decisions. Second, the cases the government cites involved suits filed notwithstanding a pre-existing review procedure, such that the court lacked jurisdiction when the suit was filed. *See, e.g., FCC v. ITT World Communs., Inc.*, 466 U.S. 463, 466 (1984) (exclusive review procedure in this Court existed when district court action was filed); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 205, 211 (1994) (review procedure was passed in 1977, and petitioner filed suit in 1990). Here, the district court had jurisdiction over Petitioners' *habeas* petitions when they were filed. *See Rasul*, 542 U.S. at 484.

III. THE COURT SHOULD CONSTRUE SECTION 1005(E)(1) TO APPLY PROSPECTIVELY TO AVOID SERIOUS CONSTITUTIONAL QUESTIONS

Even if this Court finds the language of the Act respecting section 1005(e)(1)'s applicability ambiguous, it should avoid a construction raising serious constitutional questions. *See NLRB v. Catholic Bishop*, 440 U.S. 490 (1979); *St. Cyr*, 533 U.S. at 300, 326 (rejecting argument that the AEDPA stripped federal *habeas* jurisdiction over challenge to Attorney General's determination that alien petitioner was not eligible for discretionary relief, where such a construction "would give rise to substantial constitutional questions").[9]

A construction of § 1005(e)(1) precluding judicial review of Petitioners' *habeas* claims would violate the Suspension Clause. Congress expressed no intent to suspend the writ and said nothing about any constitutional predicate for suspension. The review procedure afforded by § 1005(e)(2) likely is neither an adequate nor an effective substitute for *habeas*. As the Supreme Court noted in *St. Cyr*, the fact that it (like this Court here) would be required to "answer the difficult question of what the Suspension Clause protects is in and of itself a reason to avoid answering the constitutional questions that would be raised by concluding that [*habeas*] review was barred entirely." *St. Cyr*, 533 U.S. at 301 & n.13.

A. Congress Made No Clear Statement Of Intent To Suspend The Writ

Article I, § 9, cl. 2, of the Constitution provides: "The Privilege of the Writ of *Habeas Corpus* shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Congress has suspended the writ on only four occasions. Each time, it

---

[9] Congress may not freely suspend the writ as to "nonresident aliens." *Cf.* WLF Supp. Br. 14. The Suspension Clause applies to *habeas* for aliens held within the territorial jurisdiction of the United States, regardless of their status as residents. *See, e.g., St. Cyr*, 533 U.S. at 298, 300 (revoking alien's right to bring a *habeas* petition would raise "substantial constitutional problems" under the Suspension Clause, where alien conceded he was deportable and had no legal right to reside in the United States). The Supreme Court has held that Guantanamo Bay is United States territory for *habeas* purposes. *See Rasul*, 542 U.S. at 483-484; *see also id.* at 487 (Kennedy, J., concurring).

expressly authorized suspension.[10] Each suspension was limited in time. Absent any such express statement from Congress, this Court should not construe the Act as suspending the writ by implication.

B. Congress Made No Finding That The Predicates For Suspension Were Present

Congress may suspend *habeas* only: "when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. 1, § 9, cl. 2; *see Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 95 (1868) (Suspension Clause "absolutely prohibits the suspension of the writ, except under extraordinary exigencies"). Each of the four occasions on which the writ was suspended involved either an ongoing rebellion or invasion that threatened the operation of civil institutions. Because Congress found no such circumstance here, suspension would be unconstitutional.

C. There is Serious Doubt That Section 1005(e)(2) Provides An Adequate Substitute For *Habeas*

At minimum, the Suspension Clause protects the writ "as it existed in 1789." *St. Cyr*, 533 U.S. at 301 (citing *Felker*). The Supreme Court repeatedly has observed that "[a]t its historical core, the writ of *habeas corpus* has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *Rasul*, 542

---

[10] *See* Act of Mar. 3, 1863, ch. 81, 12 Stat. 755 (Civil War) ("That, during the present rebellion, the President of the United States, whenever in his judgment the public safety may require it, is authorized to suspend the privilege of the writ of habeas corpus in any case throughout the United States, or any part thereof."); Act of Apr. 20, 1871, ch. 22, 17 Stat. 14-15 (armed resistance to Reconstruction) ("[W]henever in any State, . . . shall be organized and armed, and so numerous and powerful as to be able, by violence, to either overthrow or set at defiance the constituted authorities of such State, . . . and the preservation of the public safety shall become in such district impracticable, in every such case such combination shall be deemed a rebellion against the government of the United States, and during the continuance of such rebellion, . . . it shall be lawful for the President of the United States, when in his judgment the public safety shall require it, to suspend the privilege of the writ of habeas corpus . . . ."); Act of July 1, 1902, ch. 1369, 32 Stat. 691 (Philippine rebellion) ("[t]hat the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion, insurrection, or invasion the public safety may require it"). The Governor of Hawaii also suspended *habeas corpus* immediately following Pearl Harbor pursuant to Section 67 of the Hawaiian Organic Act, which authorized suspension "in case of rebellion or invasion or imminent danger thereof, when the public safety requires it." *Duncan v. Kahanamoku*, 327 U.S. 304, 307-308 (1946).

U.S. at 474 (citing *St. Cyr*, 533 U.S. at 310); *Swain v. Pressley*, 430 U.S. 372, 380 (1977); *Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J. concurring). Historically, *habeas* challenges have included not only challenges to a custodian's jurisdiction, but challenges to "detentions based on errors of law, including the erroneous application or interpretation of statutes." *St. Cyr*, 533 U.S. at 302 & n.18. *Habeas* guarantees judicial review of constitutional questions and questions of law, including, importantly, the application of laws to facts. *See Ogbudimpka v. Ashcroft*, 342 F.3d 207, 222 (3d Cir. 2003); *Wang v. Ashcroft*, 320 F.3d 130, 143 (2d Cir. 2003).

Absent a valid suspension, limits on the availability of the writ are accepted only if a substitute remedy is both adequate and effective to "test the legality of a person's detention." *Swain*, 430 U.S. at 381; *see also St. Cyr*, 533 U.S. at 305 (observing that "a serious Suspension Clause issue would be presented" under the government's view that federal *habeas* jurisdiction had been stripped without any adequate substitute for its exercise); *Kuhali v. Reno*, 266 F.3d 93 (2d Cir. 2001) (statute which purports to strip courts of jurisdiction to review final orders of removal issued against certain non-citizens did not supplant *habeas* jurisdiction because "Congress has provided no . . . substitute remedy in this context"); *United States v. Hayman*, 342 U.S. 205, 219 (1952) (avoiding constitutional question by holding that § 2255 was as broad as *habeas corpus*).

No court has construed, much less applied, § 1005(e)(2). Until that occurs, it is not established whether those procedures accommodate full review of all of Petitioners' *habeas* claims.[11] But even if § 1005(e)(2) allowed this Court to address all challenges to Petitioners' imprisonment presented in this appeal, § 1005(e)(2) does not provide for a searching *habeas* review of the government's claimed factual support.

---

[11] The government surfaces here briefly its future argument that "review is more limited in this Court under section 1005" than under traditional *habeas*. Gov. Supp. Br. 9.

At minimum, "[p]etitioners in *habeas corpus* proceedings . . . are entitled to careful consideration and plenary processing of their claims including full opportunity for the presentation of the relevant facts." *Harris v. Nelson*, 394 U.S. 286, 298 (1969). On its face, § 1005(e)(2) lacks any mechanism for Petitioners to probe and rebut any facts purportedly relied upon by the Executive when it decided to imprison them at Guantanamo. In contrast to a robust *habeas* review, § 1005(e)(2) appears to require this Court to accept the government's factual return (*i.e.*, the CSRT record) and to limit its review to whether (i) the CSRT complied with its own standards and procedures; (ii) Petitioners have certain rights; and (iii) use of the CSRT standards and procedures comported with those rights (if any). *Cf.* 28 U.S.C. § 2243 (providing right to a factual return "certifying the true cause of the detention," the opportunity to traverse the return, and the right to a "hearing"). Such a review is not an adequate substitute for *habeas* review, which for centuries has protected those unlawfully imprisoned by the Executive by securing the right to an individualized inquiry into the facts asserted to justify detention. *See* Br. of Amici Curiae British and American Habeas Scholars. That the government alleges Petitioners are enemy aliens does not alter their right to such review. *See id.*[12]

The government's reliance on cases construing the REAL ID Act of 2005 is unavailing. *See* Gov. Br. 13. Those petitioners had received the process Petitioners here seek in *habeas*—a meaningful opportunity to test the legal and factual bases of the government's claims in a process providing notice of the government's allegations, an opportunity to present evidence and witnesses, and the assistance of counsel. *See Binot v. Gonzales*, 403 F.3d 1094, 1099 (9th Cir.

---

[12] *See also* Gerald L. Neuman & Charlie F. Hobson, *John Marshall and The Enemy Alien: A Case Missing from the Canon*, 9 Green Bag 40, 41-42 (2005) (citing *United States v. Thomas Williams*, U.S. Cir. Ct. for Dist. of Va. 1813) (Marshall, C.J., on circuit). Chief Justice Marshall reviewed the petition of Thomas Williams, charged as an enemy alien, to determine whether his imprisonment was lawful pursuant to regulations "respecting enemy aliens." Finding the regulations did not authorize Williams' confinement, Marshall ordered his release.

2005); *United States v. Jauregui*, 314 F.3d 961, 962-963 (8th Cir. 2003); *Hadjimehdigholi v. INS*, 49 F.3d 642, 649 (10th Cir. 1995).

Moreover, § 1005(e)(2) does not expressly grant this Court authority to provide a remedy if a CSRT decision is held "invalid." This is particularly significant here, where the government contends that § 1005 prohibits federal courts from ordering the release even of Guantanamo detainees *exonerated by CSRT decisions*. The government, remarkably, contends that persons exonerated by CSRTs may nonetheless "remain detained" as "former enemy combatants" at the Executive's discretion. Gov. Opp. to Mot. to Expedite Appeal 3, *Qassim v. Bush*, No. 05-5477 (filed Jan. 18, 2006) (attached at Addendum). Petitioners anticipate that the Government will also contend that such imprisonment may continue, even absent a CSRT finding of "enemy combatant" status, and that nothing in § 1005(e)(2) permits prisoners to challenge, or this Court to review, such continuing detention. *See id.* at 5 (contending § 1005 bars any challenge to detention by persons exonerated by a CSRT). Plainly, § 1005(e) cannot be an adequate substitute for *habeas* if it provides no means to command a prisoner's release.

This Court should construe § 1005(e)(1) to apply prospectively and reject the government's invitation to adopt a construction that would raise serious constitutional questions. *See St. Cyr*, 533 U.S. at 314; *Demore v. Kim*, 538 U.S. 510, 538 (2003) (O'Connor, J., concurring in part and concurring in the judgment).[13]

[13] If this Court finds that § 1005(e)(1) retroactively repeals *habeas corpus*, the doctrine of constitutional avoidance warrants construing the scope of review afforded by § 1005(e)(2) broadly to include all review available on *habeas*, and to authorize this Court to order the release of detainees whose claims are successful.

CONCLUSION

For the foregoing reasons, this Court should hold that the Act does not divest its jurisdiction to address Petitioners' pending appeals of the District Court's dismissal of their *habeas* claims.

Dated: January 25, 2006

Respectfully Submitted,

Stephen H. Oleskey /do

Stephen H. Oleskey
Robert C. Kirsch
Melissa A. Hoffer
Wilmer Cutler Pickering Hale and Dorr LLP
60 State Street
Boston, MA 02109
Phone: (617) 526-6000
Fax: (617) 526-5000

Douglas F. Curtis
Wilmer Cutler Pickering Hale and Dorr LLP
339 Park Avenue
New York, NY 10022
Phone: (212) 230-8800
Fax: (212) 230-8888

Attorneys for Petitioners Lakhdar Boumediene, et al.

Respectfully Submitted,

Wesley R. Powell /do

Wesley R. Powell
Hunton & Williams
200 Park Avenue
New York, NY 10166
Phone: (212) 309-1000
Fax: (212) 309-1100

James Hosking
Christopher Land
Clifford Chance US LLP
31 W. 52nd Street
New York, NY 10019
(212) 878-8000

Attorneys for Appellant Ridouane Khalid

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C)
OF THE FEDERAL RULES OF APPELLATE PROCEDURE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), that the foregoing brief uses a proportionally spaced face of 11-point or larger. The brief is 15 pages (which is within the page limit set out in this Court's January 5, 2006 order.)

Stephen H. Oleskey /do
Stephen H. Oleskey

CERTIFICATE OF SERVICE

I, Stephen H. Oleskey, hereby certify that on January 25, 2006, I served a copy of this motion by first class mail and by email transmission upon counsel of record in this case at the following addresses:

Robert M. Loeb, Esq.
Douglas N. Letter, Esq.
Eric D. Miller, Esq.
U.S. Department of Justice
(DOJ) Civil Division - Appellate Staff
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001
Counsel for Government

Stephen H. Oleskey /do
Stephen H. Oleskey

ADDENDUM

ADDENDUM TABLE OF CONTENTS

DESCRIPTION	Page
Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680	A1
Opposition to Motion to Expedite Appeal, *Qassim v Bush*, No. 05-5477 (D.C. Cir. filed Jan. 18, 2006)	A8

UNITED STATES PUBLIC LAWS
109th Congress - First Session
Convening January 7, 2005

Additions and Deletions are not identified in this database.
Vetoed provisions within tabular material are not displayed

PL 109-148 (HR 2863)
December 30, 2005
DEPARTMENT OF DEFENSE, EMERGENCY SUPPLEMENTAL APPROPRIATIONS TO ADDRESS HURRICANES IN THE GULF OF MEXICO, AND PANDEMIC INFLUENZA ACT, 2006

An Act Making appropriations for the Department of Defense for the fiscal year ending September 30, 2006, and for other purposes.

TITLE X--MATTERS RELATING TO DETAINEES
<< 42 USCA § 2000dd NOTE >>

SEC. 1001. SHORT TITLE.

This title may be cited as the "Detainee Treatment Act of 2005".

<< 10 USCA § 801 NOTE >>

SEC. 1002. UNIFORM STANDARDS FOR THE INTERROGATION OF PERSONS UNDER THE DETENTION OF THE DEPARTMENT OF DEFENSE.

(a) IN GENERAL.--No person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation.

(b) APPLICABILITY.--Subsection (a) shall not apply with respect to any person in the custody or under the effective control of the Department of Defense pursuant to a criminal law or immigration law of the United States.

(c) CONSTRUCTION.--Nothing in this section shall be construed to affect the rights under the United States Constitution of any person in the custody or under the physical jurisdiction of the United States.

<< 42 USCA § 2000dd >>

SEC. 1003. PROHIBITION ON CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT OF PERSONS UNDER CUSTODY OR CONTROL OF THE UNITED STATES GOVERNMENT.

(a) IN GENERAL.--No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.

(b) CONSTRUCTIO.n--Nothing in this section shall be construed to impose any geographical limitation on the applicability of the prohibition against cruel, inhuman, or degrading treatment or punishment under this section.

(c) LIMITATION ON SUPERSEDURE.--The provisions of this section shall not be superseded, except by a provision of law enacted after the date of the enactment of this Act which specifically repeals, modifies, or supersedes the provisions of this section.

*2740
(d) CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT DEFINED.--In this section, the term "cruel, inhuman, or degrading treatment or punishment" means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.

<< 42 USCA § 2000dd NOTE >>

SEC. 1004. PROTECTION OF UNITED STATES GOVERNMENT PERSONNEL ENGAGED IN

AUTHORIZED INTERROGATIONS.

(a) PROTECTION OF UNITED STATES GOVERNMENT PERSONNEL.--In any civil action or criminal prosecution against an officer, employee, member of the Armed Forces, or other agent of the United States Government who is a United States person, arising out of the officer, employee, member of the Armed Forces, or other agent's engaging in specific operational practices, that involve detention and interrogation of aliens who the President or his designees have determined are believed to be engaged in or associated with international terrorist activity that poses a serious, continuing threat to the United States, its interests, or its allies, and that were officially authorized and determined to be lawful at the time that they were conducted, it shall be a defense that such officer, employee, member of the Armed Forces, or other agent did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful. Good faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful. Nothing in this section shall be construed to limit or extinguish any defense or protection otherwise available to any person or entity from suit, civil or criminal liability, or damages, or to provide immunity from prosecution for any criminal offense by the proper authorities.

(b) COUNSEL.--The United States Government may provide or employ counsel, and pay counsel fees, court costs, bail, and other expenses incident to the representation of an officer, employee, member of the Armed Forces, or other agent described in subsection (a), with respect to any civil action or criminal prosecution arising out of practices described in that subsection, under the same conditions, and to the same extent, to which such services and payments are authorized under section 1037 of title 10, United States Code.

<< 10 USCA § 801 NOTE >>

SEC. 1005. PROCEDURES FOR STATUS REVIEW OF DETAINEES OUTSIDE THE UNITED STATES.

(a) SUBMITTAL OF PROCEDURES FOR STATUS REVIEW OF DETAINEES AT GUANTANAMO BAY, CUBA, AND IN AFGHANISTAN AND IRAQ.--

(1) IN GENERAL.--Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall submit to the Committee on Armed Services and the Committee on the Judiciary of the Senate and the Committee on Armed Services and the Committee on the Judiciary of the House of Representatives a report setting forth--

(A) the procedures of the Combatant Status Review Tribunals and the Administrative Review Boards established by direction of the Secretary of Defense that are ***2741** in operation at Guantanamo Bay, Cuba, for determining the status of the detainees held at Guantanamo Bay or to provide an annual review to determine the need to continue to detain an alien who is a detainee; and

(B) the procedures in operation in Afghanistan and Iraq for a determination of the status of aliens detained in the custody or under the physical control of the Department of Defense in those countries.

(2) DESIGNATED CIVILIAN OFFICIAL.--The procedures submitted to Congress pursuant to paragraph (1)(A) shall ensure that the official of the Department of Defense who is designated by the President or Secretary of Defense to be the final review authority within the Department of Defense with respect to decisions of any such tribunal or board (referred to as the "Designated Civilian Official") shall be a civilian officer of the Department of Defense holding an office to which appointments are required by law to be made by the President, by and with the advice and consent of the Senate.

(3) CONSIDERATION OF NEW EVIDENCE.--The procedures submitted under paragraph (1)(A) shall provide for periodic review of any new evidence that may become available relating to the enemy combatant status of a detainee.

(b) CONSIDERATION OF STATEMENTS DERIVED WITH COERCION.--

(1) ASSESSMENT.--The procedures submitted to Congress pursuant to subsection (a)(1)(A) shall ensure that a Combatant Status Review Tribunal or Administrative Review Board, or any similar or successor administrative tribunal or board, in making a determination of status or disposition of any detainee under such procedures, shall, to the extent practicable, assess--

(A) whether any statement derived from or relating to such detainee was obtained as a result of coercion; and

(B) the probative value (if any) of any such statement.

(2) APPLICABILITY.--Paragraph (1) applies with respect to any proceeding beginning on or after the date of the enactment of this Act.

(c) REPORT ON MODIFICATION OF PROCEDURES.--The Secretary of Defense shall submit to the committees specified in subsection (a)(1) a report on any modification of the procedures submitted under subsection (a). Any such report shall be submitted not later than 60 days before the date on which such modification goes into effect.

(d) ANNUAL REPORT.--

(1) REPORT REQUIRED.--The Secretary of Defense shall submit to Congress an annual report on the annual review process for aliens in the custody of the Department of Defense outside the United States. Each such report shall be submitted in unclassified form, with a classified annex, if necessary. The report shall be submitted not later than December 31 each year.

(2) ELEMENTS OF REPORT.--Each such report shall include the following with respect to the year covered by the report:

(A) The number of detainees whose status was reviewed.

(B) The procedures used at each location.

(e) JUDICIAL REVIEW OF DETENTION OF ENEMY COMBATANTS.--

*2742

<< 28 USCA § 2241 >>

(1) IN GENERAL.--Section 2241 of title 28, United States Code, is amended by adding at the end the following:

"(e) Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider--

"(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or

"(2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who--

"(A) is currently in military custody; or

"(B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.".

(2) REVIEW OF DECISIONS OF COMBATANT STATUS REVIEW TRIBUNALS OF PROPRIETY OF DETENTION.--

(A) IN GENERAL.--Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant.

(B) LIMITATION ON CLAIMS.--The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to claims brought by or on behalf of an alien--

(i) who is, at the time a request for review by such court is filed, detained by the Department of Defense at Guantanamo Bay, Cuba; and

(ii) for whom a Combatant Status Review Tribunal has been conducted, pursuant to applicable procedures specified by the Secretary of Defense.

(C) SCOPE OF REVIEW.--The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on any claims with respect to an alien under this paragraph shall be limited to the consideration of--

(i) whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence); and

(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.

(D) TERMINATION ON RELEASE FROM CUSTODY.--The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit with respect to the claims of an alien under this paragraph shall cease upon the *2743 release of such alien from the custody of the Department of Defense.

(3) REVIEW OF FINAL DECISIONS OF MILITARY COMMISSIONS.--

(A) IN GENERAL.--Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision rendered pursuant to Military Commission Order No. 1, dated August 31, 2005 (or any successor military order).

(B) GRANT OF REVIEW.--Review under this paragraph--

(i) with respect to a capital case or a case in which the alien was sentenced to a term of imprisonment of

10 years or more, shall be as of right; or

(ii) with respect to any other case, shall be at the discretion of the United States Court of Appeals for the District of Columbia Circuit.

(C) LIMITATION ON APPEALS.--The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to an appeal brought by or on behalf of an alien--

(i) who was, at the time of the proceedings pursuant to the military order referred to in subparagraph (A), detained by the Department of Defense at Guantanamo Bay, Cuba; and

(ii) for whom a final decision has been rendered pursuant to such military order.

(D) SCOPE OF REVIEW.--The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on an appeal of a final decision with respect to an alien under this paragraph shall be limited to the consideration of--

(i) whether the final decision was consistent with the standards and procedures specified in the military order referred to in subparagraph (A); and

(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States.

(4) RESPONDENT.--The Secretary of Defense shall be the named respondent in any appeal to the United States Court of Appeals for the District of Columbia Circuit under this subsection.

(f) CONSTRUCTION.--Nothing in this section shall be construed to confer any constitutional right on an alien detained as an enemy combatant outside the United States.

(g) UNITED STATES DEFINED.--For purposes of this section, the term "United States", when used in a geographic sense, is as defined in section 101(a)(38) of the Immigration and Nationality Act and, in particular, does not include the United States Naval Station, Guantanamo Bay, Cuba.

(h) EFFECTIVE DATE.--

(1) IN GENERAL.--This section shall take effect on the date of the enactment of this Act.

(2) REVIEW OF COMBATANT STATUS TRIBUNAL AND MILITARY COMMISSION DECISIONS.-- Paragraphs (2) and (3) of subsection *2744 (e) shall apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this Act.

<< 10 USCA § 801 NOTE >>

SEC. 1006. TRAINING OF IRAQI FORCES REGARDING TREATMENT OF DETAINEES.

(a) REQUIRED POLICIES.--

(1) IN GENERAL.--The Secretary of Defense shall ensure that policies are prescribed regarding procedures for military and civilian personnel of the Department of Defense and contractor personnel of the Department of Defense in Iraq that are intended to ensure that members of the Armed Forces, and all

persons acting on behalf of the Armed Forces or within facilities of the Armed Forces, ensure that all personnel of Iraqi military forces who are trained by Department of Defense personnel and contractor personnel of the Department of Defense receive training regarding the international obligations and laws applicable to the humane detention of detainees, including protections afforded under the Geneva Conventions and the Convention Against Torture.

(2) ACKNOWLEDGMENT OF TRAINING.--The Secretary shall ensure that, for all personnel of the Iraqi Security Forces who are provided training referred to in paragraph (1), there is documented acknowledgment of such training having been provided.

(3) DEADLINE FOR POLICIES TO BE PRESCRIBED.--The policies required by paragraph (1) shall be prescribed not later than 180 days after the date of the enactment of this Act.

(b) ARMY FIELD MANUAL.--

(1) TRANSLATION.--The Secretary of Defense shall provide for the United States Army Field Manual on Intelligence Interrogation to be translated into arabic and any other language the Secretary determines appropriate for use by members of the Iraqi military forces.

(2) DISTRIBUTION.--The Secretary of Defense shall provide for such manual, as translated, to be provided to each unit of the Iraqi military forces trained by Department of Defense personnel or contractor personnel of the Department of Defense.

(c) TRANSMITTAL OF REGULATIONS.--Not less than 30 days after the date on which regulations, policies, and orders are first prescribed under subsection (a), the Secretary of Defense shall submit to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives copies of such regulations, policies, or orders, together with a report on steps taken to the date of the report to implement this section.

(d) ANNUAL REPORT.--Not less than one year after the date of the enactment of this Act, and annually thereafter, the Secretary of Defense shall submit to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives a report on the implementation of this section.

This division may be cited as the "Department of Defense Appropriations Act, 2006".

[ORAL ARGUMENT NOT SCHEDULED]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ABU BAKKER QASSIM, et al., Petitioners-Appellants	No. 05-5477
v.	
GEORGE W. BUSH, et al., Respondents-Appellees.	

OPPOSITION TO MOTION TO EXPEDITE APPEAL

For the reasons set forth below, the motion to expedite filed by petitioners in the above-captioned appeal should be denied at this time. In any event, as explained below, the highly expedited briefing suggested by petitioners is not warranted.

1. Petitioners, Abu Bakker Qassim and Adel Abdu Al-Hakim, are ethnic Uighurs and natives of China. Prior to September 11, 2001, they received weapons training in Afghanistan at a military training facility supplied by the Taliban. *See* Declaration of Brig. General Hood (Aug. 8, 2005) (attached). After the September 11 attack on the United States, Northern Alliance forces approached the military training camp, and petitioners fled with others to nearby caves. They then fled to Pakistan where they were captured by Pakistani forces and turned over to the United States military. *Ibid.*

Petitioners were deemed "enemy combatants" and sent to the U.S. Naval Base in Guantanamo Bay, Cuba. There, each petitioner was granted a hearing before a military Combatant Status Review Tribunal to determine whether the United States should continue to consider him as an enemy combatants. For the purposes of all CSRT proceedings, "enemy combatant" was defined as "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." *See* July 7, 2004 Order Establishing the CSRTs. In March 2005, the CSRTs determined that petitioners no longer met the criteria to be considered enemy combatants. *See* Hood Dec., ¶ 2.

Thus, petitioners are no longer being held as enemy combatants. Rather, they are being detained by the military, pending the outcome of diplomatic efforts to transfer them to an appropriate country.[1] In the meantime, petitioners remain in the custody of the Department of Defense. They are housed at Guantanamo in "Camp Iguana," with other individuals determined no longer to be enemy combatants. In

[1] Typically, a detainee would be returned to his native country. It is the policy of the United States, however, not to return individuals to countries where it is more likely than not they will be tortured, *see* 8 U.S.C. § 1231 note ("United States Policy with Respect to the Involuntary Return of Persons in Danger of Subjection to Torture"), and the United States Government is currently not in a position to return petitioners to their home country over their objections.

Camp Iguana, petitioners have a communal living arrangement, with free access to all of the areas of the Camp, including the exercise/recreation yard, their own bunk house, activity room. Petitioners also have round-the-clock access to a television set with VCR and DVD capability, a stereo system, recreational items (such as soccer, volleyball, ping pong), unlimited access to a shower facility, air conditioning in all living areas (which they control), special food items, and library materials. *See* Hood Dec. at ¶ 6. Petitioners are, however, former enemy combatants and persons trained at a military training camp supplied by the Taliban, and they remain detained (albeit with greater privileges) pending their release.

2. Petitioners filed a habeas action in district court seeking their release from detention. After waiting several months while the United States pursued diplomatic efforts to place petitioners, the district court denied the petition.

The court asserted that it was "undisputed that the government cannot find, or has not yet found, another country that will accept the petitioners."[2] Slip op. 11. Thus, the court found that "the only way to comply with a release order would be to grant the petitioners entry into the United States." *Ibid.* The court held that it could not issue such relief, however. The court stated:

---

[2] In fact, the Government disputes the court's characterization to the extent it insinuates that diplomatic efforts are not ongoing. The Government offered to provide an in camera briefing to the district court on the current diplomatic efforts, but the court refused such briefing.

> These petitioners are Chinese nationals who received military training in Afghanistan under the Taliban. China is keenly interested in their return. An order requiring their release into the United States – even into some kind of parole "bubble," some legal-fictional status in which they would be here but would not have been "admitted" – would have national security and diplomatic implications beyond the competence or the authority of this Court.

Slip op. 11-12. Thus, the court found that it had "no relief to offer," *id.* at 12, and issued an order stating: "petitioners' petition for a writ of habeas corpus is denied."

3. The next day, on December 23, 2005, petitioners filed a notice of appeal to this Court. Petitioners did not seek expedition of the appeal at that time. Rather, they waited nearly three weeks before filing a motion seeking expedition. After failing to act for nearly three weeks, petitioners then propose a briefing schedule granting themselves more than two more weeks to file their opening brief, but granting the Government only one week to respond. *See* Motion to Expedite at 8.

4. This Court should not grant the motion to expedite at this time. As an initial matter, there is a substantial question of whether there is any jurisdiction over this case. On December 30, 2005, the Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1001-1006 (2005)), became law. Section 1005(e)(1) of the Act amends the habeas statute, 28 U.S.C. § 2241, to state that "no court, justice, or judge shall have jurisdiction to hear or consider" any habeas claim filed by an alien detainee held by the Department of Defense at Guantanamo Bay, Cuba. It further bars jurisdiction

over "any other action against the United States or its agents relating to any aspect of the detention," for certain detainees, including those currently in military custody.

On January 5, 2006, this Court ordered supplemental briefing on the impact of this new Act on the pending *Al Odah/Boumediene* detainee appeals (Nos. 05-5062, 05-5063, 05-5064, 05-5095 through 05-5116). This Court's resolution of the jurisdictional issue in those appeals will potentially be dispositive of the present appeals as well. While petitioners here are no longer deemed enemy combatants, they nonetheless fall with the scope of Section 1005 of the Detainee Treatment Act. The amendments to § 2241 withdraw jurisdiction over any "writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba," and further bar "jurisdiction over any other action * * * relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who * * * is currently in military custody." There is no question that petitioners are aliens being detained at Guantanamo Bay by the Department of Defense, and that they remain in military custody.

Because petitioners are encompassed within the scope of the Detainee Treatment Act, we submit that the Court and the parties would benefit from resolution of the construction of the Act in the *Al Odah/Boumediene* appeals before ordering any expedited briefing in the present case.

5. In any event, the highly expedited briefing schedule suggested by petitioners is not warranted.

a. Petitioners' almost three-week delay, and then suggested grant of two additional weeks to themselves to draft a brief, itself indicates that this is not a case warranting the type of extreme expedition sought (where the Government is granted only one week to file its appellee brief). *See Tough Traveler, Ltd. v. Outbound Prods.*, 60 F.3d 964, 968 (2d Cir. 1995) ("[T]he failure to act sooner undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury."). If the Court decides not to hold this appeal pending a ruling in *Al Odah/Boumediene* regarding the impact of Section 1005 of the Detainee Treatment Act, we obviously have no objection if petitioners wish to file their brief quickly. The Government, however, should still be given the 30 days it is allotted by rule to file its appellee brief.

b. The reasons cited by petitioners for extreme expedition do not support the grant of their motion. The primary reason cited is the "harm" of the alleged "constitutional conflict" caused by the denial of their habeas petition by the district court. Petitioners assert that a court must be able to grant habeas relief, even if such relief means releasing those formerly held as enemy combatants (with training from a Taliban-supplied military training facility) into a secure U.S. military facility abroad

or bringing them into the United States (notwithstanding that they have no immigration status or other right permitting them to enter this country). The district court's ruling is, however, clearly correct that such relief cannot be granted. In any event, that alleged institutional injury caused by this single district court ruling is not so severe as to deny the Government its full briefing time. Indeed, the complexity and gravity of the issues strongly counsels against constricting the ordinary briefing time on appeal.

c. Petitioners also argue that an alleged hunger strike by another detainee determined no longer to be an enemy combatant, Saddiq Turkestani -- who is not a petitioner in this case -- warrants expedited treatment for this case based on an alleged risk that the hunger strike could spread to petitioners. *See* Manning Declaration (attached to petitioners' motion). As an initial matter, the Court should not as a matter of principle respond to alleged emergencies created by detainees for purposes of manipulating the judicial system. *Cf. In re Sanchez*, 577 F. Supp. 7 (S.D.N.Y. 1983) (rejecting prisoner's attempt to use hunger strike to bring pressure on court to vacate contempt order). Furthermore, as noted above, Mr. Turkestani is *not* a party to this case or this appeal, and any alleged hunger strike he might have commenced is not relevant to the motion to expedite here. In any event, we are informed by officials at Guantanamo that there are *no* individuals determined no longer to be

enemy combatants at Guantanamo currently participating in a hunger strike.

d. Finally, petitioners cite the delay in their release. The district court, however, properly recognized that it could not order the military to set petitioners loose within a secure Naval Base in Cuba, and that equally it could not order individuals captured during an armed conflict abroad brought to this country. Petitioners will be released when a proper country of return is located. The United States continues to actively pursue all appropriate diplomatic options for the placement of petitioners. We can assure the Court that the United States Government has no interest in keeping petitioners in Guantanamo any longer than necessary.

In the meantime, petitioners have been granted substantial privileges while being detained at Guantanamo Bay. The delays being experienced by petitioners are obviously most unfortunate, but they are common during or at the end on an armed conflict, when trying to resettle those captured during the conflict. Historically, the United States and its allies have continued the detention of prisoners following the end of major conflicts to which the U.S. has been a party in order to properly resolve repatriation issues or effectuate resettlement where repatriation was not appropriate due to humanitarian or other concerns. For example, the United Nations Command continued to hold thousands of Chinese and North Korean prisoners of war following the end of the Korean War while it considered whether and how best to resettle them.

See Christiane Shields Delessert, REPATRIATION OF PRISONERS OF WAR TO THE SOVIET UNION DURING WORLD WAR II: A QUESTION OF HUMAN RIGHTS, IN WORLD IN TRANSITION: CHALLENGES TO HUMAN RIGHTS, DEVELOPMENT AND WORLD ORDER, 81 (Henry H. Han ed., 1979). And after the end of World War II, Allied Forces spent several years after the end of hostilities dealing with such issues with respect to prisoners of war they detained during the war. *See id.* at 80.[3]

[3] *See also* FINAL REPORT TO CONGRESS ON THE CONDUCT OF THE PERSIAN GULF WAR, Appendix O, at 708 (1992)(available at http://www.ndu.edu/library/epubs/cpgw.pdf) (explaining that the United States and its Coalition forces were dealing with such issues with respect to Iraqi prisoners for several months after the Persian Gulf War concluded in March of 1991).

CONCLUSION

For the foregoing reasons, this Court should deny the motion to expedite.

Respectfully submitted,

DOUGLAS N. LETTER
(202) 514-3602

ROBERT M. LOEB
(202) 514-4332
Attorneys, Appellate Staff
Civil Division, Room 7268
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

January 18, 2006

CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2006, I served the foregoing "OPPOSITION TO MOTION TO EXPEDITE APPEAL" upon lead counsel of record by causing copies to be sent by first-class mail and by e-mail transmission:

Susan Baker Manning
BINGHAM McCUTCHEN LLP
1120 20th Street, NW
Suite 800
Washington, D.C. 20036-3406

P. Sabin Willett
Rheba Rutkowski
Neil McGaraghan
Jason Pinney
BINGHAM McCUTCHEN LLP
150 Federal Street
Boston, MA 02110-1726

_____
Robert M. Loeb,
Attorney

[ORAL ARGUMENT HELD SEPTEMBER 8, 2005]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 05-5064, and consolidated cases 05-5095 through 05-5116

KHALED A.F. AL ODAH, *et al.*,
Petitioners/Appellants/Cross-Appellees,
v.
UNITED STATES OF AMERICA, *et al.*,
Respondents/Appellees/Cross-Appellants.

No. 05-5062, and consolidated case 05-5063

LAKHDAR BOUMEDIENE, *et al.*,
Petitioners-Appellants,
v.
GEORGE W. BUSH, *et al.*,
Respondents-Appellees.

On Appeal from the United States District Court
for the District of Columbia

SUPPLEMENTAL BRIEF *AMICI CURIAE* OF BRITISH AND AMERICAN HABEAS SCHOLARS LISTED HEREIN IN SUPPORT OF PETITIONERS ADDRESSING SECTION 1005 OF THE DETAINEE TREATMENT ACT OF 2005

Jonathan L. Hafetz
(D.C. Bar No. 49761)
BRENNAN CENTER FOR JUSTICE
AT N.Y.U. SCHOOL OF LAW
161 Avenue of the Americas, 12th Floor
New York, NY 10013
(212) 998-6289

Dated: January 25, 2006

AMICI*

DENIS GALLIGAN
Professor of Socio-Legal Studies and Fellow
WOLFSON COLLEGE
UNIVERSITY OF OXFORD
England

DR. BENJAMIN GOOLD
University Lecturer in Law and Fellow
SOMERVILLE COLLEGE
UNIVERSITY OF OXFORD
England

BERNARD HARCOURT
Professor of Law
THE UNIVERSITY OF CHICAGO LAW SCHOOL
Chicago, Illinois

RANDY HERTZ
Professor of Clinical Law
NEW YORK UNIVERSITY SCHOOL OF LAW
New York, New York

DR. CAROLYN HOYLE
University Lecturer in Criminology and Fellow
GREEN COLLEGE
UNIVERSITY OF OXFORD
England

RIGHT HONOURABLE HELENA ANN KENNEDY
BARONESS (LADY) KENNEDY OF THE SHAWS QC
England

DR. LIORA LAZARUS
University Lecturer in Law and Fellow
ST. ANNE'S COLLEGE
UNIVERSITY OF OXFORD
England

OWEN REES
Stipendiary Lecturer
LADY MARGARET HALL
UNIVERSITY OF OXFORD
England

IRA P. ROBBINS
Bernard T. Welsch Scholar and Professor of Law & Justice
AMERICAN UNIVERSITY,
WASHINGTON COLLEGE OF LAW
Washington, D.C.

JORDAN M. STEIKER
Cooper H. Ragan Regents Professor in Law
UNIVERSITY OF TEXAS SCHOOL OF LAW
Austin, Texas

CHARLES D. WEISSELBERG
Professor of Law and Director of Center for Clinical Education
UNIVERSITY OF CALIFORNIA, BERKELEY
SCHOOL OF LAW
Berkeley, California

LARRY W. YACKLE
Professor of Law
BOSTON UNIVERSITY SCHOOL OF LAW
Boston, Massachusetts

*** Affiliations of *amici* are listed for identification purposes only.**

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel of record certifies as follows:

A. Parties and *Amici*

Except for the following, all parties, intervenors, and *amici* appearing before the District Court and/or in this Court on these appeals are listed in the Opening Briefs of the Government in *Al-Odah v. United States*, Nos. 05-5064, 05-5095 through 05-5116, and of the Petitioners in *Boumediene v. Bush*, Nos. 05-5062 and 05-5063:

Amici Curiae British and American Habeas Scholars

Amicus Curiae World Organization for Human Rights USA in Support of Petitioners in *Al-Odah v. United States*

B. Rulings Under Review

References to the rulings at issue appear in the Opening Briefs of the Government in *Al-Odah v. United States* and of the Petitioners in *Boumediene v. Bush.*

C. Related Cases

The Opening Briefs of the Government in *Al-Odah v. United States* and of the Petitioners in *Boumediene v. Bush* indicate which of the cases on review were previously before this Court and identify the names and numbers of related cases pending in this Court or in the District Court.

Jonathan L. Hafetz
(D.C. Bar No. 49761)

TABLE OF CONTENTS

Page

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES i
TABLE OF AUTHORITIES iii
GLOSSARY vii
INTEREST OF *AMICI CURIAE* 1
INTRODUCTION AND SUMMARY OF ARGUMENT 1
ARGUMENT 2
I. AT COMMON LAW, HABEAS CORPUS PROVIDED A SEARCHING AND INDIVIDUALIZED INQUIRY INTO THE FACTUAL AND LEGAL BASIS FOR A PRISONER'S DETENTION 2
II. HABEAS CORPUS CONTINUED TO SAFEGUARD COMMON LAW PROCESS BOTH DURING THE COLONIAL PERIOD AND AFTER THE ADOPTION OF THE CONSTITUTION 7
III. IF APPLIED TO THESE APPEALS AND TO OTHER PENDING HABEAS CASES, THE DTA WOULD EVISCERATE THE COMMON LAW WRIT OF HABEAS CORPUS 13
CONCLUSION 15

TABLE OF AUTHORITIES

Page

Cases

A (FC) v. Secretary of State,
[2005] UKHL 71 (appeal taken from Eng.) 6

Barney's Case,
87 Eng. Rep. 683 (K.B. 1701) 3

Biwot v. Gonzalez,
403 F.3d 1094 (9th Cir. 2005) 14

Brown v. Mississippi,
297 U.S. 278 (1936) 11

Bushell's Case,
124 Eng. Rep. 1006 (C.P. 1670) 4

Commonwealth v. Cushing,
11 Mass. 67 (1814) 13

Commonwealth v. Harrison,
11 Mass. 63 (1814) 13

Crawford v. Washington,
541 U.S. 36 (2004) 5, 14

Darnel's Case,
3 How. St. Tr. 1 (K.B. 1627) 2

Duncan v. Kahanamoku,
327 U.S. 304 (1946) 13

Earl of Aylesbury's Case,
Harv. L. Sch. MS 1071, fol. 52 (K.B. 1696) 4

Eleanor Archer's Case,
1701 Lincoln's Inn MS Misc. 713, p. 164 (K.B. 1701) 3

Ex Parte Bollman,
8 U.S. (4 Cranch) 75 (1807) 8,9

Ex parte D'Olivera,
7 F. Cas. 853 (Cir. Ct. D. Mass. 1813) 9

Ex parte Hamilton,
3 U.S. (3 Dall.) 17 (1795) 9

There is no authority upon which this brief principally relies.

TABLE OF AUTHORITIES
(continued)

Page

Gardener's Case,
78 Eng. Rep. 1048 (K.B. 1600) 5

Goldswain's Case,
96 Eng. Rep. 711 (C.P. 1778) 3, 4

Hadjimehdigholi v. INS,
49 F.3d 642 (10th Cir. 1995) 14

Humkin's Case, Lincoln's Inn,
MS Misc. 713, p.164 (K.B. 1613) 4

In re Guantanamo Detainee Cases,
355 F. Supp. 2d 443 (D.D.C. 2005) 14, 15

INS v. St. Cyr,
533 U.S. 289 (2001) 1, 13

King v. Lee,
83 Eng. Rep. 482 (K.B. 1676) 5

Lockington's Case,
Bright (N.P.) 269 (Pa. 1813) 10

Matter of Peters, M-1215 (D.W. Tenn. Dec. 31, 1827) 9

Miller v. Fenton,
474 U.S. 104 (1985) 11

Proceedings Against John Felton,
3 Howell's St. Tr. 367 (1628) 6

R. v. Delaval,
97 Eng. Rep. 913 (KB. 1763) 3

R. v. Greenwood,
93 Eng. Rep. 1086 (K.B. 1739) 5

R. v. Lee,
83 Eng. Rep. 482, (K.B. 1676) 3

R. v. Schiever, 97 Eng. Rep. 551 (K.B. 1759) 4

R. v. Turlington,
97 Eng. Rep. 741 (K.B. 1761) 3

R. v. White,
20 Howell's St. Tr. 1376 (K.B. 1746) 5

Rasul v. Bush,
542 U.S. 466 (2004) 1

TABLE OF AUTHORITIES
(continued)

Page

Rogers v. Richmond,
365 U.S. 534 (1961) 11

Somerset's Case,
20 Howell's St. Tr. 1 (K.B. 1772) 4

Three Spanish Sailors' Case, 96 Eng. Rep. 775 (C.P. 1779) 4

State v. Clark,
2 Del. Cas. 578 (Del. Ch. 1820) 10

United States v. Irvine, M-1184, roll 1 (C.C.D. Ga. May 8, 1815) 10

United States v. Jauregui,
314 F.3d 961 (8th Cir. 2003) 14

United States v. Thomas Williams,
(U.S. Cir. Ct. D. Va. 1813) 10

United States v. Villato,
28 F. Cas. 377 (Cir. Ct. D. Pa. 1797) 9

Wilson v. Izard,
30 F. Cas. 131 (Cir. Ct. D. N.Y. 1815) 10

Constitutional and Statutory Provisions

U.S. Const., art. I., § 9, cl. 2 2

Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e) (2005) 1, 13, 15

Hawaiian Organic Act, ch. 339, § 67, 31 Stat. 153 (1900) 13

Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73 8

Real ID Act, Pub. L. No. 109-13,
Div. B, § 106(a), 119 Stat. 231, 310-11 (2005) 14

17 Stat. 14-15 12

28 U.S.C. § 2241(c)(1) 1, 13

Act of July 6, 1798, ch. 66, § 1, 1 Stat. 577 10

Act of Mar. 3, 1863, ch. 81, 12 Stat. 755 12

Act of July 1, 1902, ch. 1369, 32 Stat. 691 13

6 Anne. 67 (1707-08) 7

Petition of Right, 3 Car. 1, c.1 (1628) 3

Habeas Corpus Act of 1641, 16 Car. 1, c.10 (1641) 3

Page

Habeas Corpus Act of 1679, 31 Car. 2, c.2 (1679) 3, 5

19 Geo. 2 c.1 (1746) 7

38 Geo. 3 c.36 (1798) 7

Miscellaneous

3 William Blackstone, Commentaries 3

Milton Cantor, *The Writ of Habeas Corpus: Early American Origins and Development, in* Freedom and Reform: Essays in Honor of Henry Steel Commager 55 (H. Hyman & L. Levy eds. 1967) 8

A. H. Carpenter, *Habeas Corpus in the Colonies*, 8 Am. Hist. Rev. 18 (1902) 7

Albert V. Dicey, Introduction to the Study of the Law of England (1908) 7

William F. Duker, A Constitutional History of Habeas Corpus (1980) 7, 12

3 Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution (1836) 11

The Federalist 83 (Alexander Hamilton) (Clinton Rossiter ed. 1961) 8

William Forsyth, Cases and Opinions on Constitutional Law (1869) 7

Eric M. Freedman, Habeas Corpus: Rethinking the Great Writ of Liberty (2001) 10

David Hope, *Torture*, 53 Int'l & Comparative Law Qtr'ly 807 (2004) 6

Rollin C. Hurd, A Treatise on the Right of Personal Liberty, and on the Writ of Habeas Corpus (Albany, W.C. Little & Co. 2d ed. 1876) 4, 5

John H. Langbein, Torture and the Law of Proof: Europe and England in the Ancient Regime (1977) 6

Gerald L. Neuman & Charles F. Hobson, *John Marshall and the Enemy Alien: A Case Missing from the Cannon*, 9 Green Bag 40 (2005) 10

Dallin H. Oaks, *Legal History in the High Court – Habeas Corpus*, 64 Mich. L. Rev. 451 (1966) 3, 4

Francis Paschal, *The Constitution and Habeas Corpus*, 1970 Duke L.J. 605 12

2 The Records of the Federal Convention of 1787 (M. Farrand ed. 1966) 8

R.J. Sharpe, The Law of Habeas Corpus (1976) 4, 5, 7

Joseph Story, Commentaries on the Constitution of the United States § 931 (5th ed. 1891) 11

GLOSSARY

CSRT – Combatant Status Review Tribunal

DTA – Detainee Treatment Act of 2005, Pub. L. No. 109-148 (2005)

J.A. – Joint Appendix

INTEREST OF *AMICI CURIAE*

Amici curiae are academic experts on habeas corpus and its development at common law in England and in the United States. *Amici* include authors of leading textbooks and articles on habeas corpus. This matter is of great professional interest to the *amici* because the Government's position concerning the Detainee Treatment Act of 2005 rests upon an erroneous conception of the writ of habeas corpus and threatens to undo centuries of Anglo-American common law relating to the "Great Writ."

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Rasul v. Bush*, the Supreme Court held that prisoners at the Guantánamo Bay Naval Base may seek a writ of habeas corpus, now codified in the United States at 28 U.S.C. § 2241(c)(1). 542 U.S. 466, 483-84 (2004). This statutory provision is the direct descendent of the English common law writ, Blackstone's Great Writ of Liberty, which was enshrined by the Framers in the Suspension Clause of the Constitution. *INS v. St. Cyr*, 533 U.S. 289, 301 (2001). The Government argues that section 1005(e) of the Detainee Treatment Act, Pub. L. No. 109-148 (2005) ("DTA"), eliminates federal habeas jurisdiction under section 2241 over petitions filed by aliens detained at Guantánamo. Govt's Supp. Br. dated Jan. 18, 2006 ("Gov't Supp. Br.") at 1-2. It further argues that section 1005(e) may be given retroactive effect because it is a "jurisdiction-ousting provision" that simply alters the forum in which pending claims may be heard, and does not affect Petitioners' substantive rights. *Id.* at 8 n.5; 10-11. The Government's characterization of the DTA is at odds with the nature of habeas process under the common law, which has been carried through to its codification under section 2241(c)(1).

As we demonstrate herein, habeas corpus has for centuries been a *substantive*

guarantee of common law process. Habeas courts historically undertook a searching inquiry into the factual and legal basis for a prisoner's detention and exercised broad remedial powers. This common law process ensured an individualized examination into both the crown's allegations and the prisoner's defense. One settled feature of this inquiry, unchanged for centuries, was a strict prohibition against the use of evidence secured by torture. Through habeas, this common law process traveled from England to the colonies, and continued without interruption in the United States both before, and after, the adoption of the Fifth Amendment. Further, to protect these substantive rights, the writ at common law – and likewise the statute codifying it – could not be suspended absent a clear and explicit statutory statement, and suspension was narrowly limited under the Constitution to emergencies arising from an active "Rebellion or Invasion." U.S. Const., art. I., § 9, cl. 2. Though the DTA contains no such statement, it nonetheless purports to eviscerate common law habeas. If construed to apply to pending cases, the DTA would effect a substantive change in the law, and would raise a serious constitutional question under the Suspension Clause.

ARGUMENT

I. At Common Law, Habeas Corpus Provided A Searching And Individualized Inquiry Into The Factual And Legal Basis For A Prisoner's Detention.

A. Habeas corpus has long provided a searching factual and legal inquiry into the basis for a prisoner's detention. This basic purpose of the writ crystallized in response to the seminal *Darnel's Case*, 3 How. St. Tr. 1 (K.B. 1627). There, the king had indefinitely detained suspected enemies of state based solely upon his "special command," *id.* at 37, and sought to block any inquiry into the factual and legal basis for their confinement. When the court upheld the Crown, it sparked a constitutional crisis

that firmly established habeas as the pre-eminent safeguard of common law process and personal liberty with the enactment of the Petition of Right, 3 Car. 1, c.1 (1628); the Habeas Corpus Act of 1641, 16 Car. 1, c.10 (1641); and the Habeas Corpus Act of 1679, 31 Car. 2, c.2 (1679). By the late 1600s, habeas corpus had become, and would remain, "the great and efficacious writ, in all manners of illegal confinement," 3 William Blackstone, Commentaries *131, and the most "effective remedy for executive detention," Dallin H. Oaks, *Legal History in the High Court – Habeas Corpus*, 64 Mich. L. Rev. 451, 460 (1966).

At common law, habeas courts did not simply accept the government's return to a prisoner's petition; rather, they often probed the return and examined additional evidence submitted by both sides to ensure the factual and legal sufficiency of the commitment. *See, e.g.*, *Goldswain's Case*, 96 Eng. Rep. 711, 712 (C.P. 1778) (judges temporarily discharge impressed sailor, refusing to "shut their eyes" to facts in petitioner's affidavits showing he was legally exempt from impressment); *R. v. Delaval*, 97 Eng. Rep. 913, 915-16 (K.B. 1763) (scrutinizing affidavits and concluding that girl had been fraudulently indentured as an apprentice and was being misused as a prostitute); *R. v. Turlington*, 97 Eng. Rep. 741, 741 (K.B. 1761) (discharging woman from "mad-house" after ordering medical inspection, reviewing doctor's affidavit, and inspecting women who "appeared to be absolutely free from the least appearance of insanity"); *Eleanor Archer's Case* 1701, Lincoln's Inn, MS Misc. 713, p.164 (K.B. 1701) (Holt, C.J.) ("court upon oath examined [woman]" to assess claim of mistreatment by her father); *Barney's Case*, 87 Eng. Rep. 683 (K.B. 1701) (allowing bail after affidavits proved malicious prosecution); *R. v. Lee*, 83 Eng. Rep. 482, 482 (K.B. 1676) (reviewing affidavits to adjudicate wife's assertion of

"ill usage, imprisonment and danger of her life" by husband); *see also Goldswain's Case*, 96 Eng. Rep. at 712 (Gould, J.) ("I do not conceive, that either the Court or the party are concluded by the return of a habeas corpus, but may plead to it any special matter necessary to regain his liberty"); *Bushell's Case*, 124 Eng. Rep. 1006, 1010 (C.P. 1670) (Vaughan, C.J.) (deeming return insufficient because it lacked "full and manifest" evidence necessary to sustain commitment); *see generally, e.g.*, R.J. Sharpe, The Law of Habeas Corpus 66-68 (1989) (citing habeas cases involving factual inquiries); Oaks, *supra*, at 454 n.20 (observing that the instances where habeas courts conducted fact-finding in non-criminal cases are "sufficiently comprehensive to include most . . . cases"). Alleged enemy aliens could also challenge the factual basis of their commitment on habeas to ensure it was within the bounds prescribed by law. *Three Spanish Sailors' Case*, 96 Eng. Rep. 775 (C.P. 1779) (examining affidavit detailing facts supporting petitioners' release, but concluding that, "upon *their own showing*," they are alien enemies) (emphasis added); *accord R. v. Schiever*, 97 Eng. Rep. 551 (KB. 1759). Further, habeas courts exercised broad equitable powers to fashion remedies as the circumstances required. *See, e.g.*, *Earl of Aylesbury's Case*, Harv. L. Sch. MS 1071, fol. 52 (K.B. 1696) (bailing prisoner suspected of treason because it was "just and reasonable" to do so, and "within [the court's] power by the common law").

The occasional general statement that at common law the petitioner could not controvert the truth of a return to a habeas petition must be read in the specific context in which it was made: *criminal* cases. Rollin C. Hurd, A Treatise on the Right of Personal Liberty, and on the Writ of Habeas Corpus 270-71 (1876). The reason is simple. In criminal cases, the prisoner either had already been convicted at a trial that provided full

common law process, including the opportunity to confront and cross-examine any witnesses against him, *Crawford v. Washington*, 541 U.S. 36, 49 (2004), or was confined pending such trial, in which case habeas guaranteed that he would receive that process without delay. Habeas Corpus Act of 1679, 31 Car. 2, c.2, § 7 (1679) (securing right to speedy trial); *see also* Hurd, *supra*, at 266 ("It was the hateful oppressiveness of long and close confinement, and not the dread of a trial by his peers, which made the suffering prisoner of state exclaim: 'The writ of habeas corpus is the water of life to revive from the death of imprisonment.'") (emphasis omitted).[1] By contrast, in non-criminal cases, including and especially cases of executive detention without trial, the habeas court itself supplied common law process by undertaking a factual inquiry into the basis of detention in the first instance.

Thus, the government's characterization of habeas as a procedural device misconstrues the important protections that the writ historically afforded. Its very essence – its substance – was a searching inquiry by neutral judges into the factual and legal validity of the Executive's proffered justification for the detention. And, to the extent that the lawfulness of the detention turned upon disputed issues of fact, the courts conducted adversary hearings in which the parties presented evidence for courtroom examination. It was these broad equitable features, not the technicalities of pleading, that made the Great Writ of Liberty great.

B. By providing a searching inquiry into the basis of detention, habeas supported another core guarantee at common law – the categorical prohibition on the use of

[1] And, even so, there were still numerous instances where prisoners controverted the return in criminal cases, especially to obtain release on bail. *See, e.g., R. v. Greenwood*, 93 Eng. Rep. 1086 (K.B. 1739) (reviewing affidavits asserting prisoner not at place of robbery, but denying bail); Sharpe, *supra*, at 129-30.

evidence obtained by torture. During the sixteenth century, crown officials occasionally issued warrants authorizing the torture of prisoners. John H. Langbein, Torture and the Law of Proof: Europe and England in the Ancien Regime 130 (1977). Pain was inflicted by a variety of ingenious devices, including thumbscrews, pincers, and the infamous rack. David Hope, *Torture*, 53 Int'l & Comparative Law Qtr'ly 807, 811 (2004). The use of torture declined after a subsequent investigation showed that a suspected traitor had been "tortured upon the rack" based upon false allegations. Langbein, *supra*, at 130-31. Shortly thereafter, the king asked the common law judges whether another suspected traitor "might not be racked" to make him identify accomplices, and "whether there were any law against it." The judges' answer was unanimous: the prisoner could not be tortured because "no such punishment is known or allowed by our law." *Proceedings Against John Felton*, 3 Howell's St. Tr. 367, 371 (1628).

This longstanding common law prohibition was recently reaffirmed in the unanimous decision of a specially convened panel of seven members of the House of Lords. *A (FC) v. Secretary of State*, [2005] UKHL 71 (appeal taken from Eng.). In ruling that evidence obtained by the torture of witnesses by a foreign State could not be admitted even when the United Kingdom had not been complicit in the torture, the law lords explained that "the common law has regarded torture and its fruits with abhorrence for over 500 years" – an abhorrence "now shared by over 140 countries which have acceded to the Torture Convention." *Id.* ¶ 51 (per Lord Bingham). This categorical prohibition against evidence obtained by torture has long been a distinguishing feature of the common law, not simply because of its "inherent unreliability" but also because "it degraded all those who lent themselves to the practice." *Id.* ¶ 11.

C. The only way to deprive prisoners of the core common law process secured by habeas corpus was for Parliament to expressly and unequivocally suspend the writ. On various occasions, Parliament suspended the writ in time of war in order to authorize detention of suspected enemies of state. *See generally* William Forsyth, Cases and Opinions on Constitutional Law 452 (1869) (citing suspension acts). Unlike the DTA, however, these acts were clear and unequivocal suspensions that were deemed necessary to secure the public safety from an actual invasion or insurrection. *See, e.g.*, 38 Geo. 3 c.36 (1798) (suspension to protect against imminent invasion); 19 Geo. 2 c.1 (1746) (suspension to secure peace from threatened rebellion in Scotland). Further, the parliamentary suspension acts all contained an express expiration date, which was usually a year or less from the act's passage. Albert V. Dicey, Introduction to the Study of the Law of the England 226 (1908). Further, habeas corpus was again available at the expiration of the statute, showing the natural condition to which the law reverts upon a suspension's conclusion. *See, e.g.*, 6 Anne. 67 (1707-08). In short, suspension gave "[e]xtreme powers to . . . the executive, but powers nonetheless distinctly limited by law." Sharpe, *supra*, at 95.

II. Habeas Corpus Continued To Safeguard Common Law Process Both During The Colonial Period And After The Adoption of the Constitution.

A. Habeas corpus was part of colonial law from the establishment of the American colonies, and the common law writ operated in all thirteen British colonies that rebelled in 1776. William F. Duker, A Constitutional History of Habeas Corpus 98, 115 (1980). As in England, the writ provided an individualized inquiry into the factual and legal basis for the detention, and did not depend upon statute. *See, e.g.*, A.H. Carpenter, Habeas Corpus in the Colonies, 8 Am. Hist. Rev. 18, 22 (1902) (examination by habeas

court to determine if imprisonment by governor was arbitrary).

Habeas was "the only common-law process explicitly written into the Constitution," evidence of the "complete measure of its reception by the colonists and the high regard in which it was held." Milton Cantor, *The Writ of Habeas Corpus: Early American Origins and Development*, *in* Freedom and Reform: Essays in Honor of Henry Steele Commager 55, 74 (H. Hyman & L. Levy eds. 1967); *see also* The Federalist 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed. 1961) (constitutional guarantee of habeas corpus meant to protect against arbitrary detention by the executive). Indeed, restricting Congress's power to suspend the writ was never controversial: the only debate at the Federal Convention of 1787 concerned what conditions, *if any*, could *ever* justify suspension of the Great Writ. *Compare* 2 The Records of the Federal Convention of 1787, at 438 (M. Farrand ed. 1966) (suspension should not be permitted except "on the most urgent occasions, and then only for a limited time") (proposal of Charles Pinckney) (internal quotation marks omitted), *with id.* (habeas corpus is "inviolable" and should never be suspended) (proposal of John Rutledge). Habeas corpus was secured under the Suspension Clause, and confirmed under the Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, thus codifying a source of common law process two years before, and perpetually independent from, the adoption of the Fifth Amendment.

In its first habeas cases, the Supreme Court affirmed the writ's historic function at common law: to determine whether there was an adequate factual and legal basis for the commitment. In *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), the Court applied the habeas statute, but looked to the common law for the writ's content. *Id.* at 93-94. Chief Justice Marshall "fully examined and attentively considered" the "testimony on which

[the prisoners] were committed," in the prisoners' presence, during proceedings that stretched over five days. *Id.* at 125. Marshall made clear that it was the Court's responsibility to undertake a plenary examination of the evidence, which, he noted, "the court below ought to have done." *Id.* at 114. The Court then discharged the prisoners because there was insufficient proof of the "actual assemblage of men for the purpose of executing a treasonable design" which the crime of levying war against the United States required. *Id.* at 125-36; *see also Ex parte Hamilton*, 3 U.S. (3 Dall.) 17, 17-18 (1795) (report of decision describing examination of affidavits submitted by prisoner and witnesses about propriety of prisoner's conduct and Court's order releasing him on bail).

The Supreme Court thus understood that habeas jurisdiction implied both the power and obligation to ensure a searching analysis of the factual and legal basis for detention. Moreover, the plenary nature of the habeas inquiry in *Bollman* did not turn on whether a constitutional violation had been alleged. *See also, e.g., Ex parte D'Olivera*, 7 F. Cas. 853, 854 (Cir. Ct. D. Mass. 1813) (Story, J., on circuit) (discharging Portuguese sailors arrested as alleged deserters); *United States v. Villato*, 28 F. Cas. 377, 378-79 (Cir. Ct. D. Pa. 1797) (discharging non-citizen arrested for treason).

Nor was this understanding confined to the Supreme Court. The lower federal courts routinely exercised their habeas jurisdiction to conduct evidentiary hearings that examined the substantive legality of, and factual basis for, the detention. *See, e.g., Matter of Peters*, M-1215 (D.W. Tenn. Dec. 31, 1827) (conducting detailed factual inquiry into petitioner's state of mind and determining petitioner "enlisted . . . when he was wholly incapable of transacting business or understanding it by reason of intoxication," thus invalidating legal basis for commitment), *cited in* Eric M. Freedman,

Habeas Corpus: Rethinking the Great Writ of Liberty 28 & 166 n.56 (2001); *United States v. Irvine*, M-1184, roll 1 (C.C.D. Ga. May 8, 1815) (discharging petitioner because, despite having been given opportunity, detaining officer had failed to provide proof to support statement in his affidavit that enlistment was based on the necessary parental consent), *cited in* Freedman, *supra*, at 165 n.55; *see also Wilson v. Izard*, 30 F. Cas. 131, 131 (Cir. Ct. D. N.Y. 1815) (reviewing petitioners' sworn testimony that they were "alien enemies," but rejecting their claim that this made them ineligible for military service). State judges conducted similarly probing inquiries into the factual basis of a commitment. *See, e.g., State v. Clark*, 2 Del. Cas. 578, 580-81 (Del. Ch. 1820) (discharging soldier after examining his testimony that he was intoxicated at time of enlistment and his father's testimony that he did not consent to such enlistment). Enemy aliens also obtained review of the factual basis for their detention on habeas. In one case Chief Justice Marshall, on circuit, required an enemy alien to be produced in court and ordered his release because he found that the marshal had failed to designate a place where he could be removed, as the operating instructions required him to do. G. Neuman & C. Hobson, *John Marshall and the Enemy Alien: A Case Missing from the Cannon*, 9 Green Bag 40, 41-43 (2005) (reporting decision in *United States v. Thomas Williams*, U.S. Cir. Ct. for Dist. of Va. 1813); *see also Lockington's Case*, Bright (N.P.) 269, 298-99 (Pa. 1813) (Brackenridge, J.) (although law permits detention of enemy aliens, habeas corpus may issue if applicant submits "affidavit . . . that he is not an alien enemy").[2]

[2] *Amici* express no view here about the validity of the "enemy combatant" definition applied to Guantánamo detainees. But it bears mentioning that the definition of an enemy alien at common law and by statute in the United States, Act of July 6, 1798, ch. 66, § 1, 1 Stat. 577, was expressly limited to citizens of a nation or foreign government against which there was a declared war. As such, the habeas court's inquiry into the legality of the detention of enemy aliens necessarily required far less fact-finding than do detentions under the much broader definition of "enemy

B. The searching inquiry by a habeas court into the basis for a prisoner's detention also served the same vital function that it did at common law – to vindicate the prohibition on the use of evidence obtained by torture. The Framers of the Constitution abhorred torture, and viewed it as a mechanism of royal despotism. *See, e.g.*, 3 Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 447-48 (1836) ("'What has distinguished our ancestors? – That they would not admit of tortures, or cruel and barbarous punishment.'") (quoting Patrick Henry); *see also* Joseph Story, Commentaries on the Constitution of the United States § 931, at 662-63 (5th ed. 1891) ("[The Self-Incrimination Clause] is but an affirmance of a common-law privilege. But it is of inestimable value [since it] is well known that, in some countries, not only are criminals compelled to give evidence against themselves, but are subjected to the rack or torture in order to procure a confession of guilt."). As the Supreme Court has repeatedly held, reliance on evidence obtained by torture is forbidden not merely because it is inherently unreliable but also because such "interrogation techniques [are] offensive to a civilized system of justice." *Miller v. Fenton*, 474 U.S. 104, 109 (1985); *accord Brown v. Mississippi*, 297 U.S. 278, 286 (1936) (coercive interrogation techniques are "revolting to the sense of justice"); *Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961) (conviction following admission of involuntary confession cannot stand, regardless of confession's purported reliability). Without the availability of habeas corpus to provide a searching inquiry into the basis for a prisoner's detention, and to determine whether evidence was obtained by torture or other coercive methods, this most fundamental of all common law prohibitions would be significantly compromised.

---

combatants" at issue here, which includes any person "part of *or supporting* Taliban or al Qaeda forces *or associated forces* that are engaged in hostilities against the United States." Joint Appendix 1207, ¶ a (emphasis added).

C. In America, suspension of habeas corpus has required a clear and unequivocal legislative statement and has been carefully limited to the duration of an ongoing rebellion or insurrection where necessary to preserve the public safety. That habeas could be suspended only with Congress's authorization and then only under the most extraordinary circumstances was recognized from the beginning of the Republic. Faced with a possible conspiracy to wage war against the United States, President Jefferson sought to detain two alleged traitors without common law process. But Jefferson understood that Congress first had to suspend the writ before he could deprive them of the protections of habeas corpus, which Congress refused to do. Francis Paschal, *The Constitution and Habeas Corpus*, 1970 Duke L.J. 605, 623-24. The men then challenged their detention on habeas, and were discharged by the Supreme Court in *Bollman*.

Indeed, Congress has exercised its suspension power only four times in U.S. history. Duker, *supra*, at 149, 178 n.190. Each time, it specifically stated it was authorizing suspension and, each time, the suspension itself was limited to the duration of the reason for the suspension, was done amid an ongoing insurrection or invasion, and was based upon a determination that the public safety required it. Act of Mar. 3, 1863, ch. 81, 12 Stat. 755 (authorizing President Lincoln during Civil War "*to suspend the privilege of the writ of habeas corpus* in any case throughout the United States or any part thereof" for duration of "the present *rebellion*" and where "the public safety may require it") (emphasis added); 17 Stat. 14-15 (authorizing President Grant amid armed rebellion in Reconstruction South "*to suspend the privileges of the writ of habeas corpus*" for "the continuance of such *rebellion*" and where "the public [safety] may require it") (emphasis added); Act of July 1, 1902, ch. 1369, 32 Stat. 691 (authorizing President or Governor

amid armed rebellion in Philippines to "*suspend*[ ]" the "*privilege of the writ of habeas corpus*" for duration of "*rebellion, insurrection, or invasion*" and where, "during such period the necessity for such suspension shall exist") (emphasis added); *Duncan v. Kahanamoku*, 327 U.S. 304, 307-08 (1946) (suspension of habeas corpus immediately after attack on Pearl Harbor, pursuant to express authorization in Hawaiian Organic Act, ch. 339, § 67, 31 Stat. 153 (1900)). In short, the narrow emergency power to suspend habeas corpus, and the common law process it provides, has always required an express statement of suspension and has been limited in time to the duration of active rebellion or invasion that necessitated the suspension. Congress, certainly, did not provide any such express and unequivocal statement of suspension in enacting the DTA.

III. If Applied To These Appeals And To Other Pending Habeas Cases, The DTA Would Eviscerate The Common Law Writ of Habeas Corpus.

The foregoing analysis of the writ's history informs *amici*'s understanding of the DTA and its implications for habeas review. As explained below, *amici* believe that, if applied to pending cases, the DTA's repeal of section 2241(c)(1) would eviscerate the core substantive protections of common law habeas by depriving Petitioners of a searching examination of the factual as well as legal basis for their detention, including the opportunity to present evidence to controvert the government's allegations.

The Government (Supp. Br. at 2) suggests that the new mechanism created under section 1005(e)(2) of the Act provides for judicial review in this Court of the Petitioners' federal statutory and constitutional claims. But "judicial review" has historically meant something different from common law habeas review. *Cf. St. Cyr*, 533 U.S. at 311. As shown above, the latter has long included the power not only to review a particular case but also to probe the factual basis on which a person's detention rests.

The Government's comparison (Supp. Br. at 13) of the DTA to the Real ID Act of 2005 reveals its misunderstanding of the nature of habeas review. Like the Real ID Act, the government argues, the DTA merely shifts the forum for hearing Petitioners' claims from the district court to this Court and effects no substantive change. And, to be sure, the Real ID Act does eliminate district court habeas jurisdiction over immigration removal orders while providing for their review in the courts of appeals. Real ID Act, Pub. L. No. 109-13, Div. B, § 106(a), 119 Stat. 231, 310-11 (2005). The Real ID Act does not, however, eliminate a searching habeas inquiry into the factual basis for the detention precisely because that inquiry is already supplied in an underlying administrative hearing which bears the hallmarks of common law process, such as fair notice of the government's allegations and a meaningful opportunity to confront them. *Biwot v. Gonzalez*, 403 F.3d 1094, 1099 (9th Cir. 2005); *United States v. Jauregui*, 314 F.3d 961, 962-63 (8th Cir. 2003); *Hadjimehdigholi v. INS*, 49 F.3d 642, 649 (10th Cir. 1995). Here, by contrast, Judge Green found that the Petitioners were being detained based upon a Combatant Status Review Tribunal ("CSRT") that denied them that very same process. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 468-74 (D.D.C. 2005); *cf. Crawford*, 541 U.S. at 49 (Scalia, J.) ("It is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine."). If applied to pending cases, then, the DTA would do more than shift the forum: it would deprive the Petitioners of the historic and robust habeas inquiry into the truth and substance of the allegations on which their detention rests.

This substantive change in the law would depart from longstanding tradition in another important way. Specifically, if applied to pending cases, the DTA would

eviscerate common law process by in effect allowing detention based upon evidence secured by torture. The past CSRTs, it appears, did not prohibit use of such evidence, but instead required only that information be "relevant and helpful to resolution of the issue before it." Joint Appendix ("J.A.") 1209, ¶ 9. Indeed, the Government previously represented that these CSRTs may rely on information obtained by torture if deemed "reliable." J.A. 0947 (Oral Argument Transcript, Dec. 2, 2004, *Khalid v. Bush*, 04-CV-1142 (RJL); *Boumediene v. Bush*, 04-CV-1166 (RJL), at 84:7-84:22). Further, as Judge Green found, the CSRTs at issue here do not allow for a determination of whether they actually relied on such evidence. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 473-74. If construed to apply to these appeals and other pending cases, the DTA would eliminate the very habeas process that would have provided what these CSRTs failed to provide: a searching factual inquiry to determine whether a petitioner's detention was unlawful, including whether it was based on evidence secured by torture.[3]

CONCLUSION

As *amici* have explained, the writ of habeas corpus has for centuries provided a searching inquiry into the factual and legal basis of a prisoner's confinement. The DTA, if construed to apply to pending cases, would effect a substantive change in the law by eliminating this core common law inquiry, and would raise a serious constitutional question under the Suspension Clause.

[3] Section 1005(a) of the DTA provides that "[n]ot later than 180 days after the date of the enactment of this Act," the Secretary of Defense is to submit to Congress new procedures for the conduct of future CSRTs in accordance with the Act. The validity of the new CSRT procedures is not before this Court, and *amici* express no view as to whether more circumscribed court review might be appropriate in determining the lawfulness of detention decisions made under those procedures.

Respectfully Submitted,

Jonathan L. Hafetz
(Counsel of Record)
(D.C. Bar No. 49761)
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
161 Avenue of the Americas, 12th Floor
New York, NY 10013
(212) 998-6289

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C)
OF THE FEDERAL RULES OF APPELLATE PROCEDURE**

I hereby certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and D.C. Circuit Rule 32(a), that the foregoing brief of British and American Habeas Scholars is in 12-point, proportionally spaced Times-New Roman type, and is 15 pages in length.

_____
Jonathan L. Hafetz
(D.C. Bar No. 49761)

CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2006, two copies of the foregoing brief of British and American Habeas Scholars, along with one copy of the motion for leave to file, were deposited in the U.S. mail, first-class postage prepaid, and were also sent by e-mail transmission, to the following:

Robert M. Loeb
Douglas N. Letter
U.S. Department of Justice
Civil Division, Appellate
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001
Robert.Loeb@usdoj.gov

Thomas B. Wilner
Neil H. Koslowe
Shearman & Sterling
801 Pennsylvania Avenue, NW, Suite 900
Washington, DC 20004-2634
twilner@shearman.com
neil.koslowe@shearman.com

Stephen H. Oleskey
Robert C. Kirsch
Melissa A. Hoffer
Mark Fleming
Wilmer Cutler Pickering Hale & Dorr
60 State Street
Boston, MA 02109
Melissa.Hoffer@wilmerhale.com
Mark.Fleming@wilmerhale.com

Douglas F. Curtis
Wilmer Cutler Pickering Hale & Dorr LLP
339 Park Avenue
New York, NY 10022
Douglas.Curtis@wilmerhale.com

_____
Jonathan L. Hafetz
(D.C. Bar No. 49761)