ALLIED PAPERS

IN THE
MILITARY COMMISSION
CASE OF

UNITED STATES
V.
BINYAM AHMED MUHAMMAD

ALSO KNOWN AS:

TALHA AL KINI
FOAUD ZOUAOUI
TAHA AL NIGERI
JOHN SAMUEL

NO. 050009

VOLUME ___ OF ___ TOTAL VOLUMES

BINYAM MUHAMMAD HABEAS FILINGS
AT U.S. DISTRICT COURT DISTRICT OF COLUMBIA
(WASHINGTON D.C.)
U.S. DISTRICT COURT NO. 05-CV-765-EGS—
AVAILABLE AT:
HTTP://WWW.DCD.USCOURTS.GOV/DISTRICT-COURT.HTML
NO REDACTIONS OF DISTRICT COURT'S RECORDS

United States v. Binyam Ahmed Muhammad, NO. 050009

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.

Transcript, Prosecution, Defense and Review Exhibits constitute the "record of trial," and are considered during appellate review. Volumes I-VI, however, are allied papers and as such are not part of the record of trial. Allied papers provide references, and show the administrative and historical processing of a case. Allied papers are not usually considered during appellate review. *See generally United States v. Gonzalez*, 60 M.J. 572, 574-575 (Army Ct. Crim. App. 2004) and *United States v. Castleman*, 10 M.J. 750, 751 (AFCMR 1981) and cases cited therein discussing when allied papers may be considered during the military justice appellate process, which is governed by 10 U.S.C. § 866). For more information about allied papers in the military justice process, *see* Clerk of Military Commission administrative materials in Volume III.

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II[1]	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)

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VI[2]	Selected filings and U.S. District Court decisions in *United States v. Muhammad*

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U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:05-cv-00765-EGS

HABASHI et al v. BUSH et al
Assigned to: Judge Emmet G. Sullivan
Related Case: 1:04-cv-02215-RMC
Cause: 28:2241 Petition for Writ of Habeas Corpus (federa

Date Filed: 04/15/2005
Jury Demand: None
Nature of Suit: 530 Habeas Corpus (General)
Jurisdiction: U.S. Government Defendant

Petitioner

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Petitioner

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As next Friend of Benjamin Mohammed al Habashi

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V.

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Secretary, United States Department of Defense

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ATTORNEY TO BE NOTICED

Respondent

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represented by **Terry Marcus Henry**
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LEAD ATTORNEY
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Preeya M. Noronha
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ATTORNEY TO BE NOTICED

Respondent

NELSON J. CANNON
Army Colonel, Commander, Camp Delta, All sued in his official capacities

represented by **Terry Marcus Henry**
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LEAD ATTORNEY
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Preeya M. Noronha
(See above for address)
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
04/15/2005	1	PETITION for Writ of Habeas Corpus (Filing fee $ 5.) filed by BENJAMIN MOHAMMED AL HABASHI, SHAKER AAMER.(rje) Additional attachment(s) added on 4/19/2005 (rje,). (Entered: 04/19/2005)
04/15/2005	2	NOTICE OF RELATED CASE by BENJAMIN MOHAMMED AL HABASHI, SHAKER AAMER. Case related to Case No. 04-2215. (rje,) (Entered: 04/19/2005)
04/15/2005		SUMMONS Not Issued (rje,) (Entered: 04/19/2005)
04/19/2005	3	MOTION for Leave to Appear Pro Hac Vice by BENJAMIN MOHAMMED AL HABASHI. (Beane, James) (Entered: 04/19/2005)
04/19/2005	4	Unopposed MOTION for Protective Order by BENJAMIN MOHAMMED AL HABASHI. (Attachments: # 1 # 2 # 3)(Beane, James) (Entered: 04/19/2005)
04/19/2005		Case Reassigned to Judge Emmet G. Sullivan. Judge Rosemary M. Collyer no longer assigned to the case. (rje,) (Entered: 04/20/2005)
04/20/2005	5	MOTION to Stay *Proceedings Pending Related Appeals and for Continued*

		Coordination by JAY HOOD, NELSON J. CANNON, GEORGE WALKER BUSH, DONALD RUMSFELD. (Attachments: # 1 Exhibit A# 2 Exhibit B# 3 Exhibit C# 4 Text of Proposed Order)(Noronha, Preeya) (Entered: 04/20/2005)
04/21/2005		ORDER TO SHOW CAUSE. The Government shall by 4/26/2005 show cause why this Writ of Habeas Corpus should not be granted. It is further ORDERED that a hearing on pending motions shall be held on 4/28/05 at 11:00 a.m. in Courtroom One. Signed by Judge Emmet G. Sullivan on April 21, 2005. (lcegs1) (Entered: 04/21/2005)
04/21/2005	6	ORDER granting 4 Unopposed Motion for Protective Orders. Upon consideration of the unopposed motion for entry of protective order, it is hereby ORDERED that the Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba, first issued on November 8, 2004, (344 F. Supp. 2d 174 (D.D.C. 2004)) and the Order Supplementing and Amending Filing Procedures Contained in November 8, 2004 Amended Protective Order, first issued on December 13, 2004, in the In re Guantanamo Bay Detainee Cases shall apply in this case. It is FURTHER ORDERED that petitioners' counsel shall treat information designated by respondents as "protected" under the Amended Protective Order as "protected information" under the Amended Protective Order pending further order of this Court. Signed by Judge Emmet G. Sullivan on April 21, 2005. (lcegs1) (Entered: 04/21/2005)
04/26/2005	7	RESPONSE to *April 21, 2005 Docket Entry Order to Show Cause* filed by JAY HOOD, NELSON J. CANNON, GEORGE WALKER BUSH, DONALD RUMSFELD. (Attachments: # 1 Exhibit 1# 2 Exhibit 2 - Part 1# 3 Exhibit 2- Part 2# 4 Exhibit 2 - Part 3# 5 Exhibit 2 - Part 4)(Henry, Terry) (Entered: 04/26/2005)
04/26/2005	8	NOTICE *of Submission of Certain Portions of Response to April 21, 2005 Docket Entry Order to Show Cause Under Seal* by JAY HOOD, NELSON J. CANNON, GEORGE WALKER BUSH, DONALD RUMSFELD (Henry, Terry) (Entered: 04/26/2005)
04/26/2005	9	NOTICE of Appearance by Terry Marcus Henry on behalf of JAY HOOD, NELSON J. CANNON, GEORGE WALKER BUSH, DONALD RUMSFELD (Henry, Terry) (Entered: 04/26/2005)
04/28/2005		Minute Entry for proceedings held before Judge Emmet G. Sullivan : Motion Hearing/status hearing held on 4/28/2005 ; no further court schedulings set at this time. (Court Reporter Lisa Griffith.) (clv,) (Entered: 04/28/2005)
09/07/2005		MINUTE ORDER. Counsel for petitioner is instructed to strictly comply with this Court's April 21, 2005 Order granting petitioner's unopposed motion for a Protective Order and incorporating the Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba, first issued on November 8, 2004, (344 F. Supp.

		2d 174 (D.D.C. 2004)) and the Order Supplementing and Amending Filing Procedures Contained in November 8, 2004 Amended Protective Order, first issued on December 13, 2004, in the In re Guantanamo Bay Detainee Cases. In particular, counsel is directed to comply with the filing procedures, which can be found at Exhibit 2 to petitioner's own motion for a protective order, filed in this case on April 19, 2005. Signed by Judge Emmet G. Sullivan on September 7, 2005. (lcegs1) (Entered: 09/07/2005)
09/09/2005	10	RESPONSE to *Motion for Preliminary Injunction* filed by JAY HOOD, NELSON J. CANNON, GEORGE WALKER BUSH, DONALD RUMSFELD. (Attachments: # 1 Exhibit A# 2 Exhibit B# 3 Exhibit C# 4 Exhibit D# 5 Exhibit E# 6 Exhibit F)(White, Edward) (Entered: 09/09/2005)
09/13/2005	11	ENTERED IN ERROR. . . NOTICE *of Filing of Motion for Preliminary Injunction* by BENJAMIN MOHAMMED AL HABASHI, SHAKER AAMER (Smith, Clive) Modified on 9/14/2005 (td,). (Entered: 09/13/2005)
09/13/2005		NOTICE OF CORRECTED DOCKET ENTRY: re 11 Notice (Other) was entered in error and counsel was instructed to refile said pleading. (td,) (Entered: 09/14/2005)
09/14/2005	12	NOTICE *of Filing of Motion for Preliminary Injunction Concerning Conditions of Confinement* by BENJAMIN MOHAMMED AL HABASHI, SHAKER AAMER (Smith, Clive) (Entered: 09/14/2005)
09/16/2005	13	NOTICE *of Filing of Reply in Support of Motion for Preliminary Injunction* by BENJAMIN MOHAMMED AL HABASHI, SHAKER AAMER (Smith, Clive) (Entered: 09/16/2005)
09/19/2005		MINUTE ORDER granting 3 unopposed Motion for Leave to Appear Pro Hac Vice. Signed by Judge Emmet G. Sullivan on September 19, 2005. (lcegs1) (Entered: 09/19/2005)
09/23/2005		MINUTE ORDER granting 5 Motion to Stay. Signed by Judge Emmet G. Sullivan on September 23, 2005. (lcegs1) (Entered: 09/23/2005)
09/23/2005	14	ORDER referring motion for a preliminary injunction to Judge Oberdorfer for consideration and decision. Signed by Judge Emmet G. Sullivan on September 23, 2005. (lcegs1) (Entered: 09/23/2005)
09/23/2005		Case Stayed (clv,) (Entered: 09/23/2005)
09/24/2005	15	MOTION for Preliminary Injunction *Concerning Conditions of Confinement; Please See Docket Entry 12; CSO Has Approved for Public Filing* by BENJAMIN MOHAMMED AL HABASHI, SHAKER AAMER. (Smith, Clive) (Entered: 09/24/2005)
09/28/2005	16	MEMORANDUM and ORDER denying without prejudice 15 Motion for Preliminary Injunction re Conditions of Confinement. Signed by Judge Louis F. Oberdorfer on September 28, 2005. (Attachments: # 1 Declaration of Major General Hood) (AG) (Entered: 09/28/2005)

11/02/2005	17	ORDER referring all motions pertaining to interpretation or construction of any protective order which has been entered in any of these cases to Magistrate Judge Alan Kay; referring to Magistrate Judge Kay all disputes pertaining to logistical issues, such as communications with or visits to clients and counsel. Signed by Judge Gladys Kessler, Chair of Calendar and Case Management Committee, on 11/2/05. (Entered: 11/02/2005)
11/18/2005	18	MOTION *to Practice and Notice of Entry of Appearance* by BENJAMIN MOHAMMED AL HABASHI, SHAKER AAMER. (Smith, Clive) (Entered: 11/18/2005)
12/08/2005		ORDER granting 18 Motion. Signed by Judge Emmet G. Sullivan on December 8, 2005. (lcegs1) (Entered: 12/08/2005)
01/04/2006	19	NOTIFICATION OF SUPPLEMENTAL AUTHORITY by respondents GEORGE WALKER BUSH, and DONALD RUMSFELD, et al. (Attachments: # 1 Exhibit)(jeb,) (Entered: 01/04/2006)
03/17/2006		MINUTE ORDER. This case is, sua sponte, STAYED pending the final resolution of Al Odah, Khaled A.F. v. USA, Civil No. 05-5064, in the United States Court of Appeals for the District of Columbia Circuit. The Clerk of the Court is directed to remove the case from the active calendar of the Court. The removal of this case from the Court's active calendar should not discourage the filing of appropriate pleadings. The parties are directed to keep this Court apprised of any developments in Al Odah, Khaled A.F. v. USA. Signed by Judge Emmet G. Sullivan on March 17, 2006. (lcegs1) (Entered: 03/17/2006)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BENJAMIN MOHAMMED AL HABASHI,
Detainee, Camp Delta;

SHAKER AAMER,
as Next Friend of Benjamin Mohammed al Habashi;

Petitioner,

v.

GEORGE WALKER BUSH,
President of the United States
The White House
1600 Pennsylvania Ave., N.W.
Washington, D.C. 20500

DONALD RUMSFELD,
Secretary, United States
Department of Defense
1000 Defense Pentagon
'Washington, D.C. 20301-1000

ARMY BRIG. GEN. JAY HOOD,
Commander, Joint Task Force - GTMO
Guantanamo Bay Naval Station
Guanta.namo Bay, Cuba

ARMY COL. NELSON J. CANNON,
Commander, Camp Delta,
Guantanamo Bay Naval Station
Guantanamo Bay, Cuba

Respondents

All sued in his official capacities.

No.

PETITION FOR WRIT OF HABEAS CORPUS

1. Petitioner Benjamin Mohammed al Habashi seeks the Great Writ. Petitioner al Habashi acts on his own behalf and through a Next Friend, Shaker Aamer. He is being held virtually

incommunicado in Respondents' unlawful custody.

JURISDICTION

2. Petitioner brings this action under 28 US.C. 992241 and 2242, and invoke this Court's jurisdiction under 28 V.S.c. 991331, 1651, 2201, and 2202; 5 US.C. 9702; as well as the Fifth, Sixth, and Eighth Amendments to the United States Constitution, the International Covenant on Civil and Political Rights, the American Declaration on the Rights and Duties of Man, and customary international law. Because he seeks declaratory relief, Petitioner also relies on F. R. Civ. P. 57.

3. This Court is empowered under 28 US.c. 92241 to grant the Writ of Habeas Corpus, and to entertain the Petition insofar as it is filed by a Next Friend, under 28 U.S.c. 92242. This Court is further empowered to declare the rights and other legal relations of the parties herein by 28 U.S.C. 92201, and to effectuate and enforce declaratory relief by all necessary and proper means by 28 u.s.c. 92202, as this case involves an actual controversy within the Court's jurisdiction.

II
VENUE

4. Venue is proper in the United States District Court for the District of Columbia, since at least one respondent resides in the district, a substantial part of the events or omissions giving rise to the claim occurred in the district, at least one respondent may be found in the district, and all respondents are either officers or employees of the United States or any agency thereof acting in his official capacities. 28 V.S.C. 99 1391(b); 1391(e).

III
PARTIES

5. Petitioner al Habashi is an Ethiopian citizen, and is currently incarcerated and held in respondents' unlawful custody in Guantanamo.

6. Petitioner Aamer acts as next friend for Petitioner al Habashi. Because Petitioner al Habashi

cannot secure access either to legal counselor the courts of the United States, Petitioner Aamer acts as his Next Friend. *See Exhibit A.*

, , ,

7. Respondent Bush is the President of the United States and Commander in Chief of the United States Military. Respondent Bush is ultimately responsible for Petitioner's unlawful detention. He is sued in his official capacity.
8. Respondent Rumsfeld is the Secretary of the United States Department of Defense. Pursuant to either the November 13, 2001 Military Order or the President's authority as Commander in Chief and under the laws and usages of war, Respondent Rumsfeld has been charged with maintaining the custody and control of the detained Petitioner. He is sued in his official capacity.
9. Respondent Hood is the Commander of Joint Task Force-GTMO, the task force running the detention operation at Guantanamo. He has supervisory responsibility for the detained Petitioner and is sued in his official capacity.
10. Respondent Cannon is the Commander of Camp Delta, the U.S. facility where the detained Petitioner is presently held. He is the immediate custodian responsible for his detention, and is sued in his official capacity.

IV

STATEMENT OF FACTS

11. Petitioner has been held essentially incommunicado. Because he is from a far-flung country, his family members have not been able to contact U.S. counsel to file a petition on his behalf.
12. With respect to Petitioner aJ Habashi ("Petitioner"), no lawyer has been admitted to see them to detennine whether he would like to be represented.
13. Petitioner has made it clear to Shaker Aamer ("Next Friend Petitioner") that he wishes to have his legal rights vindicated, and "Next Friend Petitioner" has requested that undersigned counsel take steps to ensure that this happens.

14. Because counsel has not been able to meet with Petitioner, the allegations set forth below are necessarily made on infonnation and belief, based on limited discussions with the "Next Friend Petitioner" .

15. Detained Petitioner is not, nor has he ever been, an enemy alien, lawful or unlawful belligerent, or combatant of any kind.

16. Petitioner is not, and never has been, a member of Al Qaida or any other telTorist group. Prior to his detention, he did not commit any violent act against any American person or espouse any violent act against any American person or property. Nor was he involved in the ensuing anned conflict. He had no involvement, direct or indirect, in either the terrorist attacks on the United States on September 11, 2001, or any act of international terrorism attributed by the United States to Al Qaida or any telTorist group. He is not properly subject to the detention Order issued by the President. As he did not participate in the anned conflict at any point in time, he is not properly subject to the Executives's authority as Connnander in Chief and under the laws and usages of war.

17. Petitioner has had no telTorist training. He at no time voluntarily joined any telTorist force.

18. Petitioner was not initially taken into custody by American forces. He was taken into custody against his will and handed over to the Americans. There is no credible evidence that he engaged in combat against American forces.

19. Petitioner promptly identified himself by his COlTecname and nationality to the United States. He requested that the United States provide him with access to his family and to legal counsel. He was kept blindfolded against his will for lengthy periods while being taken involuntarily to Guantanamo.

20. Petitioner has been forced to provide involuntary statements to Respondents' agents both prior to and after his arrival at Guantanamo.

21. Petitioner has been tenibly abused and tortured by Respondents' agents.

22. Petitioner has been held under conditions that violate his international and constitutional rights

to dignity and freedom from cruel, unusual and degrading treatment or punislunent. He has been housed throughout his detention in accommodation that fails to satisfy both domestic and internationally accepted standards of accommodation for any person subject to detention. He has been refused meaningful access to his family. He has not been provided with the opportunity fully to exercise his religious beliefs. He has been exposed to the indignity and humiliation of the cameras of the national and international press, brought to Guantanarno with the express consent and control of Respondents.

The Detention Order

23. On November 13, 2001, Respondent Bush issued a Military Order authorizing indefinite detention without. due process of law. The Order authorizes Respondent Rumsfeld to detain anyone Respondent Bush has "reason to believe":

    I. is or was a member of the organization knovm as al Qaida;

    11. has engaged in, aided or abetted, or conspired to commit, acts of international telTorism, or acts in preparation therefor, that have caused, threaten to cause, or have as his aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or

    111. has knowingly harbored one or more individuals described in subparagraphs (i) and (ii).

    See Military Order of November 13, 2001. President Bush must make this detennination in writing. The Order was neither authorized nor directed by Congress, and is beyond the scope of the Joint Resolution of September 18,2001.

24. The Military Order vests the President with complete discretion to identify the individuals that fall within its scope. It estabJishes no standards governing the use of his discretion. Once a person has been detained, the Order contains no provision for the person to be notified of the charges he may face. On the contrary, the Order authorizes detainees to be held \"ithout charges. It contains no provision for detainees to be notified of his rights under domestic and international Jaw, and provides neither the right to counsel, nor the right to consular access. It

provides no right to appear before a neutral tribunal to review the legality of a detainee's continued detention and no provision for appeal to an Article III court. In fact, the Order expressly bars review by any court. The Order authorizes indefinite and umeviewable detention, based on nothing more than the President's vvritten detennination that an individual is subject to its tenns.

25. The Military Order was promulgated in the United States and in this judicial district, the decision to detain Petitioner was made by Respondents in the United States and in this judicial district, the decision to detain Petitioner at Guantfmamo was made in the United States and in this judicial district, and the decision to continue detaining the Petitioner was, and is, being made by Respondents in the United States and in this judicial district.

26. Respondent Bush has never certified or detennined in any manner, in writing or otherwise, that the detained Petitioner is subject to this detention order.

27. Petitioner is not properly subject to this detention order.

28. In the related case of *Rasul* v. *Bush,* 215 F. Supp. 2d 55 (D.D.C. 2002), Respondents contended that the men held in Guantanamo were being detained not pursuant to the President's Military Order but rather under the President's authority as Commander in Chief and under the laws and usages of war. However, Petitioner was not arrested or detained by the United States in the course of the anned conflict.

29. Petitioner, on infonnation and belief, was not arrested in Afghanistan, but elsewhere, nowhere near the battlefield. Accordingly, Petitioner is not properly detained under the President's authority as Commander in Chief and under the laws and usages of war.

Guantanamo Bay Naval Station

30. On or about January 11, 2002, the United States military began transporting prisoners captured in Afghanistan to Camp X-Ray, at the United States Naval Base, in Guantanamo Bay, Cuba. In April 2002, all prisoners were transferred to a more penn anent prison facility in Guantanamo, Camp Delta. Guantanamo is a self-sufficient and essentially pennanent city with approximately 7,000 military and civilian residents under the complete jurisdiction and control of the United States. Guantanamo occupies nearly thirty-one square miles of land, an area larger than

Manhattan, and nearly half the size of the District of Columbia. It has its O\VTIschools, generates its Dvmpower, provides its ovm internal transportation, and supplies its own water. Offenses committed by both civilians and foreign nationals living on Guantimamo are brought before federal courts on the mainland, where respondents enjoy the full panoply of Constitutional rights.

31. The United States has occupied Guantfmamo since 1903, and has repeatedly declared its intention to remain there indefinitely. For several decades, the United States has resisted claims of national sovereignty made by Cuba over Guantanamo, insisting that its occupation of the land is legal and will remain so in perpetuity, so long as the United States chooses to exercise dominion and control over the land. The base is now, and has been for many years, under exclusive United States jurisdiction.

32. Guantanamo has developed into a fully American enclave with all the residential, commercial, and recreational trappings of a small American city. The infrastructure is pennanent and complex, providing for a wholly self-sufficient American community. The "Gitmo Guide", available online, lists fifteen restaurants, a bowling alley, and a Baskin Robbins. *See* The Gitmo Guide, at http://www.geocities.com/Pentagonl 6625/dining.htmL Guantanamo contains an outdoor movie theater, a McDonald's and a mini-mall. http://www.cubanet.orgl CNews/y02/jan02115e5.htm. Residents, as well as his children, enjoy a number of recreational activities and clubs, including the Boys Scouts, Cub Scouts, USA Girl Scouts, the Guant<mamo Bay Little Theater Company, an Archery Club, a golf club and even a Star Trek club. Residents may participate in a number of different sports including golf, hunting, tennis, horseback riding, football, softball and soccer.

33. A small children's zoo has been established on the naval base which contains "goats, donkeys, iguanas and banana rats." To facilitate water recreation for the residents, the bay side beaches have been dredged and pooled to protect bathers ITom the undertow and swift tidal CUITentin the bay. "Gitmo boasts its own yacht cJub, which conducts races nearly every week ... [requiring] all boats ... to fly the United States flag"! The United States has established Theodore K Mason, *Across the Cactus Curtain* at 106 (1984) (Library of Congress Cataloging

'America's Slice of Cuba,'2 where the residents "live in American-style homes, shop for American products and drive American cars. He has cable TV and radio stations, and his children attend schools that could be found in any suburban neighborhood.,,3

34. In light of the foregoing, the United States Navy has accurately described Guantanamo as "a Naval reservation *which, for all practical purposes, is American territory.* Under the [lease] agreements, *the United States has for approximately [ninety) years exercised the essential elements of sovereignty over this territory,* without actually owning it. Unless we abandon the isa or agree to a modification of the terms of our occupancy, we can continue in the present status as long as we like. [According to the United States pJersons on the reservation are amenable only to United States legislative enactments." *See* The History of Guant{mamo Bay: An Online Edition (1964), available at http://www.nsgtrno.navy.miUhistory.htm.

35. At some time during 2002, the precise date unknown to counsel but known to Respondents, the United States military transferred the detained Petitioner to Guant{mamo, where he has been held ever since, in the custody of Respondents Bush, Rumsfeld, Hood, and Cannon.

36. Since gaining control of the detained Petitioner, the United States military has held him virtually *incommunicado.* He has been or will be interrogated repeatedly by agents of the United States Departments of Defense and Justice, though he has not been charged with an offense, nor have he been notified of any pending or contemplated charges. He has made no appearance before either a military or civilian tribunal of any sort, nor have he been provided counselor the means to contact counseL He has not been informed of his rights under the United States Constitution, the regulations of the United States Military, the Geneva Convention, the International Covenant on Civil and Political Rights, the American Declaration on the Rights and Duties of Man, or customary internationallaw. Indeed, Respondents have

in Publication Data).

2 *See* Tom Gibbs, *World Americas, America's Slice of Cuba* (BBC Online Nehvork, Friday January 1, 1999).

3 http://www.sun-sentinel.comlnews/locallcuba/sns-gitmo-galleryindex.photogallery *?coll=sfla-news-cuba-(lnside Guantcmamo Bay Naval Station).*

taken the position that he should not be told of these rights. As a result, the detained Petitioner is completely unable either to protect, or to vindicate his rights under domestic and international law.'

37. In published statements, Respondents Bush, Rumsfeld, and officers Lehnert and Carrico who preceded Hood and Carmon in his respective positions, indicated the United States may hold the detained Petitioner under these conditions indefinitely. *See, e.g.,* Roland Watson, THE TIMES (LONDON), Jan. 18,2002 ("Donald Rumsfeld, the U.S. Defence Secretary, suggested last night that al-Qaeda prisoners could be held indefinitely at the base. He said that the detention of some would be open-ended as the United States tried to build a case against them."); Lynne Sladky, Assoc. PRESS, Jan. 22, 2002 ("Marine Brig. Gen. Mike Lehnert, who is in charge of the detention mission, defended the temporary cells where detainees are being held... 'We have to look at Camp X-ray as a work in progress...,' Lehnert told CNN. ... Lehnert said plans are to build a more permanent prison 'exactly in accordance with federal prison standards'"); John Mintz, The WASH. Post, *Extended Detention In Cuba Mulled,* Feb. 13, 2002 ("As the Bush administration nears completion of new rules for conducting military trials of foreign detainees, U.S. officials say he enVISIOn the naval base at Guantanamo Bay, Cuba, as a site for the tribunals and as a telTorist penal colony for many years to come."). [4]

V
CAUSES OF ACTION

FIRST CLAIM FOR RELIEF
(DUE PROCESS - FIFTH AMENDMENT
TO THE UNITED STATES CONSTmITION)

38. Petitioner incorporates all of the above paragraphs by reference.

39. By the actions described above, Respondents, acting under color of law, have violated and

[4] *See also* TIME MAG., *Welcome to Camp X-Ray,* Feb. 3,2002:

> More curious still is the matter of the prisoners' ultimate fate. Rumsfeld has laid out four options: a military trial, a trial in U.S. criminal courts, return to his home countries for prosecution, or continued detention 'while additional intelligence is gathered.' The last seems a distinct possibility; the Pentagon plans to build 2,000 cells at Camp X-Ray.

continue to violate the Fifth Amendment to the United States Constitution. Respondent Bush has ordered the prolonged, indefinite, and arbitrary detention of individuals, without Due Process of Law. Respondents Rumsfeld, Hood, and Cannon are likewise acting in violation of the Fifth Amendment, since he act at the President's direction. On its face, the Executive Order violates the Fifth Amendment.

SECOND CLAIM FOR RELIEF
(DUE PROCESS - FIFTH AMENDMENT
TO THE UNITED STATES CONSTITUTIOtl)

40. Petitioner incorporates all of the above paragraphs by reference.

41. By the actions described above, Respondents, acting under color of law, have violated and continue to violate the right of the detained Petitioner to be free from arbitrary, prolonged, and indefinite detention, in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution. The Executive Order, as applied to Petitioner, violates the Fifth Amendment.

THIRD CLAIM FOR RELIEF
(DUE PROCESS . INTERNATIONAL LAW)

42. Petitioner incorporates all of the above paragraphs by reference.

43. By the actions described above, Respondents, acting under color of law, have violated and continue to violate customary international law, Arts. 9 and 14 of the International Covenant on Civil and Political Rights, and Arts. XXVIII, XXV, and XXVI of the American Declaration on the Rights and Duties of Man. Respondent Bush has ordered the prolonged, indefinite, and arbitrary detention of Petitioner, without legal process, in violation of binding obligations of the United States under international law. Respondents Rumsfeld, Hood, and Cannon are likewise acting in violation ofintemationallaw, since they act at the President's direction. On its face, the Executive Order violates international law.

FOURTH CLAIM FOR RELIEF
(DUE PROCESS - INTERNATIONAL LAW)

44. Petitioner incorporates all of the above paragraphs by reference.

45. By the actions described above, Respondents, acting under color of law, have violated and continue to violate the right of the detained Petitioner to be free from arbitrary, prolonged, and indefinite detention, in violation of customary international law, Arts. 9 and 14 of the International Covenant on Civil and Political Rights, and Arts. XXVIII, XXV, and XXVI of the American Declaration on the Rights and Duties of Man. The Executive Order, as applied to the detained Petitioner, violates these and other binding obligations of the United States under International Law.

FIFTH CLAIM FOR RELIEF
(DUE PROCESS - FAILURE TO COMPLY WITH U.S. MILITARY REGULATIONS AND INTERNATIONAL HUMANIT ARrAN LAW)

46. Petitioner incorporates all of the above paragraphs by reference.

47. By the actions described above, Respondents, acting under color of law, have violated and continue to violate the rights accorded to persons seized by the United States Military in times of anned conflict, as established by, *inter alia,* the regulations of the United States Military, Articles 4 and 5 of Geneva Convention III, Geneva Convention IV, and customary international law.

SIXTH CLAIM FOR RELIEF
(WAR POWERS CLAUSE)

48. Petitioner incorporates all ofthe above paragraphs by reference.

49. By the actions described above, Respondents, acting under color of law, have exceeded the constitutional authority of the Executive and have violated and continue to violate the War Powers Clause by ordering the prolonged and indefinite detention of the detained Petitioner without Congressional authorization.

SEVENTH CLAIM FOR RELIEF
(SUSPENSION OF THE WRIT)

50. Petitioner incorporates all of the above paragraphs by reference.

S1. To the extent the order of November 13, 2001, disallows any challenge to the legality of the

Petitioner's detention by way of habeas corpus, the Order and its enforcement constitute an unlawful Suspension of the Writ, in violation of Article I of the United States Constitution.

VI
PRAYER FOR RELIEF

WHEREFORE, Petitioner prays for relief as fo]]ows:

I. Grant the "Next Friend Petitioner" such status as may be necessary;

2. Appoint individual counsel for the Petitioner, and provide the funding necessary for adequate representation;

3. Order the detained Petitioner released from Respondents' unlawful custody;

4. Order Respondents to anow counsel to meet and confer with the detained Petitioner, in private and umnonitored attorney-client conversations;

5. Order Respondents to cease all intelTogations of the detained Petitioner, direct or indirect, while this litigation is pending;

6. Order the Respondents not conduct or permit a Combatant Status Review Tribunal to be held in Petitioner's case;

7. Order and declare the Executive Order of November 13, 2001, unlawful as a violation of the Fifth and Fourteenth Amendments to the United States Constitution;

8. Order and declare the Executive Order of November 13, 2001, unlawful as a violation of the Administrative Procedures Act, 5 U.S.c. 9702;

9. Order and declare that the detained Petitioner is being held in violation of the Fifth and Fourteenth Amendments to the United States Constitution;

10. Order and declare the Executive Order of November 13, 2001, unlawful as a violation of customary international law, the International Covenant on Civil and Political Rights, and the American Declaration on the Rights and Duties of Man;

II. Order and declare that the detained Petitioner is being held in violation of- customary international law, the International Covenant on Civil and Political Rights, and the American Declaration on the Rights and Duties of Man;

12. Order and declare that the detained Petitioner is being held in violation of the regulations of the

United States Military, the Geneva Conventions, and international humanitarian law;

13. Order and declare that the Executive Order of November 13, 2001, violates the War Powers Clause;
14. Order and declare that the provision of the Executive Order that bars the detained Petitioner from seeking relief in this Court is an unlawful Suspension of the Writ, in violation of Article I of the United States Constitution;
15. To the extent Respondents contest any material factual allegations in this Petition, schedule an evidentiary hearing, at which Petitioner may adduce proof in support of his allegations; and
16. Grant such other relief as the Court may deem necessary and appropriate to protect Petitioner's rights under the United States Constitution and international law.

Dated: Washington, D.C., March ~2005

Respectfully submitted,
Counsel for Petitioner:

James W. Beane Jr.
U.S. District Court for the
District of Columbia Bar No. 444920
803 Florida Avenue, N.W.
Washington, D.C. 20001
(202) 257-3920 (tel)
(703) 354-3456 (fax)
e-mail: beane.law@verizon.net

Clive A. Stafford Smith**
Admitted in the States of Georgia, Louisiana & Mississippi
636 Baronne Street
New Orleans, La. 70113
(504) 558 9867
e-mail: clivess@mac.com

Counsel for Petitioner

* Signed by co-counsel with pennission by James Beane.
** Mr. Stafford Smith has previously been admitted pro hac vice in connection with the Guantanamo Bay litigation

VERIFICATION

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

Executed on this ~· day of March, 2005.

Clive A. Stafford Smith***

*** Counsel must sign the verification, rather than have it signed by a member of the D.C. bar, because this pleading is completed in the Secure Facility, and is not unclassified. Counsel has security clearance while local counsel does not, and cannot therefore review the pleading until is it unclassified.

EXHIBIT A

I.S.N 239

(1)

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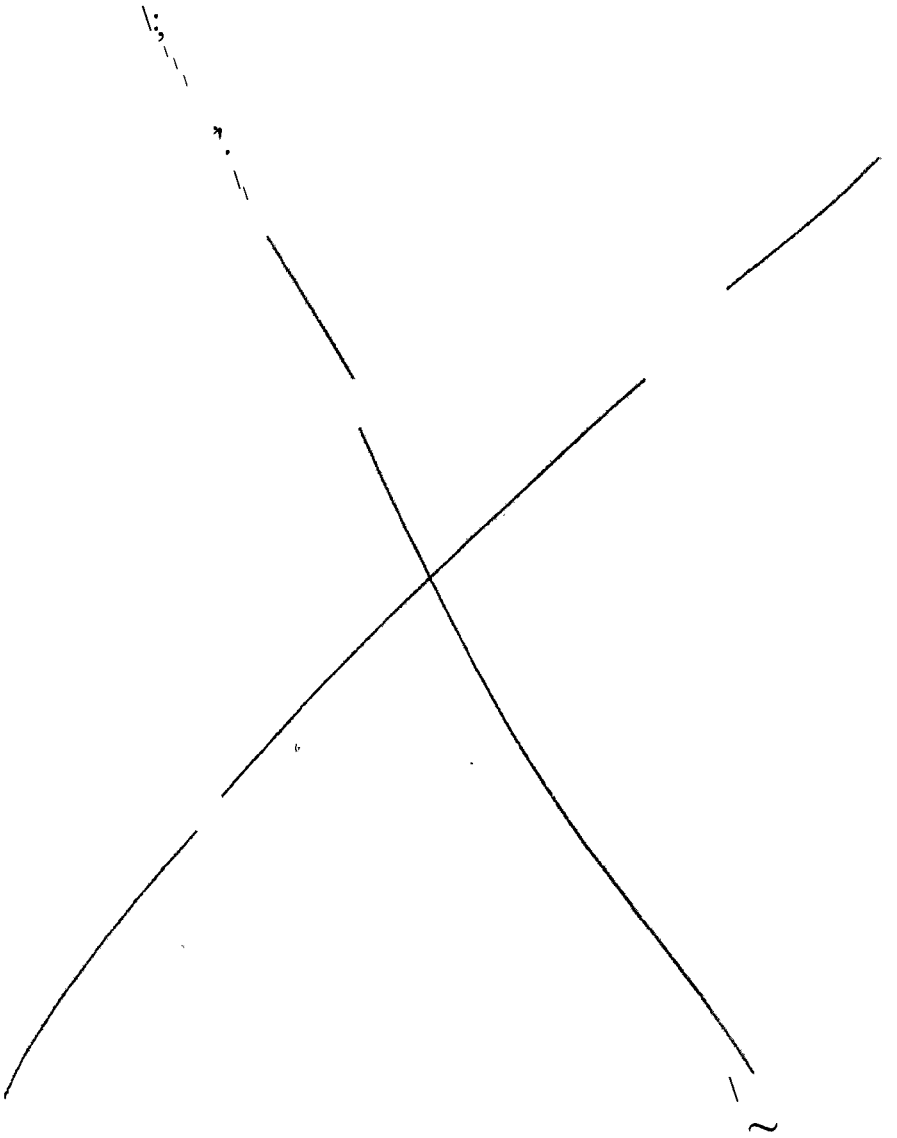

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CLERK=S OFFICE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CO-932
Rev. 4/96

NOTICE OF DESIGNATION OF RELATED CIVIL CASES PENDING
IN THIS OR ANY OTHER UNITED STATES COURT

FILED

APR 15 2005

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

Civil Action No. 05 0765
(To be supplied by the Clerk)

NOTICE TO PARTIES:

Pursuant to Rule 405(b)(2), you are required to submit this form at the time of filing any civil action which is related to any pending cases or which involves the same parties and related to the same subject matter of any dismissed related cases. This form must be prepared in sufficient quantity to provide one copy for the Clerks records, one copy for the Judge to whom the cases is assigned and one copy for each defendant, so that you must prepare 3 copies for a one defendant case, 4 copies for a two defendant case, etc.

NOTICE TO DEFENDANT:

Rule 405(b)(2) of this Court requires that you serve upon the plaintiff and file with your first responsive pleading or motion any objection you have to the related case designation.

NOTICE TO ALL COUNSEL

Rule 405(b)(3) of this Court requires that as soon as an attorney for a party becomes aware of the existence of a related case or cases, such attorney shall immediately notify, in writing, the Judges on whose calendars the cases appear and shall serve such notice on counsel for all other parties.

The plaintiff, defendant or counsel must complete the following:

I. RELATIONSHIP OF NEW CASE TO PENDING RELATED CASE(S).

A new case is deemed related to a case pending in this or another U.S. Court if the new case: [Check appropriate box(es) below.]

- [ ] (a) relates to common property
- [x] (b) involves common issues of fact
- [x] (c) grows out of the same event or transaction
- [ ] (d) involves the validity or infringement of the same patent
- [ ] (e) is filed by the same pro se litigant

2. RELATIONSHIP OF NEW CASE TO DISMISSED RELATED CASE(ES)

A new case is deemed related to a case dismissed, with or without prejudice, in this or any other U.S. Court, if the new case involves the same parties and same subject matter.

Check box if new case is related to a dismissed case: [ ]

3. NAME THE UNITED STATES COURT IN WHICH THE RELATED CASE IS FILED (IF OTHER THAN THIS COURT):

4. CAPTION AND CASE NUMBER OF RELATED CASE(ES). IF MORE ROOM IS NEED PLEASE USE OTHER SIDE.

Omar Deghayes, et al. v. George W. Bush, et al. C.A. No. 04cv2215(RMC)

4/14/05
DATE

James W. Bell
Signature of Plaintiff /Defendant (or counsel)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BENJAMIN MOHAMMED AL HABASHI, et al.	)	
Petitioners,	)	
v.	)	**No. 1:05CV00765 (RMC)**
GEORGE WALKER BUSH, et al.	)	
Respondents.	)	

UNOPPOSED MOTION TO APPEAR PRO HAC VICE

COMES NOW James W. Beane, Jr. Esq., a member in good standing of the bar of this Court, and hereby moves for the admission pro hac vice of Clive Stafford Smith, Esq., a member of the bars of the States of Georgia, Mississippi, and Louisiana for the purpose of this case only.

The movant states that he as well as the visiting attorney have read the rules of this Court concerning admissions pro hac vice and will abide by them.

Dated in Washington, April 12, 2005.

Respectfully submitted,
Counsel for Petitioner:

/s/

James W. Beane Jr.
U.S. District Court for the
District of Columbia Bar No. 444920
803 Florida Avenue, N.W.
Washington, D.C. 20001
(202) 257-3920 (tel)
(703) 354-3456 (fax)
e-mail: beane.law@verizon.net

CERTIFICATION OF MAILING

I hereby certify that on this 12th day of April, 2005, a true and correct copy of the above and foregoing was mailed by United States mail, postage prepaid, to Andrew I. Warden, U.S. Department of Justice, Civil Division, Federal Programs Branch, 20 Massachusetts Ave., NW, Room 6120, Washington, DC 20530.

_____/s/_____
James W. Beane Jr.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BENJAMIN MOHAMMED AL HABASHI, et al.	)	
Petitioners,	)	
v.	)	**No. 1:05CV00756 (RMC)**
GEORGE WALKER BUSH, et al.	)	
Respondents.	)	

PROPOSED ORDER

Upon consideration of the unopposed motion for admission of counsel pro hac vice, it is hereby ordered that Clive A. Stafford Smith is admitted *pro hac vice* for purposes of this case.

IT IS SO ORDERED.

DATED: _____

_____
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BENJAMIN MOHAMMED AL HABASHI, et al.	)	
Petitioners,	)	
v.	)	**No. 1:05CV00765 (RMC)**
GEORGE WALKER BUSH, et al.	)	
Respondents.	)	

UNOPPOSED MOTION FOR ENTRY OF PROTECTIVE ORDER

Petitioners move for entry of the Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba, first issued on November 8, 2004, (344 F. Supp. 2d 174 (D.D.C. 2004)) and the Order Supplementing and Amending Filing Procedures Contained in November 8, 2004 Amended Protective Order, first issued on December 13, 2004, in the *In re Guantanamo Bay Detainee Cases* by then Coordinating Judge Joyce Hens Green. See Exhibits 1-2. Entry of the Protective Order would permit counsel the opportunities accorded counsel in certain other pending Guantanamo Bay detainee cases in which the Protective Order has been entered to send mail to petitioners by way of the legal mail procedures outlined in the Protective Order and to visit petitioners at Guantanamo Bay, upon compliance with the terms of the Protective Order.

Pursuant to Local Civil Rule 7(m), undersigned counsel for petitioners conferred with respondents' counsel regarding the relief sought in this motion. Respondents' counsel does not oppose the motion on the condition that, consistent with Judge Green's November 10, 2004 Order in the other coordinated Guantanamo Bay detainee cases, an order be entered requiring petitioners' counsel to treat information designated by respondents as "protected" under the

Amended Protective Order as "protected information" under the Amended Protective Order pending further order of this Court. See Order Addressing Designation Procedures for "Protected Information" (Nov. 10, 2004) (Green, J.) (attached as Exhibit 3). Petitioners' counsel does not oppose the entry of such an order. Respondents' counsel has further represented that lack of objection to entry of the Protective Order is without prejudice to respondents' right to challenge any particular terms of the Protective Order in the future as appropriate or to seek a stay of proceedings in this case as appropriate.

A proposed order is attached. See Exhibit 4.

Dated: Washington, D.C., April 12, 2005

Respectfully submitted,
Counsel for Petitioner:

____/s/_____

James W. Beane Jr.
U.S. District Court for the
District of Columbia Bar No. 444920
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New Orleans, La. 70113
(504) 558 9867
e-mail: clivcss@mac.com

* Mr. Stafford Smith has previously been admitted pro hac vice in connection with the Guantanamo Bay litigation

CERTIFICATION OF MAILING

I hereby certify that on this 12 day of April, 2005, a true and correct copy of the above and foregoing was mailed by United States mail, postage prepaid, to Andrew I. Warden, U.S. Department of Justice, Civil Division, Federal Programs Branch, 20 Massachusetts Ave., NW, Room 6120, Washington, DC 20530.

/s/
James W. Beane Jr.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BENJAMIN MOHAMMED AL HABASHI, et al.	)	
Petitioners,	)	
v.	)	**No. 1:05CV00765**
GEORGE WALKER BUSH, et al.	)	
Respondents.	)	

PROPOSED ORDER

Upon consideration of the unopposed motion for entry of protective order, it is

ORDERED that the Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba, first issued on November 8, 2004, (344 F. Supp. 2d 174 (D.D.C. 2004)) and the Order Supplementing and Amending Filing Procedures Contained in November 8, 2004 Amended Protective Order, first issued on December 13, 2004, in the *In re Guantanamo Bay Detainee Cases* shall apply in this case. It is

FURTHER ORDERED that petitioners' counsel shall treat information designated by respondents as "protected" under the Amended Protective Order as "protected information" under the Amended Protective Order pending further order of this Court.

IT IS SO ORDERED.

DATED: _____

_____
United States District Judge

EXHIBIT 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

AMENDED PROTECTIVE ORDER AND PROCEDURES FOR COUNSEL ACCESS TO DETAINEES AT THE UNITED STATES NAVAL BASE IN GUANTANAMO BAY, CUBA

This matter comes before the Court upon Respondents' Motion for Protective Order to prevent the unauthorized disclosure or dissemination of classified national security information and other protected information that may be reviewed by, made available to, or are otherwise in the possession of, the petitioners and/or petitioners' counsel in these coordinated cases. Pursuant to the general supervisory authority of the Court, in order to protect the national security, and for good cause shown,

IT IS ORDERED:

1. The Court finds that these cases involve classified national security information or documents, the storage, handling and control of which require special security precautions, and access to which requires a security clearance and a "need to know." These cases may also involve other protected information or documents, the storage, handling and control of which may require special precautions in order to protect the security of United States government personnel and facilities, and other significant government interests.

2. The purpose of this Protective Order is to establish the procedures that must be followed by all petitioners' counsel, their respective petitioner(s), all other counsel involved in

these cases, translators for the parties, and all other individuals who receive access to classified national security information or documents, or other protected information or documents, in connection with these cases, including the privilege team as defined in Exhibit A.

3. The procedures set forth in this Protective Order will apply to all aspects of these cases, and may be modified by further order of the Court *sua sponte* or upon application by any party. The Court will retain continuing jurisdiction to enforce or modify the terms of this Order.

4. Nothing in this Order is intended to or does preclude the use of classified information by the government as otherwise authorized by law outside of these actions.

5. Petitioners' counsel shall be responsible for advising their employees, the petitioners, and others of the contents of this Protective Order, as appropriate or needed.

6. Petitioners' counsel are bound by the terms and conditions set forth in the "Revised Procedures For Counsel Access To Detainees At the U.S. Naval Base In Guantanamo Bay, Cuba," and the procedures for handling mail and documents brought into and out of counsel meetings, attached hereto as Exhibit A. This Protective Order specifically incorporates by reference all terms and conditions established in the procedures contained in Exhibit A to the extent they place limitations on petitioners' counsel in their access to and interaction with petitioners or handling of information. Any violation of the terms and conditions of those procedures will also be deemed a violation of this Protective Order. This paragraph does not apply with respect to provisions in the procedures contained in Exhibit A that are or have been overridden by the Court.

7. The privilege team shall not disclose to any person any information provided by counsel for a petitioner or by a petitioner, other than information provided in a filing with the Court, unless such information, if it were monitored information, could be disclosed under Section X of Exhibit A. Such disclosure shall be consistent with the provisions of Section X of Exhibit A.

Definitions

8. As used herein, the words "documents" or "information" shall include, but are not limited to, all written or printed matter of any kind, formal or informal, including originals, conforming copies and non-conforming copies (whether different from the original by reason of notation made on such copies or otherwise), and further include, but are not limited to:

a. papers, correspondence, memoranda, notes, letters, reports, summaries, photographs, maps, charts, graphs, interoffice and intra-office communications, notations of any sort concerning conversations, meetings, or other communications, bulletins, teletypes, telegrams, telefacsimiles, invoices, worksheets, and drafts, alterations, modifications, changes and amendments of any kind to the foregoing;

b. graphic or oral records or representations of any kind, including, but not limited to, photographs, charts, graphs, microfiche, microfilm, videotapes, sound recordings of any kind, and motion pictures;

c. electronic, mechanical or electric records of any kind, including, but not limited to, tapes, cassettes, disks, recordings, electronic mail, films, typewriter ribbons, word processing or other computer tapes or disks, and all manner of electronic data processing storage; and

d. information acquired orally.

9. The terms "classified national security information and/or documents," "classified information" and "classified documents" refer to:

a. any classified document or information that has been classified by any Executive Branch agency in the interests of national security or pursuant to Executive Order, including Executive Order 12958, as amended, or its predecessor Orders as "CONFIDENTIAL," "SECRET," or "TOP SECRET," or additionally controlled as "SENSITIVE

COMPARTMENTED INFORMATION (SCI)," or any classified information contained in such document;

b. any document or information, regardless of its physical form or characteristics, now or formerly in the possession of a private party that has been derived from United States government information that was classified, regardless of whether such document or information has subsequently been classified by the government pursuant to Executive Order, including Executive Order 12958, as amended, or its predecessor Orders as "CONFIDENTIAL," "SECRET," or "TOP SECRET," or additionally controlled as "SENSITIVE COMPARTMENTED INFORMATION (SCI)";

c. verbal or non-documentary classified information known to the petitioner or petitioners' counsel; or

d. any document and information as to which the petitioner or petitioners' counsel have been notified orally or in writing that such documents or information contains classified information.

10. All classified documents, and information contained therein, shall remain classified unless the documents bear a clear indication that they have been declassified by the agency or department that is the original classification authority of the document or the information contained therein (hereinafter, the "original classification authority").

11. The terms "protected information and/or documents," "protected information" and "protected documents" refer to any document or information deemed by the Court, either upon application by counsel or *sua sponte*, as worthy of special treatment as if the document or information were classified, even if the document or information has not been formally deemed to be classified.

12. For purposes of this Protective Order, "petitioners' counsel" shall be defined to include an attorney who is employed or retained by or on behalf of a petitioner for purposes of

representing the petitioner in habeas corpus or other litigation in federal court in the United States, as well as co-counsel, interpreters, translators, paralegals, investigators and all other personnel or support staff employed or engaged to assist in the litigation.

13. "Access to classified information" or "access to protected information" shall mean having access to, reviewing, reading, learning, or otherwise coming to know in any manner any classified information or protected information.

14. "Secure area" shall mean a physical facility accredited or approved for the storage, handling, and control of classified information.

15. "Unauthorized disclosure of classified information" shall mean any knowing, willful or negligent action that could reasonably be expected to result in a communication or physical transfer of classified information to an unauthorized recipient.

Designation of Court Security Officer

16. The Court designates Christine E. Gunning as Court Security Officer for these cases, and Joan B. Kendrall, Michael P. Macisso, James P. Londergan, Mary M. Cradlin, Daniel O. Hartenstine, John P. Molinard, Jennifer Campbell, and Barbara J. Russell as Alternate Court Security Officers, for the purpose of providing security arrangements necessary to protect from unauthorized disclosure of any classified documents or information, or protected documents or information, to be made available in connection with these cases. Petitioners' counsel shall seek guidance from the Court Security Officer with regard to appropriate storage, handling, transmittal, and use of classified documents or information.

Access to Classified Information and Documents

17. Without authorization from the government, no petitioner or petitioners' counsel shall have access to any classified information involved in these cases unless that person shall first have:

a. made a written submission to the Court Security Officer precisely stating the reasons why counsel has a need to know the classified information requested; and

b. received the necessary security clearance as determined by the Department of Justice Security Officer; and

c. signed the Memorandum of Understanding ("MOU"), attached hereto as Exhibit B, agreeing to comply with the terms of this Protective Order.

The written submissions that are made by counsel to the Court Security Officer stating the reasons why counsel has a need to know the classified information requested shall be kept confidential by the Court Security Officer and shall not be disclosed to any other counsel or party to these cases unless the Court specifically orders such disclosure.

18. Petitioners' counsel to be provided access to classified information shall execute the MOU appended to this Protective Order, and shall file executed originals with the Court and submit copies to the Court Security Officer and counsel for the government. The execution and submission of the MOU is a condition precedent for petitioners' counsel to have access to, or continued access to, classified information for the purposes of this proceeding.

19. The substitution, departure, or removal of petitioners' counsel from these cases for any reason shall not release that person from the provisions of this Protective Order or the MOU executed in connection with this Order.

20. The government shall arrange for one appropriately approved secure area for the use of petitioners' counsel. The secure area shall contain a working area that will be supplied with secure office equipment reasonable and necessary to the preparation of the petitioners' case. Expenses for the secure area and its equipment shall be borne by the government.

21. The Court Security Officer shall establish procedures to ensure that the secure area is accessible to the petitioners' counsel during normal business hours and at other times on reasonable request as approved by the Court Security Officer. The Court Security Officer shall establish procedures to ensure that the secure area may be maintained and operated in the most efficient manner consistent with the protection of classified information. The Court Security Officer or Court Security Officer designee may place reasonable and necessary restrictions on the schedule of use of the secure area in order to accommodate appropriate access to all petitioners' counsel in this and other proceedings.

22. All classified information provided by the government to counsel for petitioners, and all classified information otherwise possessed or maintained by petitioners' counsel, shall be stored, maintained, and used only in the secure area.

23. No documents containing classified information may be removed from the secure area unless authorized by the Court Security Officer or Court Security Officer designee supervising the area.

24. Consistent with other provisions of this Protective Order, petitioners' counsel shall have access to the classified information made available to them in the secure area, and shall be allowed to take notes and prepare documents with respect to those materials.

25. Petitioners' counsel shall not copy or reproduce any classified information in any form, except with the approval of the Court Security Officer or in accordance with the procedures established by the Court Security Officer for the operation of the secure area.

26. All documents prepared by petitioners or petitioners' counsel that do or may contain classified information (including without limitation, notes taken or memoranda prepared by counsel and pleadings or other documents intended for filing with the Court) shall be transcribed, recorded, typed, duplicated, copied, or otherwise prepared only by persons who have received an appropriate approval for access to classified information. Such activities shall take place in the secure area on approved word processing equipment and in accordance with the procedures approved by the Court Security Officer. All such documents and any associated materials containing classified information (such as notes, memoranda, drafts, copies, typewriter ribbons, magnetic recordings, exhibits) shall be maintained in the secure area unless and until the Court Security Officer advises that those documents or associated materials are unclassified in their entirety. None of these materials shall be disclosed to counsel for the government unless authorized by the Court, by petitioners' counsel or as otherwise provided in this Protective Order.

27. Petitioners' counsel shall discuss classified information only within the secure area or in another area authorized by the Court Security Officer, shall not discuss classified information over any standard commercial telephone instrument or office intercommunication system, and shall not transmit or discuss classified information in electronic mail communications of any kind.

28. The Court Security Officer or Court Security Officer designee shall not reveal to any person the content of any conversations she or he may hear by or among petitioners' counsel, nor reveal the nature of documents being reviewed by them, or the work generated by them, except as necessary to report violations of this Protective Order to the Court or to carry out their duties pursuant to this Order. In addition, the presence of the Court Security Officer or Court Security Officer designee shall not operate as a waiver of, limit, or otherwise render inapplicable, the attorney-client privilege or work product protections.

29. Petitioners' counsel shall not disclose the contents of any classified documents or information to any person, including counsel in related cases brought by Guantanamo Bay detainees in this or other courts, except those authorized pursuant to this Protective Order, the Court, and counsel for the government with the appropriate clearances and the need to know that information. Except as otherwise specifically provided by Judge Colleen Kollar-Kotelly in her well-reasoned opinion addressing counsel access procedures regarding petitioners Mohammed Ahmed al Kandari, Fawzi Khalid Abdullah Fahad al Odah, and Khalid Abdullah Mishal al Mutairi in Al Odah v. United States, 02-CV-0828 (CKK), counsel for petitioners in these cases are presumed to have a "need to know" information both in their own cases and in related cases pending before this Court. Therefore, and except as provided with respect to the three petitioners in Al Odah mentioned above, counsel for all petitioners in these cases who have satisfied all necessary prerequisites and follow all procedures set forth herein may share and discuss among themselves classified information to the extent necessary for the effective representation of their clients. Counsel for respondents may challenge the "need to know" presumption on a case-by-case basis for good cause shown.

30. Petitioners' counsel shall not disclose classified information not provided by petitioner-detainee to that petitioner-detainee. Should petitioners' counsel desire to disclose classified information not provided by petitioner-detainee to that petitioner-detainee, petitioners' counsel will provide in writing to the privilege review team (See Exhibit A) a request for release clearly stating the classified information they seek to release. The privilege review team will forward the petitioner counsel's request to the appropriate government agency authorized to declassify the classified information for a determination. The privilege review team will inform petitioners' counsel of the determination once it is made.

31. No petitioner or counsel for petitioner shall disclose or cause to be disclosed any information known or believed to be classified in connection with any hearing or proceeding in these cases except as otherwise provided herein.

32. Except as otherwise stated in this paragraph and to ensure the security of the United States of America, at no time, including any period subsequent to the conclusion of the proceedings, shall petitioners' counsel make any public or private statements disclosing any classified information or documents accessed pursuant to this Protective Order, including the fact that any such information or documents are classified. In the event that classified information enters the public domain, however, counsel is not precluded from making private or public statements about the information already in the public domain, but only to the extent that the information is in fact in the public domain. Counsel may not make any public or private statements revealing personal knowledge from non-public sources regarding the classified or protected status of the information or disclosing that counsel had personal access to classified or protected information confirming, contradicting, or otherwise relating to the information already in the public domain. In an abundance of caution and to help ensure clarity on this matter, the Court emphasizes that counsel shall not be the source of any classified or protected information entering the public domain.

As stated in more detail in paragraph 49 below, failure to comply with these rules may result in the revocation of counsel's security clearance as well as civil and/or criminal liability.

33. The foregoing shall not prohibit petitioners' counsel from citing or repeating information in the public domain that petitioners' counsel does not know to be classified information or a classified document, or derived from classified information or a classified document.

34. All documents containing classified information prepared, possessed or maintained by, or provided to, petitioners' counsel (except filings submitted to the Court and

served on counsel for the government), shall remain at all times in the control of the Court Security Officer for the duration of these cases. Upon final resolution of these cases, including all appeals, all such documents shall be destroyed by the Court Security Officer.

Access to Protected Information and Documents

35. Without authorization from the government or the Court, protected information shall not be disclosed or distributed to any person or entity other than the following:

a. petitioners' counsel, provided such individuals have signed the Acknowledgment, attached hereto as Exhibit C, attesting to the fact that they have read this Protective Order and agree to be bound by its terms; and

b. the Court and its support personnel.

36. The execution of the Acknowledgment is a condition precedent for petitioners' counsel to have access to, or continued access to, protected information for the purposes of this proceeding. A copy of each executed Acknowledgment shall be kept by counsel making the disclosure until thirty (30) days after the termination of this action, including appeals.

37. The substitution, departure, or removal of petitioners' counsel from these cases for any reason shall not release that person from the provisions of this Protective Order or the Acknowledgment executed in connection with this Protective Order.

38. Petitioners' counsel shall not disclose the contents of any protected documents or information to any person, to include counsel in related cases brought by Guantanamo Bay detainees in this or other courts, except those authorized pursuant to this Protective Order, the Court, or counsel for the government. Except as otherwise specifically provided by Judge Colleen Kollar-Kotelly with respect to counsel for petitioners Mohammed Ahmed al Kandari, Fawzi Khalid Abdullah Fahad al Odah, and Khalid Abdullah Mishal al Mutairi in Al Odah v. United States, 02-CV-0828 (CKK), counsel for petitioners in these coordinated cases may share protected information with each other but only to the extent that counsel have appropriate

security clearances and that all other procedures set forth in this Protective Order are complied with. Petitioners' counsel shall maintain all protected information and documents received through this proceeding in a confidential manner.

39. Petitioners' counsel shall not disclose protected information not provided by petitioner-detainee to that petitioner-detainee without prior concurrence of counsel for the government or express permission of the Court.

40. No petitioner or counsel for petitioner shall disclose or cause to be disclosed any information known or believed to be protected in connection with any hearing or proceeding in these cases except as otherwise provided herein.

41. At no time, including any period subsequent to the conclusion of the proceedings, will petitioners' counsel make any public or private statements disclosing any protected information or documents accessed pursuant to this Protective Order, including the fact that any such information or documents are protected.

42. Protected information shall be used only for purposes directly related to these cases and not for any other litigation or proceeding, except by leave of the Court. Photocopies of documents containing such information shall be made only to the extent necessary to facilitate the permitted use hereunder.

43. Nothing in this Protective Order shall prevent the government from using for any purpose protected information it provides a party. Nothing in this Protective Order shall entitle another party to protected information.

44. Supplying protected information to another party does not waive privilege with respect to any person or use outside that permitted by this Protective Order.

45. Within sixty (60) days of the resolution of these actions, and the termination of any appeals therefrom, all protected documents or information, and any copies thereof, shall be promptly destroyed, provided that the party to whom protected information is disclosed certifies

in writing that all designated documents and materials have been destroyed, and further provided that counsel for the government may retain one complete set of any such materials that were presented in any form to the Court. Any such retained materials shall be placed in an envelope or envelopes marked "Protected Information Subject to Protective Order." In any subsequent or collateral proceeding, a party may seek discovery of such materials from the government, without prejudice to the government's right to oppose such discovery or its ability to dispose of the materials pursuant to its general document retention policies.

Procedures for Filing Documents

46. Until further order of this Court, any pleadings or other document filed by a petitioner shall be filed under seal with the Court through the Court Security Officer unless the petitioner has obtained from the Court Security Officer permission, specific to a particular, non-substantive pleading or document (e.g., motions for extensions of time, continuances, scheduling matters, etc.) not containing information that is or may be classified or protected, to file the pleading or document not under seal. The date and time of physical submission to the Court Security Officer shall be considered the date and time of filing with the Court. The Court Security Officer shall promptly examine the pleading or document and forward it to the appropriate agencies for their determination whether the pleading or document contains classified information. If it is determined that the pleading or document contains classified information, the Court Security Officer shall ensure that portion of the document, and only that portion, is marked with the appropriate classification marking and that the document remains under seal. If it is determined that the pleading or document contains protected information, the Court Security Officer shall ensure that portion of the document, and only that portion, remains under seal. Any document filed by petitioner that is determined not to contain classified information or protected information, and is not subject to any other restrictions on disclosure, shall immediately be unsealed by the Court Security Officer and placed in the public record. The Court Security

Officer shall immediately deliver under seal to the Court and counsel for the government any pleading or document to be filed by petitioners that contains classified information or protected information. The Court shall then direct the clerk to enter on the docket sheet the title of the pleading or document, the date it was filed, and the fact that it has been filed under seal with the Court Security Officer.

47. Any pleading or other document filed by the government containing classified information shall be filed under seal with the Court through the Court Security Officer. The date and time of physical submission to the Court Security Officer shall be considered the date and time of filing with the Court. The Court Security Officer shall serve a copy of any classified pleadings by the government upon the Petitioner at the secure facility.

48. Nothing herein shall require the government to disclose classified or protected information. Nor shall anything herein prohibit the government from submitting classified information or protected information to the Court *in camera* or *ex parte* in these proceedings, or entitle petitioners or petitioners' counsel access to such submissions or information. Except for good cause shown in the filing, the government shall provide counsel for the petitioner or petitioners with notice served on such counsel on the date of the filing.

Penalties for Unauthorized Disclosure

49. Any unauthorized disclosure of classified information may constitute violations of United States criminal laws. In addition, any violation of the terms of this Protective Order shall be immediately brought to the attention of the Court and may result in a charge of contempt of Court and possible referral for criminal prosecution. See e.g., Executive Order 12958, as amended. Any breach of this Protective Order may also result in the termination of access to classified information and protected information. Persons subject to this Protective Order are advised that direct or indirect unauthorized disclosure, retention, or negligent handling of classified documents or information could cause damage to the national security of the United

States or may be used to the advantage of an adversary of the United States or against the interests of the United States. Persons subject to this Protective Order are also advised that direct or indirect unauthorized disclosure, retention, or negligent handling of protected documents or information could risk the security of United States government personnel and facilities, and other significant government interests. This Protective Order is to ensure that those authorized to receive classified information and protected information will not divulge this information to anyone who is not authorized to receive it, without prior written authorization from the original classification authority and in conformity with this Protective Order.

50. The termination of these proceedings shall not relieve any person or party provided classified information or protected information of his, her, or its obligations under this Protective Order.

IT IS SO ORDERED.

November 8, 2004

/s/
JOYCE HENS GREEN
United States District Judge

Exhibit A

EXHIBIT A

REVISED PROCEDURES FOR COUNSEL ACCESS TO DETAINEES AT THE U.S. NAVAL BASE IN GUANTANAMO BAY, CUBA

I. Applicability

Except as otherwise stated herein or by other Order issued in the United States District Court for the District of Columbia, the following procedures shall govern counsel access to all detainees in the control of the Department of Defense ("DoD") at the U.S. Naval Base in Guantanamo Bay, Cuba ("GTMO") by counsel for purposes of litigating the cases in which this Order is issued.

These procedures do not apply to counsel who are retained solely to assist in the defense of a detainee in a trial by military commission. Access by that counsel is covered by the Procedures for Monitoring Communications Between Detainees Subject to Trial by Military Commission and their Defense Counsel Pursuant to Military Commission Order No. 3.

II. Definitions

A. Communications: All forms of communication between counsel and a detainee, including oral, written, electronic, or by any other means.

B. Counsel: An attorney who is employed or retained by or on behalf of a detainee for purposes of representing the detainee in the United States District Court for the District of Columbia and who is admitted, either generally or pro hac vice, in this Court. Unless otherwise stated, "counsel" also includes co-counsel, interpreters, translators, paralegals, investigators and all other personnel or support staff employed or engaged to assist in the litigation.

C. Detainee: An individual detained by DoD as an alleged enemy combatant at the U.S. Naval Base in Guantanamo Bay, Cuba.

D. Privilege Team: A team comprised of one or more DoD attorneys and one or more intelligence or law enforcement personnel who have not taken part in, and, in the future, will not take part in, any domestic or foreign court, military commission or combatant status tribunal proceedings involving the detainee. If required, the privilege team may include interpreters/translators, provided that such personnel meet these same criteria.

E. Legal Mail: Letters written between counsel and a detainee that are related to the counsel's representation of the detainee, as well as privileged documents and publicly-filed legal documents relating to that representation.

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III. Requirements for Access to and Communication with Detainees

A. Security Clearance:

1. Counsel must hold a valid current United States security clearance at the Secret level or higher, or its equivalent (as determined by appropriate DoD intelligence personnel).

2. Counsel who possess a valid security clearance shall provide, in writing, the date of their background investigation, the date such clearance was granted, the level of the clearance, and the agency who granted the clearance. Access will be granted only after DoD verification of the security clearance.

3. Counsel who does not currently possess a Secret clearance will be required to submit to an application for clearance to the Department of Justice, Litigation Security Division.

B. Acknowledgment of and Compliance with Access Procedures

1. Before being granted access to the detainee, counsel will receive a copy of these procedures. To have access to the detainee, counsel must agree to comply fully with these procedures and must sign an affirmation acknowledging his/her agreement to comply with them.

2. This affirmation will not be considered an acknowledgment by counsel that the procedures are legally permissible. Even if counsel elects to challenge these procedures, counsel may not knowingly disobey an obligation imposed by these procedures.

3. The DoD expects that counsel, counsel's staff, and anyone acting on the behalf of the attorney will fully abide by the requirements of this document. Counsel is required to provide the DoD with signed affirmations from interpreters, translators, paralegals, investigators and all other personnel or support staff employed or engaged to assist in the litigation, upon utilization of those individuals by counsel in a manner that implicates these procedures.

4. Should counsel fail to comply with the procedures set forth in this document, access to or communication with the detainee will not be permitted.

C. Verification of Representation

1. Prior to being permitted access to the detainee, counsel must provide DoD with a *Notification of Representation*. This Notification must include the counsel's licensing information, business and email addresses and phone number, as well as

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the name of the detainee being represented by the counsel. Additionally, counsel shall provide evidence of his or her authority to represent the detainee.

2. Counsel shall provide evidence of his or her authority to represent the detainee as soon as practicable and in any event no later than ten (10) days after the conclusion of a second visit with the detainee. The Court recognizes that counsel may not be in a position to present such evidence after the initial meeting with a detainee. Counsel for detainees and counsel for respondents shall cooperate to the fullest extent possible to reach a reasonable agreement on the number of counsel visits allowed. Should counsel for a detainee believe that the government is unreasonably limiting the number of visits with a detainee, counsel may petition the Court at the appropriate time for relief.

3. If the counsel withdraws from representation of the detainee or if the representation is otherwise terminated, counsel is required to inform DoD immediately of that change in circumstances.

4. Counsel must provide DoD with a signed representation stating that to the best of counsel's knowledge after reasonable inquiry, the source of funds to pay counsel any fees or reimbursement of expenses are not funded directly or indirectly by persons or entities the counsel believes are connected to terrorism or the product of terrorist activities, including "Specially Designated Global Terrorists," identified pursuant to Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001) or Exec. Order No. 12,947, 60 Fed. Reg. 5079 (Jan. 23, 1995), and (b) counsel has complied with ABA Model Rule 1.8(f).

D. Logistics of Counsel Visits

1. Counsel shall submit to the Department of Justice (DoJ) any request to meet with a detainee. This request shall specify date(s) of availability for the meeting, the desired duration of the meeting and the language that will be utilized during the meeting with the detainee. Reasonable efforts will be made to accommodate the counsel's request regarding the scheduling of a meeting. Once the request has been approved, DoJ will contact counsel with the date and duration of the meeting.

2. Legal visits shall take place in a room designated by JTF-Guantanamo. No more than two attorneys (or one attorney and one assistant) plus one interpreter/translator shall visit with a detainee at one time, unless approved in advance by the Commander, JTF-Guantanamo. Such approval shall not be unreasonably withheld.

3. Due to the mission and location of the US Naval Base at Guantanamo Bay, Cuba, certain logistical details will need to be coordinated by counsel prior to arrival. This includes arrangements for travel and lodging. Specific information regarding these issues will be provided by DoJ.

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4. In order to travel to GTMO, all counsel must have a country and theater clearance for that specific visit. In order to begin processing country and theater clearances, counsel must have confirmed flight information for travel to GTMO and a valid current United States security clearance at the Secret level or higher, or its equivalent (as determined by appropriate DoD intelligence personnel). Country and theater clearances require twenty (20) days to process. Accordingly, counsel shall provide DoD, through DoJ, with the required information no later than 20 days prior to the GTMO visit date, or as soon as a visit is scheduled. Requests for visits made inside of 20 days will not normally be granted.

IV. Procedures for Correspondence Between Counsel and Detainee

A. Mail Sent by Counsel to Detainee ("Incoming Mail")

1. Counsel shall send incoming legal mail for a detainee to the privilege team at the appropriate address provided by government counsel. Each envelope or mailer shall be labeled with the name of the detainee and shall include a return address for counsel sending the materials. The outside of the envelope or mailer for incoming legal mail shall be labeled clearly with the following annotation: "Attorney-Detainee Materials-For Mail Delivery to Detainee."

2. Each page of legal mail shall be labeled "Attorney-Detainee Materials." No staples, paper clips or any non-paper items shall be included with the documents.

3. Upon receiving legal mail from counsel for delivery to the detainee, the privilege team shall open the envelope or mailer to search the contents for prohibited physical contraband. Within two (2) business days of receipt of legal mail, and assuming no physical contraband is present, the privilege team shall forward the mail to military personnel at GTMO in a sealed envelope marked "Legal Mail Approved by Privilege Team" and clearly indicating the identity of the detainee to which the legal mail is to be delivered. The privilege team shall return to the sender any incoming mail that does not comply with the terms of paragraphs IV.A.1., 2.

4. Within two (2) business days of receipt of legal mail from the privilege team, personnel at GTMO shall deliver the envelope or mailer marked by the privilege team as "Legal Mail Approved by the Privilege Team" to the detainee without opening the envelope or mailer. If counsel desires confirmation that the documents were delivered to the detainee, counsel is responsible for providing a stamped, self-addressed envelope for that purpose. The detainee shall be responsible for mailing any confirmation of delivery to counsel as outgoing legal mail. This method shall be the sole and exclusive means by which confirmation of delivery is provided to counsel.

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5. Written correspondence to a detainee not falling within the definition of legal mail shall be sent through the United States Postal Service to the appropriate address provided by government counsel. Non-legal mail includes, but is not limited to, letters from persons other than counsel, including family and friends of the detainee. These non-privileged communications will be reviewed by military personnel at GTMO under the standard operating procedures for detainee non-legal mail.

6. Counsel is required to treat all information learned from a detainee, including any oral and written communications with a detainee, as classified information, unless and until the information is submitted to the privilege team and determined to be otherwise by the privilege team or by this Court or another court. Accordingly, if a counsel's correspondence contains any summary or recitation of or reference to a communication with a detainee that has not been previously determined to be unclassified, the correspondence shall be prepared, marked, transported and handled as classified material as required by Executive Order 12958, DOD Regulation 5200.1-R and AI 26, OSD Information and Security Supplement to DOD Regulation 5200.1R.

7. Written and oral communications with a detainee, including all incoming legal mail, shall not include information relating to any ongoing or completed military, intelligence, security, or law enforcement operations, investigations, or arrests, or the results of such activities, by any nation or agency or current political events in any country that are not directly related to counsel's representation of that detainee; or security procedures at GTMO (including names of U.S. Government personnel and the layout of camp facilities) or the status of other detainees, not directly related to counsel's representation.

B. Mail Sent by Detainee to Counsel ("Outgoing Mail")

1. Detainees will be provided with paper to prepare communications to counsel. In the presence of military personnel, the detainee will seal the written communication into an envelope and it will be annotated as "Attorney-Detainee Materials-For Mail Delivery To Counsel." Each envelope shall be labeled with the name of the detainee and the counsel. Envelopes annotated with the name of persons other the detainee's counsel (including family/friends or other attorneys) shall be processed according to the standard operating procedures for detainee non-legal mail.

2. Military personnel will collect the outgoing legal mail within one (1) business day of being notified by the detainee that the communication is prepared for sealing and mailing.

3. After the outgoing legal mail is collected from the detainee, the envelope will be sealed into a larger envelope by military personnel at Guantanamo which will be marked as "Attorney-Detainee Materials-For Mail Delivery To Counsel" and will

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be annotated with the name of the detainee and the counsel. The envelope will be sealed and mailed in the manner required for classified materials. Within two (2) business days of receipt from the detainee, the communication will be mailed to the appropriate address as provided by government counsel.

4. Detainees also are permitted to send non-legal mail, including written communications to persons other than counsel, through the United States Postal Service. These communications shall be reviewed by military personnel at Guantanamo under the standard operating procedures for detainee non-legal mail.

5. In the event any non-legal correspondence or messages from a detainee to individuals other than his counsel (including family/friends or other attorneys) are sent to counsel as, or included with, legal mail, counsel shall return the documents to military personnel at GTMO for processing according to the standard operating procedures for detainee non-legal mail.

V. Materials Brought Into A Meeting With Detainee And Counsel

A. Counsel shall bring only legal mail, writing utensils and paper into any meeting with a detainee unless counsel has received prior approval from the Commander, JTF-GTMO. The Commander shall not unreasonably withhold approval for counsel to bring into a meeting with a detainee letters, tapes, or other communications introducing counsel to the detainee, if the government has first reviewed the communication and determined that sharing the communication with the detainee would not threaten the security of the United States.

B. Written and oral communications with a detainee, including all documents brought into a meeting with a detainee, shall not include information relating to any ongoing or completed military, intelligence, security, or law enforcement operations, investigations, or arrests, or the results of such activities, by any nation or agency or current political events in any country that are not directly related to counsel's representation of that detainee; or security procedures at GTMO (including names of U.S. Government personnel and the layout of camp facilities) or the status of other detainees, not directly related to counsel's representation.

VI. Materials Brought Out Of A Meeting With Detainee and Counsel

A. Upon the completion of each meeting with a detainee or during any break in a meeting session, counsel will give the notes or documents used or produced during the meeting to a designated individual at Guantanamo. These materials will be sealed in the presence of counsel and will be handled as classified material as required by Executive Order 12958, DOD Regulation 5200.1-R and AI 26, OSD Information Security Supplement to DOD Regulation 5200.1R.

B. Upon the completion of the counsel's visit to Guantanamo, the notes or documents used or produced during the visit shall be sealed in the presence of

counsel and placed in an envelope labeled as "Attorney-Detainee Meeting Documents–For Delivery to Counsel." The envelope shall be sealed into a larger envelope by military personnel at Guantanamo which shall be marked as "Attorney-Detainee Meeting Documents-For Mail Delivery To Counsel" and shall be annotated with the name of the detainee and the counsel. The envelope shall be sealed and mailed in the manner required for classified materials. Within two (2) business days following the completion of the counsel's visit to Guantanamo, the package shall be mailed to the appropriate address provided by government counsel.

C. Correspondence or messages from a detainee to individuals other than his counsel (including family/friends or other attorneys) shall not be handled through this process. If a detainee provides these communications to his counsel during a visit, counsel shall give those communications to military personnel at Guantanamo so they can be processed under the standard operating procedures for detainee non-legal mail.

VII. Classification Determination of Detainee Communications

A. Counsel may submit information learned from a detainee to the privilege team for a determination of its appropriate security classification. Counsel shall memorialize the information submitted for classification review into a written memorandum outlining as specifically as possible the information for which counsel requests a classification determination. All documents submitted for classification review shall be prepared, handled and treated in the manner required for classified materials, as provided by as required by Executive Order 12958, DOD Regulation 5200.1-R and AI 26, OSD Information Security Supplement to DOD Regulation 5200.1R. No information derived from these submissions shall be disclosed outside the privilege team pursuant to these procedures until after the privilege team has reviewed it for security and intelligence purposes. Absent express consent given by the Court, or except as otherwise provided in this document, the submissions shall not be disclosed to any person involved in the interrogation of a detainee, and no such individual may make any use of those communications whatsoever, nor shall the submissions be disclosed to any Government personnel involved in any domestic or foreign court, military commission or combatant status tribunal proceedings involving the detainee.

B. Counsel shall send all materials submitted for classification review to the appropriate address to be provided by government counsel. The outside of the envelope or mailer shall be clearly labeled "Attorney-Detainee Meeting Documents-For Classification Review By Privilege Team." Each envelope or mailer shall be annotated with the name of the detainee and the counsel. Each page of the document submitted for classification review shall be marked "Attorney-Detainee Materials" and "Classified." The envelope or mailer will be sealed and mailed in the manner required for classified materials.

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C. As soon as possible after conducting the classification review, the privilege team shall advise counsel of the classification levels of the information contained in the materials submitted for review. The privilege team shall forward its classification determination directly to counsel after a review and analysis period not to exceed, from the time of receipt by the privilege team:

1. Seven (7) business days for information that is written in the English language;

2. Fourteen (14) business days for any information that includes writing in any language other than English, to allow for translations by the privilege team;

3. Twenty (20) business days for any information where the privilege team has reason to believe that a code was used, to allow for further analysis.

D. While conducting classification review, the privilege team shall promptly report any information that reasonably could be expected to result in immediate and substantial harm to the national security to the Commander, JTF-Guantanamo. In his discretion, the Commander, JTF-Guantanamo may disseminate the relevant portions of the information to law enforcement, military and intelligence officials as appropriate.

E. If, at any time, the privilege team determines that information in the documents submitted for classification review relate to imminent acts of violence, the privilege team shall report the contents of those documents to Commander, JTF-Guantanamo. In his discretion, the Commander, JTF-Guantanamo may disseminate the relevant portions of the information to law enforcement, military and intelligence officials.

F. The privilege team shall not disclose any information submitted by counsel for classification review outside the privilege team, except as provided by these procedures or as permitted by counsel submitting the information.

VIII. Telephonic Access to Detainee

A. Requests for telephonic access to the detainee by counsel or other persons will not normally be approved. Such requests may be considered on a case-by-case basis due to special circumstances and must be submitted to Commander, JTF-Guantanamo.

B. Any telephonic access by counsel will be subject to appropriate security procedures, but shall not include contemporaneous monitoring or recording.

C. Any telephonic access by persons other than counsel will be subject to appropriate security procedures, including contemporaneous monitoring and recording.

EXHIBIT A

IX. Counsel's Handling And Dissemination Of Information From Detainee

A. Subject to the terms of any applicable protective order, counsel may disseminate the unclassified contents of the detainee's communications for purposes reasonably related to their representation of that detainee.

B. Counsel is required to treat all information learned from a detainee, including any oral and written communications with a detainee, as classified information, unless and until the information is submitted to the privilege team and determined to be otherwise. All classified material must be handled, transported and stored in a secure manner, as provided by Executive Order 12958, DOD Regulation 5200.1-R and AI 26, OSD Information Security Supplement to DOD Regulation 5200.1R.

C. Counsel shall disclose to DoJ or Commander, JTF-Guantanamo any information learned from a detainee involving future events that threaten national security or involve imminent violence.

D. Counsel may not divulge classified information not learned from the detainee to the detainee. Counsel may not otherwise divulge classified information related to a detainee's case to anyone except those with the requisite security clearance and need to know using a secure means of communication. Counsel for detainees in the coordinated cases pending in the United States District Court for the District of Columbia are presumed to have a "need to know" information in related cases pending before this Court. Counsel for respondents in those cases may challenge this presumption on a case-by-case basis for good cause shown.

X. JTF-Guantanamo Security Procedures

A. Counsel and translators/interpreters shall comply with the following security procedures and force protection safeguards applicable to the US Naval Base in Guantanamo Bay, Cuba, JTF-Guantanamo and the personnel assigned to or visiting these locations, as well as any supplemental procedures implemented by JTF-Guantanamo personnel.

B. Contraband is not permitted in JTF-Guantanamo and all visitors are subject to search upon arrival and departure. Examples of contraband include, but are not limited to, weapons, chemicals, drugs, and materials that may be used in an escape attempt. Contraband also includes money, stamps, cigarettes, writing instruments, etc. No items of any kind may be provided to the detainee without the advance approval of the Commander, JTF-Guantanamo.

C. Photography or recording of any type is prohibited without the prior approval of the Commander, JTF-Guantanamo. No electronic communication devices are permitted. All recording devices, cameras, pagers, cellular phones, PDAs, laptops, portable electronic devices and related equipment are prohibited in or near JTF-Guantanamo. Should any of these devices be inadvertently taken into a

EXHIBIT A

prohibited area, the device must be surrendered to JTF-Guantanamo staff and purged of all information.

D. Upon arrival at JTF-Guantanamo, security personnel will perform a contraband inspection of counsel and translators/interpreters using metal detectors as well as a physical inspection of counsel's bags and briefcases and, if determined necessary, a physical inspection of his/her person.

E. Counsel shall not be permitted to interview or question members of the Joint Task Force about their duties or interactions with detainees without first obtaining permission from the Commander, Joint Task Force Guantanamo. Should permission be unreasonably denied, counsel may seek an Order from this Court granting permission for good cause shown.

F. Counsel will meet with a detainee in conference facilities provided by GTMO. These facilities are subject to visual monitoring by closed circuit TV for safety and security reasons. (The only other method of visual observation available is for the door to remain open with military police sitting outside the door.). No oral communications between counsel and detainee will be heard.

G. At the conclusion of a meeting with a detainee, counsel and translators/interpreters will again be inspected using a metal detector and, if deemed necessary, by physical inspection of their persons.

Exhibit B

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

, *et al.*	)	
Petitioners,	)	
v.	)	Civil Action No.
GEORGE W. BUSH, President of the United States, *et al.*,	)	
Respondents.	)	

MEMORANDUM OF UNDERSTANDING REGARDING ACCESS TO CLASSIFIED NATIONAL SECURITY INFORMATION

Having familiarized myself with the applicable statutes, regulations, and orders related to, but not limited to, unauthorized disclosure of classified information, espionage and related offenses; The Intelligence Identities Protection Act, 50 U.S.C. § 421; 18 U.S.C. § 641; 50 U.S.C. § 783; 28 C.F.R. § 17 et seq.; and Executive Order 12958; I understand that I may be the recipient of information and documents that belong to the United States and concern the present and future security of the United States, and that such documents and information together with the methods and sources of collecting it are classified by the United States government. In consideration for the disclosure of classified information and documents:

(1) I agree that I shall never divulge, publish, or reveal either by word, conduct or any other means, such classified

EXHIBIT B

documents and information unless specifically authorized in writing to do so by an authorized representative of the United States government, or as expressly authorized by the Protective Order entered in the United States District Court for the District of Columbia in the case captioned _____ v. George W. Bush, No. _____.

(2) I agree that this Memorandum of Understanding and any other non-disclosure agreement signed by me will remain forever binding on me.

(3) I have received, read, and understand the Protective Order entered by the United States District Court for the District of Columbia in the case captioned _____ v. George W. Bush, No. _____, and I agree to comply with the provisions thereof.

_____ _____
Date

_____ _____
Date

Exhibit C

EXHIBIT C

ACKNOWLEDGMENT

The undersigned hereby acknowledges that he/she has read the Protective Order entered in the United States District Court for the District of Columbia in the case captioned _____ v. George W. Bush, No. _____, understands its terms, and agrees to be bound by each of those terms. Specifically, and without limitation, the undersigned agrees not to use or disclose any protected information or documents made available to him/her other than as provided by the Protective Order. The undersigned acknowledges that his/her duties under the Protective Order shall survive the termination of this case and are permanently binding, and that failure to comply with the terms of the Protective Order may result in the imposition of sanctions by the Court.

DATED: _____ BY: _____
(type or print name)

SIGNED: _____

EXHIBIT 2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re **Guantanamo Detainee Cases**	)	**Civil Action Nos. 02-CV-0299 (CKK), 02-CV-0828 (CKK), 02-CV-1130 (CKK), 04-CV-1135 (ESH), 04-CV-1136 (JDB), 04-CV-1137 (RMC), 04-CV-1144 (RWR), 04-CV-1164 (RBW), 04-CV-1194 (HHK), 04-CV-1227 (RBW), 04-CV-1254 (HHK), 04-CV-1897 (RMC)**

ORDER SUPPLEMENTING AND AMENDING FILING PROCEDURES CONTAINED IN NOVEMBER 8, 2004 AMENDED PROTECTIVE ORDER

In its November 8, 2004 Amended Protective Order, the Court set forth procedures for the filing of documents by counsel in these coordinated cases. Paragraph 46 governs the filing of documents by counsel for the petitioners and requires that all filings be first submitted under seal to the Court Security Officer ("CSO") to determine whether they contain classified or protected information. If the CSO, in consultation with the appropriate agency, concludes that a particular filing does not contain any classified or protected information, ¶ 46 requires the unsealing of the document by the CSO and the filing of the document in the public record. If the CSO, in consultation with the appropriate agency, concludes that a particular filing does contain classified or protected information, that information is to remain under seal and the unclassified and unprotected portions of the filing, if any, are to be placed in the public record. Paragraph 47 governs the filing of classified materials by counsel for the respondents and requires counsel to submit classified filings under seal to the Court through the CSO.

It has recently come to the Court's attention that some confusion and certain difficulties have arisen with respect to the filing of documents containing classified or protected information. Most of the difficulties have arisen as a result of the nature of the Court's CM/ECF electronic filing system. To clarify and, hopefully, to improve the filing system, it is hereby

ORDERED that the "Procedures For Filing Documents" contained on pages 13 through 14 of the November 8, 2004 Amended Protective Order are modified and supplemented as follows:

All documents filed by a petitioner shall be filed under seal with the Court through the Court Security Officer for determination by the appropriate agency as to whether the documents contain classified or protected information. At the time of making a submission to the CSO, the attorney shall file on the public record in the CM/ECF system a "Notice of Filing" notifying the Court that a submission has been made to the CSO and specifying in general terms the nature of the filing without disclosing any potentially classified or protected information. It is the Court's understanding that the CM/ECF system requires counsel to attach a document to any entry made by them on the system. Accordingly, the document to be attached to the Notice of Filing in the CM/ECF system shall be a one page submission repeating in general terms the nature of the filing without disclosing any potentially classified or protected information and disclosing the date and time the document was delivered to the CSO for her review.

In the event that the CSO informs counsel for a petitioner that a proposed filing does not contain any classified or protected information, counsel shall then promptly file the full submission in the CM/ECF system and counsel shall make specific reference to the earlier docket

entry notifying the Court that the document had been submitted to the CSO for review. The docket entry description shall also state that the CSO has approved of the public filing of the document. The underlying document filed in the CM/ECF system shall contain a notation in the upper right hand corner of the first page stating "PREVIOUSLY FILED WITH CSO AND CLEARED FOR PUBLIC FILING."

In the event that the CSO informs counsel for a petitioner that a proposed filing does in fact contain some or all classified or protected information, counsel shall then promptly file in the CM/ECF system a version of the document suitable for public viewing. Unless an entire document is deemed classified or protected, a "version of the document suitable for public viewing" shall mean a document in which the portions of the document containing classified or protected information are redacted. Such document shall contain a notification in the upper right hand corner of the first page stating "REDACTED VERSION FOR PUBLIC FILING CLEARED BY CSO." In the event an entire document is deemed classified or protected, a "version of the document suitable for public viewing" shall mean a one page "half sheet" containing the caption of the case, a version of the title of the document that does not disclose classified or protected information, and a brief statement that the CSO has informed counsel that the entire document is classified or protected. The docket entry description in the CM/ECF system for the document suitable for public viewing shall make specific reference to the earlier docket entry notifying the Court that the document had been submitted to the CSO for review.

Any pleading or other document filed by counsel for the respondents containing classified or protected information shall be filed under seal with the Court through the CSO. In addition,

counsel for respondents shall file in the CM/ECF system a version of the document suitable for public viewing as that phrase is defined in the preceding paragraph.

IT IS SO ORDERED.

December 13, 2004

/s/
JOYCE HENS GREEN
United States District Judge

EXHIBIT 3

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

ORDER ADDRESSING DESIGNATION PROCEDURES
FOR "PROTECTED INFORMATION"

On November 8, 2004, counsel for respondents in these coordinated cases filed a motion requesting the Court to designate as "protected information" the unclassified information contained in the respondents' factual returns to the petitions for writs of habeas corpus that is not filed on the public record. Counsel for certain petitioners filed responses stating that they could not take a position on the respondents' motion until they or a designated representative had an opportunity to review the material that the respondents seek to have declared "protected."

In the interest of the efficient administration of these proceedings, it is hereby

ORDERED that should counsel for respondents in these consolidated cases wish to have the Court deem any information "protected" pursuant to the Court's November 8, 2004 Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba, counsel for respondents shall disclose the information to qualified counsel for petitioners and attempt to reach an agreement regarding the designation of the information prior to filing a motion with the Court. "Qualified counsel" for petitioners means those counsel who have satisfied the necessary prerequisites set forth in the Amended

Protective Order for the viewing of protected information.

It is FURTHER ORDERED that counsel for petitioners shall treat such disclosed information as "protected" unless and until the Court rules that the information should not be designated as "protected."

It is FURTHER ORDERED that counsel for petitioners shall make their best efforts to designate one attorney as a representative to review the information on their behalf and to negotiate with counsel for respondents prior to the filing of any motions to deem information "protected."

With respect to the November 8, 2004 Motion to Designate as "Protected Information" Unclassified Information in Factual Returns to Petitions for Writ of Habeas Corpus That is Not Filed on the Public Record, it is hereby

ORDERED that counsel for respondents shall deliver the information they seek to be deemed "protected" to the Court Security Officer at the designated secured facility on or before November 17, 2004.

It is FURTHER ORDERED that the Court Security Officer shall notify counsel for the petitioners of the location of the secured facility on or before November 12, 2004.

It is FURTHER ORDERED that petitioners' counsel shall review at the secured facility the information at issue and shall notify the Court of their position with respect to the designation of the information on or before November 19, 2004.

IT IS SO ORDERED.
November 10, 2004

/s/
JOYCE HENS GREEN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOHSEN ABDRUB ABOASSY, *et al.*, Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 05-CV-0748 (HHK)
ADEL HAMLILY, *et al.*, Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 05-CV-0763 (JDB)
AHMED ABU IMRAN, *et al.*, Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 05-CV-0764 (CKK)

BENJAMIN MOHAMMED AL HABASHI, *et al.*, Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 05-CV-0765 (EGS)
ABDUL HADI IBN EL HATHILY AL HAMAMY, *et al.*, Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 05-CV-0766 (RJL)

RESPONDENTS' MOTION TO STAY PROCEEDINGS
PENDING RELATED APPEALS AND FOR CONTINUED COORDINATION

For the reasons explained below, respondents move to stay proceedings in the above-captioned cases pending resolution of all appeals in Khalid et al. v. Bush, No. 04-CV-1142 (RJL), 2005 WL 100924 (D.D.C. Jan. 19, 2005), appeals docketed, Nos. 05-5062, 05-5063 (D.C. Cir. Mar. 2, 2005) and In re Guantanamo Detainee Cases, No. 02-CV-0299, et al., 2005 WL 195356 (D.D.C. Jan. 31, 2005), petition for interlocutory appeal granted, No. 05-8003 (D.C. Cir. Mar. 10, 2005). The pending appeals will address the core issues in the above-captioned cases

and, thus, determine how the cases should proceed, if at all. It makes no sense for the cases to proceed prior to resolution of the appeals; further proceedings would require the expenditure of significant judicial and other resources that may be avoided as a result of the appeals, and, in any event, such proceedings very likely would have to be revisited or relitigated once the appeals are decided and the Court of Appeals provides guidance regarding handling of the claims in these Guantanamo detainee cases.

In seeking a stay, however, respondents do not intend thereby to block counsel access to properly represented petitioners. To that end, respondents do not object to entry in these cases of the protective order previously entered in other Guantanamo detainee cases, along with appropriate supplementary orders, to permit such access.

Pursuant to LCvR 7(m), counsel for respondents has conferred by e-mail with counsel for petitioners in the above-captioned cases regarding this motion. Counsel for petitioners have indicated that they oppose or do not consent to the relief as requested herein.

BACKGROUND

The above-captioned cases are some of the latest round of habeas petitions filed on behalf of aliens detained by the Department of Defense ("DoD") at the United States Naval Base at Guantanamo Bay, Cuba. Within just a few weeks after the Supreme Court's decision in Rasul v. Bush, ___ U.S. ___, 124 S. Ct. 2686 (2004), which held that aliens apprehended abroad and detained at Guantanamo as enemy combatants can invoke the habeas jurisdiction of a district court under 28 U.S.C. § 2241, there were pending in this Court thirteen habeas lawsuits on behalf of more than 60 Guantanamo detainees. Given the common issues involved in the Guantanamo detainee cases, the situation led this Court to issue, on or about September 14, 2004, a Resolution

of the Executive Session, providing that the Guantanamo detainee cases and any similar cases filed in the future were to be transferred to Senior Judge Joyce Hens Green for coordination and management, with the transferring judges retaining the cases for all other purposes. Under the Resolution, Judge Green was to decide any common procedural and substantive issues with the consent of the transferring judge(s).

Pursuant to her charge, Judge Green established a schedule for the filing by respondents of returns indicating the factual bases for the detention of each petitioner and also scheduled briefing on the legal issues pertaining to the petitions, i.e., on respondents' motion to dismiss or for judgment as a matter of law. Judge Green also entered a protective order applicable to the cases, which included procedures for counsel access to detainees, taking into account the potentially classified nature of much of the information held by or pertaining to the detainees. See November 8, 2004 Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba, 344 F. Supp. 2d 174 (D.D.C. 2004).

On January 19, 2005, Judge Leon granted respondents' motion to dismiss or for judgment in its entirety, concluding that constitutional protections do not extend to aliens outside sovereign United States territory, such as petitioners, and that petitioners also have no viable claims under U.S. statutory law or international law or treaties. See Khalid v. Bush, No. 04-CV-1142 (RJL), Boumediene v. Bush, No. 04-CV-1166 (RJL), 2005 WL 100924 (D.D.C. Jan. 19, 2005). The Khalid and Boumediene cases are currently on appeal to the D.C. Circuit. See Nos. 05-5062, 05-5063 (D.C. Cir.).

On January 31, 2005, Judge Green entered an order (and memorandum opinion) in eleven other of the pending Guantanamo Bay detainee cases[1] denying in part and granting in part respondents' motion to dismiss or for judgment as a matter of law. See Memorandum Opinion Denying in Part and Granting in Part Respondents' Motion to Dismiss or for Judgment as a Matter of Law in In re Guantanamo Detainee Cases, No. 02-CV-0299, et al., 2005 WL 195356 (D.D.C. Jan. 31, 2005). Contrary to the prior decision of Judge Leon, Judge Green, inter alia, determined that constitutional "due process" protections apply to aliens detained at Guantanamo Bay and that the Combatant Status Review Tribunal proceedings the military has used to confirm detainees' status as enemy combatants do not satisfy these due process requirements. Id. at *8-*31. Further, in her decision, Judge Green agreed with the decision of Judge Robertson in Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 165 (D.D.C. 2004), appeal docketed, No. 04-5393 (D.C. Cir. Nov. 16, 2004), and concluded that the Third Geneva Convention is "self-executing" and can provide petitioners with a claim in a habeas action. 2005 WL 195356 at *31-*33. Judge Green, however, dismissed petitioners' remaining constitutional, statutory, international law, and treaty claims. Id. at *33-*34.

Judge Green noted that her January 31, 2005 decision on respondents' motion to dismiss or for judgment "technically applie[d] only to the eleven cases contained in the [opinion's] caption," but the Court nevertheless acknowledged that the opinion "addresse[d] issues common"

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[1] Hicks v. Bush, No. 02-CV-0299 (CKK); Al Odah v. United States, No. 02-CV-0828 (CKK); Habib v. Bush, No. 02-CV-1130 (CKK); Kurnaz v. Bush, No. 04-CV-1135 (ESH); O.K.v. Bush, No. 04-CV-1136 (JDB); Begg v. Bush, No. 04-CV-1137 (RMC); El-Banna v. Bush, No. 04-CV-1144 (RWR); Gherebi v. Bush, No. 04-CV-1164 (RBW); Anam v. Bush, No. 04-CV-1194 (HHK); Almurbati v. Bush, No. 04-CV-1227 (RBW); and Abdah v. Bush, No. 04-CV-1254 (HHK).

to eight other Guantanamo Bay detainee cases that had been filed during or after the briefing and oral argument that resulted in the Court's opinion.[2] See id. at *7 & n.15.

On February 3, 2005, respondents filed a motion seeking certification of the January 31, 2005 order for interlocutory appeal and filed a motion to stay all the Guantanamo Bay detainee cases pending at that time, consistent with the need for these cases to proceed in a coordinated fashion. Thus, the motion was filed as a motion for certification of order for interlocutory appeal and for a stay in the eleven cases in which the January 31, 2005 order was entered, and was filed by respondents solely as a motion to stay in the other then-pending cases. Judge Green certified her January 31, 2005 decision on respondents' motion to dismiss or for judgment for appeal and stayed proceedings in the eleven cases in which the January 31, 2005 order was entered, "for all purposes pending resolution of all appeals." Judge Green left the decision whether to stay cases other than the eleven to the individual judges in those cases. See Order Granting in Part and Denying in Part Respondents' Motion for Certification of Jan. 31, 2005 Orders and for Stay in In re Guantanamo Detainee Cases (Feb. 3, 2005) (Green, J.).

Various petitioners in the eleven cases sought reconsideration of Judge Green's stay order, arguing that the Court should permit factual development and proceedings regarding detainee living conditions to go forward. See, e.g., Petrs' Motion for Reconsideration of Order Granting Stay Pending Appeal at 9-10 (dkt. no. 203 in Al Odah, No. 02-CV-0828 (CKK)). Judge Green, however, denied the motion for reconsideration

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[2] Belmar v. Bush, No. 04-CV-1897 (RMC); Al-Qosi v. Bush, No. 04-CV-1937 (PLF); Paracha v. Bush, No. 04-CV-2022 (PLF); Al-Marri v. Bush, No. 04-CV-2035 (GK); Zemiri v. Bush, No. 04-CV-2046 (CKK); Deghayes v. Bush, No. 04-CV-2215 (RMC); Mustapha v. Bush, No. 05-CV-22 (JR); Abdullah v. Bush, No. 05-CV-23 (RWR).

> in light of the substantial resources that would be expended and the significant burdens that would be incurred should this litigation go forward, and . . . [in] recognition that a reversal of the Court's January 31, 2005 rulings would avoid the expenditure of such resources and incurrence of such burdens . . . .

See In re Guantanamo Detainee Cases (Order Denying Motion for Reconsideration of Order Granting Stay Pending Appeal), No. 02-CV-0299, et al., 2005 WL 326862 (D.D.C. Feb. 8, 2005) (Green, J.).

On February 9, 2005, pursuant to Judge Green's certification, respondents filed a petition for interlocutory appeal of the January 31, 2005 decision with the D.C. Circuit, see 28 U.S.C. § 1292(b), and requested that the appeal proceed on an expedited basis. Further, petitioners in the eleven cases subject to Judge Green's decision filed a cross-petition for interlocutory appeal with the D.C. Circuit and petitioners in Al-Odah appealed Judge Green's stay order. In addition, as noted above, petitioners in Khalid and Boumediene appealed Judge Leon's decision. On March 10, 2005, the D.C. Circuit accepted the interlocutory appeal and established a briefing schedule for the appeal that concludes at the end of June 2005. The Court also established a briefing schedule in Khalid and Boumediene that also runs through June 2005. The Hamdan case, as noted above, is already on appeal to the D.C. Circuit, and oral argument in that case is currently scheduled for April 7, 2005.

In light of these pending appeals, several of the cases pending at the time of Judge Green's decision, but that Judge Green did not stay, have been stayed pending appeal. See Mustapha, No. 05-CV-22 (JR) (dkt no. 7); Deghayes, No. 04-CV-2215 (RMC) (dkt. no. 7); Al Marri, No. 04-CV-2035 (GK) (dkt. no. 26); Abdullah, No. 05-CV-23 (RWR) (dkt. no. 16);

Paracha, No. 04-CV-2022 (PLF) (dkt. no. 49). As Judge Kessler stated in her stay order in Al Marri,

> The opinions resolving Judge Leon's and Judge Green's cases encompass and discuss many of the precise issues raised in Respondents' Motion [to Stay]. Thus, until the Court of Appeals addresses these issues, the law in this Circuit is unsettled, since Judge Green and Judge Leon reached different conclusions about many of the issues before them. Requiring this case to proceed before appellate resolution of those cases therefore would involve an unnecessary expenditure of judicial resources.

Order dated March 8, 2004 in Al-Marri, No. 04-CV-2035 (GK), at 2.

Since February 3, 2005 – the date respondents moved to stay all of the Guantanamo Bay detainee cases pending at that time – over 35 new petitions, involving more than eighty Guantanamo detainees, have been filed. Respondents have filed motions to stay proceedings in these new cases for the reasons stated herein. Several of these motions have been granted,[3] and the remainder are still pending before the Judges presiding over those cases. The above-captioned cases represent some of the latest wave of new petitions. To ensure continued coordination of all the Guantanamo detainee habeas cases, and for the reasons explained below, the proceedings in the above-captioned cases should be stayed pending resolution of all appeals.

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[3] See El-Mashad v. Bush, No. 05-CV-0270 (JR) (dkt. no. 29); Al-Wazan v. Bush, No. 05-CV-0329 (PLF) (dkt. no. 15); Ameziane v. Bush, No. 05-CV-0392 (ESH) (dkt. no.12); Sliti v. Bush, No. 05-CV-0429 (RJL) (dkt. no. 5); M.C. v. Bush, No. 05-CV-0430 (ESH) (dkt. no. 10); Kabir v. Bush, No. 05-CV-0431 (RJL) (dkt. no. 10); Qayed v. Bush, No. 05-CV-0454 (RMU) (dkt. no. 4); Al-Shihry v. Bush, No. 05-CV-0490 (PLF) (dkt no. 14); Qassim v. Bush, No. 05-CV-0497 (JR) (dkt. no. 14); Al-Oshan v. Bush, No. 05-CV-0520 (RMU) (dkt. no. 12); Tumani v. Bush, No. 05-CV-0526 (RMU) (dkt no. 5); Salahi v. Bush, No. 05-CV-0569 (JR) (dkt. no. 8). Respondents' motion to stay in Al Rashaidan v. Bush, No. 05-CV-0586 (RWR) (dkt. no. 10) was granted in part and denied in part.

ARGUMENT

I. The Court Should Grant a Stay of the Above-Captioned Guantanamo Bay Detainee Cases Pending Resolution of the Pending Related Appeals.

In light of the extraordinary issues presented in these cases that must be resolved on appeal, respondents seek a stay of the above-captioned cases, which all present issues, indeed core claims, that are directly raised in, or will be affected by decisions in, the appeals in In re Guantanamo Detainee Cases, Khalid, Boumediene, and Hamdan. The outcome of the appeals will determine how all of the Guantanamo detainee cases should proceed, if at all. In light of this fact, these cases should not go forward prior to obtaining such guidance from the D.C. Circuit through the resolution of the appeals.[4]

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[4] The Court has the authority to stay proceedings in habeas cases, even prior to the filing of a response. Pursuant to the Rules Governing Section 2254 Cases in the United States District Courts (the "2254 Rules"), which are applicable to petitions for writ of habeas corpus other than those arising under 28 U.S.C. § 2254, such as the petitions in these cases, see 2254 Rule 1(b), a court may extend the deadline for responses to habeas petitions beyond the time limits set forth in 28 U.S.C. § 2243 — the 2254 Rules do not indicate a fixed deadline for responding to habeas petitions, and they supersede the time limits set forth in 28 U.S.C. § 2243. Rule 4 provides that "the judge must order the respondent to file an answer, motion, or other response within a fixed time, or to take other action the judge may order. . . ." See also Bleitner v. Welborn, 15 F.3d 652, 653-54 (7th Cir. 1994) ("[T]he Rules Governing Section 2254 Cases in the United States District Courts, which have the force of a superseding statute, 28 U.S.C. § 2072(b) . . . loosened up the deadline for responses. Rule 4 leaves it up to the district court to fix the deadline."); Castillo v. Pratt, 162 F. Supp. 2d 575, 577 (N.D. Tex. 2001) (denying § 2241 petitioner's request for expedited consideration because "[t]he discretion afforded by Rule 4 of the 2254 Rules "prevails" over the strict time limits of 28 U.S.C. § 2243"); Kramer v. Jenkins, 108 F.R.D. 429, 431 (N.D. Ill. 1985) (denying § 2241 petitioner's motion for correction of court scheduling order because "in the conflict between Rule 4 of the 2254 Rules and 28 U.S.C. § 2243, Rule 4 must prevail"). Furthermore, the 2254 Rules have provided courts with the discretion to consider the burdens involved in filing responses to habeas petitions when implementing case management schedules. See Advisory Committee Notes to 2254 Rules; see also Lonchar v. Thomas, 517 U.S. 314, 325 (1996) (stating that the 2254 Rules confer "ample discretionary authority" on district courts "to tailor the proceedings" in habeas cases). See also Landis v. North American Co., 299 U.S. 248, 254-55 (1936) ("The power to stay proceedings is incidental to the power inherent in

(continued...)

The petitions in all the above-captioned cases raise legal issues that were squarely addressed by the opinions in In re Guantanamo Detainee Cases, Khalid, Boumediene, and Hamdan and that are raised in the appeals, including: (1) whether the petitioners have stated valid claims under the Fifth Amendment to the United States Constitution and, if so, whether the procedures implemented by respondents to determine the status of petitioners violate their Fifth Amendment rights; (2) whether the petitioners have stated valid claims under the Third Geneva Convention; and (3) whether the petitioners have stated valid claims based on various other legal theories, including other Constitutional provisions, other international treaties, Army Regulation 190-8, the Alien Tort Statute, the Administrative Procedure Act, and customary international law. It makes no sense for proceedings related to the merits of these cases, such as the submission of factual returns in response to orders to show cause regarding the issuance of habeas writs, to go forward when decisions from the D.C. Circuit on the related Guantanamo detainee appeals, which are proceeding in an expedited fashion, will determine the legal analyses applicable to the cases and, indeed, whether and how these cases should proceed.

Also, as Judge Green recognized, further proceedings consistent with her January 31, 2005 rulings, including, in the view of petitioners in those cases, extensive discovery and factual development, promise to impose "significant burdens" that may be avoided, depending on the outcome of the appeals. See In re Guantanamo Detainee Cases (Order Denying Motion for Reconsideration of Order Granting Stay Pending Appeal), No. 02-CV-0299, et al., 2005 WL

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[4](...continued)
every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants."); id. at 256 (noting propriety of stay in cases "of extraordinary public moment").

326862 (D.D.C. Feb. 8, 2005) (Green, J.). And as Judge Kessler concluded, "the law in this Circuit is [currently] unsettled," given the contrary decisions of Judges Green and Leon. Al Marri, No. 04-CV-2035 (GK) (dkt. no. 26). Requiring these cases to proceed before resolution of the appeals "would involve an unnecessary expenditure of judicial resources." Id. Indeed, any proceedings that are permitted to go forward very likely would have to be revisited or relitigated once the appeals are decided and the Court of Appeals provides guidance regarding handling of the claims in these Guantanamo detainee cases.

For these reasons, the cases should be stayed pending guidance from the D.C. Circuit, through the various appeals, regarding the issues in these cases, including whether and how to proceed.[5]

II. Respondents Do Not Object to Entry of the In re Guantanamo Detainee Cases Protective Order and Related, Supplementary Orders to Facilitate Counsel Access to Petitioner-Detainees.

In seeking a stay in these cases, respondents do not intend thereby to block access of petitioners' counsel to properly represented detainees pending the appeals. Thus, respondents do not object[6] to entry of the Court's November 8, 2004 Amended Protective Order and Procedures for Counsel Access To Detainees at the United States Naval Base In Guantanamo Bay, Cuba, see

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[5] The Court presumably would retain discretion to modify a stay of proceedings in any particular case should circumstances arise truly warranting a lifting of the stay. See, e.g., Abdullah v. Bush, No. 05-CV-23 (RWR), Order (Mar. 16, 2005) (dkt. no. 16) ("The proceedings in this case are stayed pending resolution of the appeals pending before the United States Court of Appeals for the District of Columbia, in In re Guantanamo Detainee Cases and Boumediene v. Bush et al., except that petitioners may seek emergency relief from this court in appropriate circumstances . . . .").

[6] Respondents' lack of objection to entry of the Protective Order and the supplementary orders, however, is without prejudice to their right to challenge any particular terms of these orders in any future proceedings as appropriate.

In re Guantanamo Detainee Cases, 344 F. Supp. 2d 174 (D.D.C. 2004) ("Protective Order") (attached as Exhibit A), as long as the Court also enters other related, supplementary orders issued by Judge Green. These orders include the Order Supplementing and Amending Filing Procedures Contained in November 8, 2004 Amended Protective Order, first issued on December 13, 2004 in In re Guantanamo Detainee Cases (attached as Exhibit B), which clarified and addressed certain issues related to procedures for filing materials subject to the Protective Order, and Order Addressing Designation Procedures for "Protected Information," first issued on November 10, 2004 in In re Guantanamo Detainee Cases (attached as Exhibit C), which requires that "protected information" under the Protective Order be treated as "protected" pending further order of the Court. Entry of the Protective Order and the supplementary orders would permit counsel, upon compliance with these orders, opportunities to visit and exchange legal mail with petitioners at Guantanamo Bay during the pendency of the appeals. See Protective Order, Exhibit A (Revised Procedures For Counsel Access to Detainees at the U.S. Naval Base in Guantanamo Bay, Cuba).[7]

Although respondents do not object to entry of the Protective Order and related, supplementary orders to enable counsel to meet and correspond with petitioners in a privileged manner at Guantanamo Bay on appropriate matters related to their cases, it makes no sense for the government to process and submit factual returns[8] with respect to the all of the petitioners in

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[7] Indeed, the Protective Order and both of the supplementary orders already have been entered in other new habeas cases. See Al-Wazan, No. 05-CV-0329 (PLF) (dkt. no. 15); Al-Shihry, No. 05-CV-0490 (PLF) (dkt no. 14).

[8] A factual return for a petitioner in a Guantanamo detainee case typically has consisted of the record of proceedings before the Combatant Status Review Tribunal that confirmed

(continued...)

these cases when the D.C. Circuit will be considering the proper scope of these habeas proceedings, including whether the claims of petitioners can be dismissed without reference to specific factual returns for petitioners. See Khalid et al. v. Bush, No. 04-CV-1142 (RJL), 2005 WL 100924 (D.D.C. Jan. 19, 2005) (dismissing petitioners' claims in their entirety). Even if counsel had access to factual returns, they would not be able to share classified information in the returns with petitioners. See Protective Order ¶ 30. Thus, there is no reason why counsel need access to factual returns at this time.

Moreover, the submission of factual returns which, in any event, may ultimately be unnecessary, burdens the government's resources and risks the inadvertent disclosure of classified information. Each factual return must be obtained from the Department of Defense ("DoD"), and then reviewed by agencies who provided source information to DoD to ensure that information disclosed to counsel in the returns is in accordance with all applicable statutes, regulations and Executive Orders. Respondents must then prepare both public and classified versions of the factual returns for submission to the Court and counsel. Each return can range from dozens to hundreds of pages, depending upon the circumstances. Thus, respondents face an immense logistical burden to process and file the returns, especially on the short, simultaneous schedules being requested by petitioners in the various cases.[9] Further, submission of these

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[8](...continued)
petitioner's status as an enemy combatant properly subject to detention. The factual return is separate from briefing on legal issues in the cases. Factual returns include both classified and unclassified material.

[9] Although certain Judges of this Court have ordered respondents to submit factual returns to petitions in cases that are otherwise stayed, respondents oppose the submission of factual returns in the above-captioned cases for the reasons stated herein. Petitioners are sixteen (continued...)

returns will vastly expand the number of counsel and other individuals with access to classified information contained in the returns, thereby increasing the risks of inadvertent or other disclosure or compromise of the information. These burdens and risks, however, could be rendered completely unnecessary, depending on the outcome of the appeals. Cf. In re Guantanamo Detainee Cases (Order Denying Motion for Reconsideration of Order Granting Stay Pending Appeal), No. 02-CV-0299, et al., 2005 WL 326862 (D.D.C. Feb. 8, 2005) (Green, J.) (staying cases so as to avoid expenditure of "substantial resources" and imposition of "significant burdens" that might not be necessary depending on outcome of appeal).

Accordingly, respondents should not have to submit factual returns pending resolution of the appeals; rather, the cases should be stayed except with respect to entry of the Protective Order and related, supplementary orders.[10]

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[9](...continued)
of more than eighty detainees at Guantanamo Bay who filed petitions for habeas corpus in the recent avalanche of new cases. Permitting access to factual returns in any of the above-captioned cases would precipitate a further cascade effect in which scores of the other eighty petitioners, seeking parity of treatment, will also request access to factual returns in their cases. Thus, petitioners' request for access to factual returns, if granted, would result in a substantial administrative burden for respondents.

[10] If the submission of factual returns were to go forward, it could only be done pursuant to a coordinated and reasonable schedule, given the severe logistical burdens posed by the undertaking. Though the submission of factual returns should not go forward at all, a schedule for any such undertaking should be no more restrictive than is necessary; for example, a schedule for the rolling production of factual returns over anything less than the next 10 to 12 weeks would be unreasonable. At a minimum, respondents would request at least 90 days to prepare factual returns for petitioners in the above-captioned cases. (Judge Huvelle ordered such a 90-day schedule in Ameziane v. Bush, No. 05-CV-0392 (ESH) on April 12, 2005 and on April 19, 2005, Judge Urbina issued orders imposing a 90-day schedule in Tumani v. Bush, No. 05-CV-0526 (RMU) and Qayed v. Bush, No. 05-CV-0454 (RMU)). A more burdensome schedule would also be unnecessary, given that a stay of proceedings is appropriate and that it will take weeks for any new petitioners' counsel to obtain the security clearances necessary for counsel to have access to the classified factual returns under the Protective Order. Security clearances are processed by agencies outside the control of DoD, and, interim security clearances typically have
(continued...)

CONCLUSION

For these reasons, the Court should stay further proceedings in these cases, except as noted above, pending resolution of the appeals of Judge Leon's decision in Khalid and Boumediene and Judge Green's January 31, 2005 decision in In re Guantanamo Detainee Cases.

Dated: April 20, 2005

Respectfully submitted,

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[10](...continued)
taken at least four to eight weeks from the submission by counsel of the appropriate application, depending on any specific security issues that may arise in the clearance background investigation. It is expected that security clearance applications will be submitted by counsel, and will be processed, on a rolling basis over the coming weeks.

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Attorneys for Respondents

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

AMENDED PROTECTIVE ORDER AND PROCEDURES FOR COUNSEL ACCESS TO DETAINEES AT THE UNITED STATES NAVAL BASE IN GUANTANAMO BAY, CUBA

This matter comes before the Court upon Respondents' Motion for Protective Order to prevent the unauthorized disclosure or dissemination of classified national security information and other protected information that may be reviewed by, made available to, or are otherwise in the possession of, the petitioners and/or petitioners' counsel in these coordinated cases. Pursuant to the general supervisory authority of the Court, in order to protect the national security, and for good cause shown,

IT IS ORDERED:

1. The Court finds that these cases involve classified national security information or documents, the storage, handling and control of which require special security precautions, and access to which requires a security clearance and a "need to know." These cases may also involve other protected information or documents, the storage, handling and control of which may require special precautions in order to protect the security of United States government personnel and facilities, and other significant government interests.

2. The purpose of this Protective Order is to establish the procedures that must be followed by all petitioners' counsel, their respective petitioner(s), all other counsel involved in

these cases, translators for the parties, and all other individuals who receive access to classified national security information or documents, or other protected information or documents, in connection with these cases, including the privilege team as defined in Exhibit A.

3. The procedures set forth in this Protective Order will apply to all aspects of these cases, and may be modified by further order of the Court *sua sponte* or upon application by any party. The Court will retain continuing jurisdiction to enforce or modify the terms of this Order.

4. Nothing in this Order is intended to or does preclude the use of classified information by the government as otherwise authorized by law outside of these actions.

5. Petitioners' counsel shall be responsible for advising their employees, the petitioners, and others of the contents of this Protective Order, as appropriate or needed.

6. Petitioners' counsel are bound by the terms and conditions set forth in the "Revised Procedures For Counsel Access To Detainees At the U.S. Naval Base In Guantanamo Bay, Cuba," and the procedures for handling mail and documents brought into and out of counsel meetings, attached hereto as Exhibit A. This Protective Order specifically incorporates by reference all terms and conditions established in the procedures contained in Exhibit A to the extent they place limitations on petitioners' counsel in their access to and interaction with petitioners or handling of information. Any violation of the terms and conditions of those procedures will also be deemed a violation of this Protective Order. This paragraph does not apply with respect to provisions in the procedures contained in Exhibit A that are or have been overridden by the Court.

7. The privilege team shall not disclose to any person any information provided by counsel for a petitioner or by a petitioner, other than information provided in a filing with the Court, unless such information, if it were monitored information, could be disclosed under Section X of Exhibit A. Such disclosure shall be consistent with the provisions of Section X of Exhibit A.

Definitions

8. As used herein, the words "documents" or "information" shall include, but are not limited to, all written or printed matter of any kind, formal or informal, including originals, conforming copies and non-conforming copies (whether different from the original by reason of notation made on such copies or otherwise), and further include, but are not limited to:

a. papers, correspondence, memoranda, notes, letters, reports, summaries, photographs, maps, charts, graphs, interoffice and intra-office communications, notations of any sort concerning conversations, meetings, or other communications, bulletins, teletypes, telegrams, telefacsimiles, invoices, worksheets, and drafts, alterations, modifications, changes and amendments of any kind to the foregoing;

b. graphic or oral records or representations of any kind, including, but not limited to, photographs, charts, graphs, microfiche, microfilm, videotapes, sound recordings of any kind, and motion pictures;

c. electronic, mechanical or electric records of any kind, including, but not limited to, tapes, cassettes, disks, recordings, electronic mail, films, typewriter ribbons, word processing or other computer tapes or disks, and all manner of electronic data processing storage; and

d. information acquired orally.

9. The terms "classified national security information and/or documents," "classified information" and "classified documents" refer to:

a. any classified document or information that has been classified by any Executive Branch agency in the interests of national security or pursuant to Executive Order, including Executive Order 12958, as amended, or its predecessor Orders as "CONFIDENTIAL," "SECRET," or "TOP SECRET," or additionally controlled as "SENSITIVE

COMPARTMENTED INFORMATION (SCI)," or any classified information contained in such document;

b. any document or information, regardless of its physical form or characteristics, now or formerly in the possession of a private party that has been derived from United States government information that was classified, regardless of whether such document or information has subsequently been classified by the government pursuant to Executive Order, including Executive Order 12958, as amended, or its predecessor Orders as "CONFIDENTIAL," "SECRET," or "TOP SECRET," or additionally controlled as "SENSITIVE COMPARTMENTED INFORMATION (SCI)";

c. verbal or non-documentary classified information known to the petitioner or petitioners' counsel; or

d. any document and information as to which the petitioner or petitioners' counsel have been notified orally or in writing that such documents or information contains classified information.

10. All classified documents, and information contained therein, shall remain classified unless the documents bear a clear indication that they have been declassified by the agency or department that is the original classification authority of the document or the information contained therein (hereinafter, the "original classification authority").

11. The terms "protected information and/or documents," "protected information" and "protected documents" refer to any document or information deemed by the Court, either upon application by counsel or *sua sponte*, as worthy of special treatment as if the document or information were classified, even if the document or information has not been formally deemed to be classified.

12. For purposes of this Protective Order, "petitioners' counsel" shall be defined to include an attorney who is employed or retained by or on behalf of a petitioner for purposes of

representing the petitioner in habeas corpus or other litigation in federal court in the United States, as well as co-counsel, interpreters, translators, paralegals, investigators and all other personnel or support staff employed or engaged to assist in the litigation.

13. "Access to classified information" or "access to protected information" shall mean having access to, reviewing, reading, learning, or otherwise coming to know in any manner any classified information or protected information.

14. "Secure area" shall mean a physical facility accredited or approved for the storage, handling, and control of classified information.

15. "Unauthorized disclosure of classified information" shall mean any knowing, willful or negligent action that could reasonably be expected to result in a communication or physical transfer of classified information to an unauthorized recipient.

Designation of Court Security Officer

16. The Court designates Christine E. Gunning as Court Security Officer for these cases, and Joan B. Kendrall, Michael P. Macisso, James P. Londergan, Mary M. Cradlin, Daniel O. Hartenstine, John P. Molinard, Jennifer Campbell, and Barbara J. Russell as Alternate Court Security Officers, for the purpose of providing security arrangements necessary to protect from unauthorized disclosure of any classified documents or information, or protected documents or information, to be made available in connection with these cases. Petitioners' counsel shall seek guidance from the Court Security Officer with regard to appropriate storage, handling, transmittal, and use of classified documents or information.

Access to Classified Information and Documents

17. Without authorization from the government, no petitioner or petitioners' counsel shall have access to any classified information involved in these cases unless that person shall first have:

a. made a written submission to the Court Security Officer precisely stating the reasons why counsel has a need to know the classified information requested; and

b. received the necessary security clearance as determined by the Department of Justice Security Officer; and

c. signed the Memorandum of Understanding ("MOU"), attached hereto as Exhibit B, agreeing to comply with the terms of this Protective Order.

The written submissions that are made by counsel to the Court Security Officer stating the reasons why counsel has a need to know the classified information requested shall be kept confidential by the Court Security Officer and shall not be disclosed to any other counsel or party to these cases unless the Court specifically orders such disclosure.

18. Petitioners' counsel to be provided access to classified information shall execute the MOU appended to this Protective Order, and shall file executed originals with the Court and submit copies to the Court Security Officer and counsel for the government. The execution and submission of the MOU is a condition precedent for petitioners' counsel to have access to, or continued access to, classified information for the purposes of this proceeding.

19. The substitution, departure, or removal of petitioners' counsel from these cases for any reason shall not release that person from the provisions of this Protective Order or the MOU executed in connection with this Order.

20. The government shall arrange for one appropriately approved secure area for the use of petitioners' counsel. The secure area shall contain a working area that will be supplied with secure office equipment reasonable and necessary to the preparation of the petitioners' case. Expenses for the secure area and its equipment shall be borne by the government.

21. The Court Security Officer shall establish procedures to ensure that the secure area is accessible to the petitioners' counsel during normal business hours and at other times on reasonable request as approved by the Court Security Officer. The Court Security Officer shall establish procedures to ensure that the secure area may be maintained and operated in the most efficient manner consistent with the protection of classified information. The Court Security Officer or Court Security Officer designee may place reasonable and necessary restrictions on the schedule of use of the secure area in order to accommodate appropriate access to all petitioners' counsel in this and other proceedings.

22. All classified information provided by the government to counsel for petitioners, and all classified information otherwise possessed or maintained by petitioners' counsel, shall be stored, maintained, and used only in the secure area.

23. No documents containing classified information may be removed from the secure area unless authorized by the Court Security Officer or Court Security Officer designee supervising the area.

24. Consistent with other provisions of this Protective Order, petitioners' counsel shall have access to the classified information made available to them in the secure area, and shall be allowed to take notes and prepare documents with respect to those materials.

25. Petitioners' counsel shall not copy or reproduce any classified information in any form, except with the approval of the Court Security Officer or in accordance with the procedures established by the Court Security Officer for the operation of the secure area.

26. All documents prepared by petitioners or petitioners' counsel that do or may contain classified information (including without limitation, notes taken or memoranda prepared by counsel and pleadings or other documents intended for filing with the Court) shall be transcribed, recorded, typed, duplicated, copied, or otherwise prepared only by persons who have received an appropriate approval for access to classified information. Such activities shall take place in the secure area on approved word processing equipment and in accordance with the procedures approved by the Court Security Officer. All such documents and any associated materials containing classified information (such as notes, memoranda, drafts, copies, typewriter ribbons, magnetic recordings, exhibits) shall be maintained in the secure area unless and until the Court Security Officer advises that those documents or associated materials are unclassified in their entirety. None of these materials shall be disclosed to counsel for the government unless authorized by the Court, by petitioners' counsel or as otherwise provided in this Protective Order.

27. Petitioners' counsel shall discuss classified information only within the secure area or in another area authorized by the Court Security Officer, shall not discuss classified information over any standard commercial telephone instrument or office intercommunication system, and shall not transmit or discuss classified information in electronic mail communications of any kind.

28. The Court Security Officer or Court Security Officer designee shall not reveal to any person the content of any conversations she or he may hear by or among petitioners' counsel, nor reveal the nature of documents being reviewed by them, or the work generated by them, except as necessary to report violations of this Protective Order to the Court or to carry out their duties pursuant to this Order. In addition, the presence of the Court Security Officer or Court Security Officer designee shall not operate as a waiver of, limit, or otherwise render inapplicable, the attorney-client privilege or work product protections.

29. Petitioners' counsel shall not disclose the contents of any classified documents or information to any person, including counsel in related cases brought by Guantanamo Bay detainees in this or other courts, except those authorized pursuant to this Protective Order, the Court, and counsel for the government with the appropriate clearances and the need to know that information. Except as otherwise specifically provided by Judge Colleen Kollar-Kotelly in her well-reasoned opinion addressing counsel access procedures regarding petitioners Mohammed Ahmed al Kandari, Fawzi Khalid Abdullah Fahad al Odah, and Khalid Abdullah Mishal al Mutairi in Al Odah v. United States, 02-CV-0828 (CKK), counsel for petitioners in these cases are presumed to have a "need to know" information both in their own cases and in related cases pending before this Court. Therefore, and except as provided with respect to the three petitioners in Al Odah mentioned above, counsel for all petitioners in these cases who have satisfied all necessary prerequisites and follow all procedures set forth herein may share and discuss among themselves classified information to the extent necessary for the effective representation of their clients. Counsel for respondents may challenge the "need to know" presumption on a case-by-case basis for good cause shown.

30. Petitioners' counsel shall not disclose classified information not provided by petitioner-detainee to that petitioner-detainee. Should petitioners' counsel desire to disclose classified information not provided by petitioner-detainee to that petitioner-detainee, petitioners' counsel will provide in writing to the privilege review team (See Exhibit A) a request for release clearly stating the classified information they seek to release. The privilege review team will forward the petitioner counsel's request to the appropriate government agency authorized to declassify the classified information for a determination. The privilege review team will inform petitioners' counsel of the determination once it is made.

31. No petitioner or counsel for petitioner shall disclose or cause to be disclosed any information known or believed to be classified in connection with any hearing or proceeding in these cases except as otherwise provided herein.

32. Except as otherwise stated in this paragraph and to ensure the security of the United States of America, at no time, including any period subsequent to the conclusion of the proceedings, shall petitioners' counsel make any public or private statements disclosing any classified information or documents accessed pursuant to this Protective Order, including the fact that any such information or documents are classified. In the event that classified information enters the public domain, however, counsel is not precluded from making private or public statements about the information already in the public domain, but only to the extent that the information is in fact in the public domain. Counsel may not make any public or private statements revealing personal knowledge from non-public sources regarding the classified or protected status of the information or disclosing that counsel had personal access to classified or protected information confirming, contradicting, or otherwise relating to the information already in the public domain. In an abundance of caution and to help ensure clarity on this matter, the Court emphasizes that counsel shall not be the source of any classified or protected information entering the public domain.

As stated in more detail in paragraph 49 below, failure to comply with these rules may result in the revocation of counsel's security clearance as well as civil and/or criminal liability.

33. The foregoing shall not prohibit petitioners' counsel from citing or repeating information in the public domain that petitioners' counsel does not know to be classified information or a classified document, or derived from classified information or a classified document.

34. All documents containing classified information prepared, possessed or maintained by, or provided to, petitioners' counsel (except filings submitted to the Court and

served on counsel for the government), shall remain at all times in the control of the Court Security Officer for the duration of these cases. Upon final resolution of these cases, including all appeals, all such documents shall be destroyed by the Court Security Officer.

Access to Protected Information and Documents

35. Without authorization from the government or the Court, protected information shall not be disclosed or distributed to any person or entity other than the following:

a. petitioners' counsel, provided such individuals have signed the Acknowledgment, attached hereto as Exhibit C, attesting to the fact that they have read this Protective Order and agree to be bound by its terms; and

b. the Court and its support personnel.

36. The execution of the Acknowledgment is a condition precedent for petitioners' counsel to have access to, or continued access to, protected information for the purposes of this proceeding. A copy of each executed Acknowledgment shall be kept by counsel making the disclosure until thirty (30) days after the termination of this action, including appeals.

37. The substitution, departure, or removal of petitioners' counsel from these cases for any reason shall not release that person from the provisions of this Protective Order or the Acknowledgment executed in connection with this Protective Order.

38. Petitioners' counsel shall not disclose the contents of any protected documents or information to any person, to include counsel in related cases brought by Guantanamo Bay detainees in this or other courts, except those authorized pursuant to this Protective Order, the Court, or counsel for the government. Except as otherwise specifically provided by Judge Colleen Kollar-Kotelly with respect to counsel for petitioners Mohammed Ahmed al Kandari, Fawzi Khalid Abdullah Fahad al Odah, and Khalid Abdullah Mishal al Mutairi in Al Odah v. United States, 02-CV-0828 (CKK), counsel for petitioners in these coordinated cases may share protected information with each other but only to the extent that counsel have appropriate

security clearances and that all other procedures set forth in this Protective Order are complied with. Petitioners' counsel shall maintain all protected information and documents received through this proceeding in a confidential manner.

39. Petitioners' counsel shall not disclose protected information not provided by petitioner-detainee to that petitioner-detainee without prior concurrence of counsel for the government or express permission of the Court.

40. No petitioner or counsel for petitioner shall disclose or cause to be disclosed any information known or believed to be protected in connection with any hearing or proceeding in these cases except as otherwise provided herein.

41. At no time, including any period subsequent to the conclusion of the proceedings, will petitioners' counsel make any public or private statements disclosing any protected information or documents accessed pursuant to this Protective Order, including the fact that any such information or documents are protected.

42. Protected information shall be used only for purposes directly related to these cases and not for any other litigation or proceeding, except by leave of the Court. Photocopies of documents containing such information shall be made only to the extent necessary to facilitate the permitted use hereunder.

43. Nothing in this Protective Order shall prevent the government from using for any purpose protected information it provides a party. Nothing in this Protective Order shall entitle another party to protected information.

44. Supplying protected information to another party does not waive privilege with respect to any person or use outside that permitted by this Protective Order.

45. Within sixty (60) days of the resolution of these actions, and the termination of any appeals therefrom, all protected documents or information, and any copies thereof, shall be promptly destroyed, provided that the party to whom protected information is disclosed certifies

in writing that all designated documents and materials have been destroyed, and further provided that counsel for the government may retain one complete set of any such materials that were presented in any form to the Court. Any such retained materials shall be placed in an envelope or envelopes marked "Protected Information Subject to Protective Order." In any subsequent or collateral proceeding, a party may seek discovery of such materials from the government, without prejudice to the government's right to oppose such discovery or its ability to dispose of the materials pursuant to its general document retention policies.

Procedures for Filing Documents

46. Until further order of this Court, any pleadings or other document filed by a petitioner shall be filed under seal with the Court through the Court Security Officer unless the petitioner has obtained from the Court Security Officer permission, specific to a particular, non-substantive pleading or document (e.g., motions for extensions of time, continuances, scheduling matters, etc.) not containing information that is or may be classified or protected, to file the pleading or document not under seal. The date and time of physical submission to the Court Security Officer shall be considered the date and time of filing with the Court. The Court Security Officer shall promptly examine the pleading or document and forward it to the appropriate agencies for their determination whether the pleading or document contains classified information. If it is determined that the pleading or document contains classified information, the Court Security Officer shall ensure that portion of the document, and only that portion, is marked with the appropriate classification marking and that the document remains under seal. If it is determined that the pleading or document contains protected information, the Court Security Officer shall ensure that portion of the document, and only that portion, remains under seal. Any document filed by petitioner that is determined not to contain classified information or protected information, and is not subject to any other restrictions on disclosure, shall immediately be unsealed by the Court Security Officer and placed in the public record. The Court Security

Officer shall immediately deliver under seal to the Court and counsel for the government any pleading or document to be filed by petitioners that contains classified information or protected information. The Court shall then direct the clerk to enter on the docket sheet the title of the pleading or document, the date it was filed, and the fact that it has been filed under seal with the Court Security Officer.

47. Any pleading or other document filed by the government containing classified information shall be filed under seal with the Court through the Court Security Officer. The date and time of physical submission to the Court Security Officer shall be considered the date and time of filing with the Court. The Court Security Officer shall serve a copy of any classified pleadings by the government upon the Petitioner at the secure facility.

48. Nothing herein shall require the government to disclose classified or protected information. Nor shall anything herein prohibit the government from submitting classified information or protected information to the Court *in camera* or *ex parte* in these proceedings, or entitle petitioners or petitioners' counsel access to such submissions or information. Except for good cause shown in the filing, the government shall provide counsel for the petitioner or petitioners with notice served on such counsel on the date of the filing.

Penalties for Unauthorized Disclosure

49. Any unauthorized disclosure of classified information may constitute violations of United States criminal laws. In addition, any violation of the terms of this Protective Order shall be immediately brought to the attention of the Court and may result in a charge of contempt of Court and possible referral for criminal prosecution. See e.g., Executive Order 12958, as amended. Any breach of this Protective Order may also result in the termination of access to classified information and protected information. Persons subject to this Protective Order are advised that direct or indirect unauthorized disclosure, retention, or negligent handling of classified documents or information could cause damage to the national security of the United

States or may be used to the advantage of an adversary of the United States or against the interests of the United States. Persons subject to this Protective Order are also advised that direct or indirect unauthorized disclosure, retention, or negligent handling of protected documents or information could risk the security of United States government personnel and facilities, and other significant government interests. This Protective Order is to ensure that those authorized to receive classified information and protected information will not divulge this information to anyone who is not authorized to receive it, without prior written authorization from the original classification authority and in conformity with this Protective Order.

50. The termination of these proceedings shall not relieve any person or party provided classified information or protected information of his, her, or its obligations under this Protective Order.

IT IS SO ORDERED.

November 8, 2004

/s/
JOYCE HENS GREEN
United States District Judge

Exhibit A

EXHIBIT A

REVISED PROCEDURES FOR COUNSEL ACCESS TO DETAINEES AT THE U.S. NAVAL BASE IN GUANTANAMO BAY, CUBA

I. Applicability

Except as otherwise stated herein or by other Order issued in the United States District Court for the District of Columbia, the following procedures shall govern counsel access to all detainees in the control of the Department of Defense ("DoD") at the U.S. Naval Base in Guantanamo Bay, Cuba ("GTMO") by counsel for purposes of litigating the cases in which this Order is issued.

These procedures do not apply to counsel who are retained solely to assist in the defense of a detainee in a trial by military commission. Access by that counsel is covered by the Procedures for Monitoring Communications Between Detainees Subject to Trial by Military Commission and their Defense Counsel Pursuant to Military Commission Order No. 3.

II. Definitions

A. Communications: All forms of communication between counsel and a detainee, including oral, written, electronic, or by any other means.

B. Counsel: An attorney who is employed or retained by or on behalf of a detainee for purposes of representing the detainee in the United States District Court for the District of Columbia and who is admitted, either generally or pro hac vice, in this Court. Unless otherwise stated, "counsel" also includes co-counsel, interpreters, translators, paralegals, investigators and all other personnel or support staff employed or engaged to assist in the litigation.

C. Detainee: An individual detained by DoD as an alleged enemy combatant at the U.S. Naval Base in Guantanamo Bay, Cuba.

D. Privilege Team: A team comprised of one or more DoD attorneys and one or more intelligence or law enforcement personnel who have not taken part in, and, in the future, will not take part in, any domestic or foreign court, military commission or combatant status tribunal proceedings involving the detainee. If required, the privilege team may include interpreters/translators, provided that such personnel meet these same criteria.

E. Legal Mail: Letters written between counsel and a detainee that are related to the counsel's representation of the detainee, as well as privileged documents and publicly-filed legal documents relating to that representation.

EXHIBIT A

III. Requirements for Access to and Communication with Detainees

A. Security Clearance:

1. Counsel must hold a valid current United States security clearance at the Secret level or higher, or its equivalent (as determined by appropriate DoD intelligence personnel).

2. Counsel who possess a valid security clearance shall provide, in writing, the date of their background investigation, the date such clearance was granted, the level of the clearance, and the agency who granted the clearance. Access will be granted only after DoD verification of the security clearance.

3. Counsel who does not currently possess a Secret clearance will be required to submit to an application for clearance to the Department of Justice, Litigation Security Division.

B. Acknowledgment of and Compliance with Access Procedures

1. Before being granted access to the detainee, counsel will receive a copy of these procedures. To have access to the detainee, counsel must agree to comply fully with these procedures and must sign an affirmation acknowledging his/her agreement to comply with them.

2. This affirmation will not be considered an acknowledgment by counsel that the procedures are legally permissible. Even if counsel elects to challenge these procedures, counsel may not knowingly disobey an obligation imposed by these procedures.

3. The DoD expects that counsel, counsel's staff, and anyone acting on the behalf of the attorney will fully abide by the requirements of this document. Counsel is required to provide the DoD with signed affirmations from interpreters, translators, paralegals, investigators and all other personnel or support staff employed or engaged to assist in the litigation, upon utilization of those individuals by counsel in a manner that implicates these procedures.

4. Should counsel fail to comply with the procedures set forth in this document, access to or communication with the detainee will not be permitted.

C. Verification of Representation

1. Prior to being permitted access to the detainee, counsel must provide DoD with a *Notification of Representation*. This Notification must include the counsel's licensing information, business and email addresses and phone number, as well as

EXHIBIT A

the name of the detainee being represented by the counsel. Additionally, counsel shall provide evidence of his or her authority to represent the detainee.

2. Counsel shall provide evidence of his or her authority to represent the detainee as soon as practicable and in any event no later than ten (10) days after the conclusion of a second visit with the detainee. The Court recognizes that counsel may not be in a position to present such evidence after the initial meeting with a detainee. Counsel for detainees and counsel for respondents shall cooperate to the fullest extent possible to reach a reasonable agreement on the number of counsel visits allowed. Should counsel for a detainee believe that the government is unreasonably limiting the number of visits with a detainee, counsel may petition the Court at the appropriate time for relief.

3. If the counsel withdraws from representation of the detainee or if the representation is otherwise terminated, counsel is required to inform DoD immediately of that change in circumstances.

4. Counsel must provide DoD with a signed representation stating that to the best of counsel's knowledge after reasonable inquiry, the source of funds to pay counsel any fees or reimbursement of expenses are not funded directly or indirectly by persons or entities the counsel believes are connected to terrorism or the product of terrorist activities, including "Specially Designated Global Terrorists," identified pursuant to Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001) or Exec. Order No. 12,947, 60 Fed. Reg. 5079 (Jan. 23, 1995), and (b) counsel has complied with ABA Model Rule 1.8(f).

D. Logistics of Counsel Visits

1. Counsel shall submit to the Department of Justice (DoJ) any request to meet with a detainee. This request shall specify date(s) of availability for the meeting, the desired duration of the meeting and the language that will be utilized during the meeting with the detainee. Reasonable efforts will be made to accommodate the counsel's request regarding the scheduling of a meeting. Once the request has been approved, DoJ will contact counsel with the date and duration of the meeting.

2. Legal visits shall take place in a room designated by JTF-Guantanamo. No more than two attorneys (or one attorney and one assistant) plus one interpreter/translator shall visit with a detainee at one time, unless approved in advance by the Commander, JTF-Guantanamo. Such approval shall not be unreasonably withheld.

3. Due to the mission and location of the US Naval Base at Guantanamo Bay, Cuba, certain logistical details will need to be coordinated by counsel prior to arrival. This includes arrangements for travel and lodging. Specific information regarding these issues will be provided by DoJ.

EXHIBIT A

4. In order to travel to GTMO, all counsel must have a country and theater clearance for that specific visit. In order to begin processing country and theater clearances, counsel must have confirmed flight information for travel to GTMO and a valid current United States security clearance at the Secret level or higher, or its equivalent (as determined by appropriate DoD intelligence personnel). Country and theater clearances require twenty (20) days to process. Accordingly, counsel shall provide DoD, through DoJ, with the required information no later than 20 days prior to the GTMO visit date, or as soon as a visit is scheduled. Requests for visits made inside of 20 days will not normally be granted.

IV. Procedures for Correspondence Between Counsel and Detainee

A. Mail Sent by Counsel to Detainee ("Incoming Mail")

1. Counsel shall send incoming legal mail for a detainee to the privilege team at the appropriate address provided by government counsel. Each envelope or mailer shall be labeled with the name of the detainee and shall include a return address for counsel sending the materials. The outside of the envelope or mailer for incoming legal mail shall be labeled clearly with the following annotation: "Attorney-Detainee Materials-For Mail Delivery to Detainee."

2. Each page of legal mail shall be labeled "Attorney-Detainee Materials." No staples, paper clips or any non-paper items shall be included with the documents.

3. Upon receiving legal mail from counsel for delivery to the detainee, the privilege team shall open the envelope or mailer to search the contents for prohibited physical contraband. Within two (2) business days of receipt of legal mail, and assuming no physical contraband is present, the privilege team shall forward the mail to military personnel at GTMO in a sealed envelope marked "Legal Mail Approved by Privilege Team" and clearly indicating the identity of the detainee to which the legal mail is to be delivered. The privilege team shall return to the sender any incoming mail that does not comply with the terms of paragraphs IV.A.1., 2.

4. Within two (2) business days of receipt of legal mail from the privilege team, personnel at GTMO shall deliver the envelope or mailer marked by the privilege team as "Legal Mail Approved by the Privilege Team" to the detainee without opening the envelope or mailer. If counsel desires confirmation that the documents were delivered to the detainee, counsel is responsible for providing a stamped, self-addressed envelope for that purpose. The detainee shall be responsible for mailing any confirmation of delivery to counsel as outgoing legal mail. This method shall be the sole and exclusive means by which confirmation of delivery is provided to counsel.

EXHIBIT A

5. Written correspondence to a detainee not falling within the definition of legal mail shall be sent through the United States Postal Service to the appropriate address provided by government counsel. Non-legal mail includes, but is not limited to, letters from persons other than counsel, including family and friends of the detainee. These non-privileged communications will be reviewed by military personnel at GTMO under the standard operating procedures for detainee non-legal mail.

6. Counsel is required to treat all information learned from a detainee, including any oral and written communications with a detainee, as classified information, unless and until the information is submitted to the privilege team and determined to be otherwise by the privilege team or by this Court or another court. Accordingly, if a counsel's correspondence contains any summary or recitation of or reference to a communication with a detainee that has not been previously determined to be unclassified, the correspondence shall be prepared, marked, transported and handled as classified material as required by Executive Order 12958, DOD Regulation 5200.1-R and AI 26, OSD Information and Security Supplement to DOD Regulation 5200.1R.

7. Written and oral communications with a detainee, including all incoming legal mail, shall not include information relating to any ongoing or completed military, intelligence, security, or law enforcement operations, investigations, or arrests, or the results of such activities, by any nation or agency or current political events in any country that are not directly related to counsel's representation of that detainee; or security procedures at GTMO (including names of U.S. Government personnel and the layout of camp facilities) or the status of other detainees, not directly related to counsel's representation.

B. Mail Sent by Detainee to Counsel ("Outgoing Mail")

1. Detainees will be provided with paper to prepare communications to counsel. In the presence of military personnel, the detainee will seal the written communication into an envelope and it will be annotated as "Attorney-Detainee Materials-For Mail Delivery To Counsel." Each envelope shall be labeled with the name of the detainee and the counsel. Envelopes annotated with the name of persons other the detainee's counsel (including family/friends or other attorneys) shall be processed according to the standard operating procedures for detainee non-legal mail.

2. Military personnel will collect the outgoing legal mail within one (1) business day of being notified by the detainee that the communication is prepared for sealing and mailing.

3. After the outgoing legal mail is collected from the detainee, the envelope will be sealed into a larger envelope by military personnel at Guantanamo which will be marked as "Attorney-Detainee Materials-For Mail Delivery To Counsel" and will

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be annotated with the name of the detainee and the counsel. The envelope will be sealed and mailed in the manner required for classified materials. Within two (2) business days of receipt from the detainee, the communication will be mailed to the appropriate address as provided by government counsel.

4. Detainees also are permitted to send non-legal mail, including written communications to persons other than counsel, through the United States Postal Service. These communications shall be reviewed by military personnel at Guantanamo under the standard operating procedures for detainee non-legal mail.

5. In the event any non-legal correspondence or messages from a detainee to individuals other than his counsel (including family/friends or other attorneys) are sent to counsel as, or included with, legal mail, counsel shall return the documents to military personnel at GTMO for processing according to the standard operating procedures for detainee non-legal mail.

V. Materials Brought Into A Meeting With Detainee And Counsel

A. Counsel shall bring only legal mail, writing utensils and paper into any meeting with a detainee unless counsel has received prior approval from the Commander, JTF-GTMO. The Commander shall not unreasonably withhold approval for counsel to bring into a meeting with a detainee letters, tapes, or other communications introducing counsel to the detainee, if the government has first reviewed the communication and determined that sharing the communication with the detainee would not threaten the security of the United States.

B. Written and oral communications with a detainee, including all documents brought into a meeting with a detainee, shall not include information relating to any ongoing or completed military, intelligence, security, or law enforcement operations, investigations, or arrests, or the results of such activities, by any nation or agency or current political events in any country that are not directly related to counsel's representation of that detainee; or security procedures at GTMO (including names of U.S. Government personnel and the layout of camp facilities) or the status of other detainees, not directly related to counsel's representation.

VI. Materials Brought Out Of A Meeting With Detainee and Counsel

A. Upon the completion of each meeting with a detainee or during any break in a meeting session, counsel will give the notes or documents used or produced during the meeting to a designated individual at Guantanamo. These materials will be sealed in the presence of counsel and will be handled as classified material as required by Executive Order 12958, DOD Regulation 5200.1-R and AI 26, OSD Information Security Supplement to DOD Regulation 5200.1R.

B. Upon the completion of the counsel's visit to Guantanamo, the notes or documents used or produced during the visit shall be sealed in the presence of

counsel and placed in an envelope labeled as "Attorney-Detainee Meeting Documents–For Delivery to Counsel." The envelope shall be sealed into a larger envelope by military personnel at Guantanamo which shall be marked as "Attorney-Detainee Meeting Documents-For Mail Delivery To Counsel" and shall be annotated with the name of the detainee and the counsel. The envelope shall be sealed and mailed in the manner required for classified materials. Within two (2) business days following the completion of the counsel's visit to Guantanamo, the package shall be mailed to the appropriate address provided by government counsel.

C. Correspondence or messages from a detainee to individuals other than his counsel (including family/friends or other attorneys) shall not be handled through this process. If a detainee provides these communications to his counsel during a visit, counsel shall give those communications to military personnel at Guantanamo so they can be processed under the standard operating procedures for detainee non-legal mail.

VII. Classification Determination of Detainee Communications

A. Counsel may submit information learned from a detainee to the privilege team for a determination of its appropriate security classification. Counsel shall memorialize the information submitted for classification review into a written memorandum outlining as specifically as possible the information for which counsel requests a classification determination. All documents submitted for classification review shall be prepared, handled and treated in the manner required for classified materials, as provided by as required by Executive Order 12958, DOD Regulation 5200.1-R and AI 26, OSD Information Security Supplement to DOD Regulation 5200.1R. No information derived from these submissions shall be disclosed outside the privilege team pursuant to these procedures until after the privilege team has reviewed it for security and intelligence purposes. Absent express consent given by the Court, or except as otherwise provided in this document, the submissions shall not be disclosed to any person involved in the interrogation of a detainee, and no such individual may make any use of those communications whatsoever, nor shall the submissions be disclosed to any Government personnel involved in any domestic or foreign court, military commission or combatant status tribunal proceedings involving the detainee.

B. Counsel shall send all materials submitted for classification review to the appropriate address to be provided by government counsel. The outside of the envelope or mailer shall be clearly labeled "Attorney-Detainee Meeting Documents-For Classification Review By Privilege Team." Each envelope or mailer shall be annotated with the name of the detainee and the counsel. Each page of the document submitted for classification review shall be marked "Attorney-Detainee Materials" and "Classified." The envelope or mailer will be sealed and mailed in the manner required for classified materials.

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C. As soon as possible after conducting the classification review, the privilege team shall advise counsel of the classification levels of the information contained in the materials submitted for review. The privilege team shall forward its classification determination directly to counsel after a review and analysis period not to exceed, from the time of receipt by the privilege team:

1. Seven (7) business days for information that is written in the English language;

2. Fourteen (14) business days for any information that includes writing in any language other than English, to allow for translations by the privilege team;

3. Twenty (20) business days for any information where the privilege team has reason to believe that a code was used, to allow for further analysis.

D. While conducting classification review, the privilege team shall promptly report any information that reasonably could be expected to result in immediate and substantial harm to the national security to the Commander, JTF-Guantanamo. In his discretion, the Commander, JTF-Guantanamo may disseminate the relevant portions of the information to law enforcement, military and intelligence officials as appropriate.

E. If, at any time, the privilege team determines that information in the documents submitted for classification review relate to imminent acts of violence, the privilege team shall report the contents of those documents to Commander, JTF-Guantanamo. In his discretion, the Commander, JTF-Guantanamo may disseminate the relevant portions of the information to law enforcement, military and intelligence officials.

F. The privilege team shall not disclose any information submitted by counsel for classification review outside the privilege team, except as provided by these procedures or as permitted by counsel submitting the information.

VIII. Telephonic Access to Detainee

A. Requests for telephonic access to the detainee by counsel or other persons will not normally be approved. Such requests may be considered on a case-by-case basis due to special circumstances and must be submitted to Commander, JTF-Guantanamo.

B. Any telephonic access by counsel will be subject to appropriate security procedures, but shall not include contemporaneous monitoring or recording.

C. Any telephonic access by persons other than counsel will be subject to appropriate security procedures, including contemporaneous monitoring and recording.

EXHIBIT A

IX. Counsel's Handling And Dissemination Of Information From Detainee

A. Subject to the terms of any applicable protective order, counsel may disseminate the unclassified contents of the detainee's communications for purposes reasonably related to their representation of that detainee.

B. Counsel is required to treat all information learned from a detainee, including any oral and written communications with a detainee, as classified information, unless and until the information is submitted to the privilege team and determined to be otherwise. All classified material must be handled, transported and stored in a secure manner, as provided by Executive Order 12958, DOD Regulation 5200.1-R and AI 26, OSD Information Security Supplement to DOD Regulation 5200.1R.

C. Counsel shall disclose to DoJ or Commander, JTF-Guantanamo any information learned from a detainee involving future events that threaten national security or involve imminent violence.

D. Counsel may not divulge classified information not learned from the detainee to the detainee. Counsel may not otherwise divulge classified information related to a detainee's case to anyone except those with the requisite security clearance and need to know using a secure means of communication. Counsel for detainees in the coordinated cases pending in the United States District Court for the District of Columbia are presumed to have a "need to know" information in related cases pending before this Court. Counsel for respondents in those cases may challenge this presumption on a case-by-case basis for good cause shown.

X. JTF-Guantanamo Security Procedures

A. Counsel and translators/interpreters shall comply with the following security procedures and force protection safeguards applicable to the US Naval Base in Guantanamo Bay, Cuba, JTF-Guantanamo and the personnel assigned to or visiting these locations, as well as any supplemental procedures implemented by JTF-Guantanamo personnel.

B. Contraband is not permitted in JTF-Guantanamo and all visitors are subject to search upon arrival and departure. Examples of contraband include, but are not limited to, weapons, chemicals, drugs, and materials that may be used in an escape attempt. Contraband also includes money, stamps, cigarettes, writing instruments, etc. No items of any kind may be provided to the detainee without the advance approval of the Commander, JTF-Guantanamo.

C. Photography or recording of any type is prohibited without the prior approval of the Commander, JTF-Guantanamo. No electronic communication devices are permitted. All recording devices, cameras, pagers, cellular phones, PDAs, laptops, portable electronic devices and related equipment are prohibited in or near JTF-Guantanamo. Should any of these devices be inadvertently taken into a

prohibited area, the device must be surrendered to JTF-Guantanamo staff and purged of all information.

D. Upon arrival at JTF-Guantanamo, security personnel will perform a contraband inspection of counsel and translators/interpreters using metal detectors as well as a physical inspection of counsel's bags and briefcases and, if determined necessary, a physical inspection of his/her person.

E. Counsel shall not be permitted to interview or question members of the Joint Task Force about their duties or interactions with detainees without first obtaining permission from the Commander, Joint Task Force Guantanamo. Should permission be unreasonably denied, counsel may seek an Order from this Court granting permission for good cause shown.

F. Counsel will meet with a detainee in conference facilities provided by GTMO. These facilities are subject to visual monitoring by closed circuit TV for safety and security reasons. (The only other method of visual observation available is for the door to remain open with military police sitting outside the door.). No oral communications between counsel and detainee will be heard.

G. At the conclusion of a meeting with a detainee, counsel and translators/interpreters will again be inspected using a metal detector and, if deemed necessary, by physical inspection of their persons.

Exhibit B

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

, *et al.*	)	
Petitioners,	)	
v.	)	Civil Action No.
GEORGE W. BUSH, President of the United States, *et al.*,	)	
Respondents.	)	

MEMORANDUM OF UNDERSTANDING REGARDING ACCESS TO CLASSIFIED NATIONAL SECURITY INFORMATION

Having familiarized myself with the applicable statutes, regulations, and orders related to, but not limited to, unauthorized disclosure of classified information, espionage and related offenses; The Intelligence Identities Protection Act, 50 U.S.C. § 421; 18 U.S.C. § 641; 50 U.S.C. § 783; 28 C.F.R. § 17 et seq.; and Executive Order 12958; I understand that I may be the recipient of information and documents that belong to the United States and concern the present and future security of the United States, and that such documents and information together with the methods and sources of collecting it are classified by the United States government. In consideration for the disclosure of classified information and documents:

(1) I agree that I shall never divulge, publish, or reveal either by word, conduct or any other means, such classified

EXHIBIT B

documents and information unless specifically authorized in writing to do so by an authorized representative of the United States government, or as expressly authorized by the Protective Order entered in the United States District Court for the District of Columbia in the case captioned _____ v. George W. Bush, No. _____.

(2) I agree that this Memorandum of Understanding and any other non-disclosure agreement signed by me will remain forever binding on me.

(3) I have received, read, and understand the Protective Order entered by the United States District Court for the District of Columbia in the case captioned _____ v. George W. Bush, No. _____, and I agree to comply with the provisions thereof.

_____ _____
Date

_____ _____
Date

Exhibit C

EXHIBIT C

ACKNOWLEDGMENT

The undersigned hereby acknowledges that he/she has read the Protective Order entered in the United States District Court for the District of Columbia in the case captioned _____ v. George W. Bush, No. _____, understands its terms, and agrees to be bound by each of those terms. Specifically, and without limitation, the undersigned agrees not to use or disclose any protected information or documents made available to him/her other than as provided by the Protective Order. The undersigned acknowledges that his/her duties under the Protective Order shall survive the termination of this case and are permanently binding, and that failure to comply with the terms of the Protective Order may result in the imposition of sanctions by the Court.

DATED: _____ BY: _____
(type or print name)

SIGNED: _____

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

	)	**Civil Action Nos.**
	)	**02-CV-0299 (CKK), 02-CV-0828 (CKK),**
	)	**02-CV-1130 (CKK), 04-CV-1135 (ESH),**
	)	**04-CV-1136 (JDB), 04-CV-1137 (RMC),**
***In re* Guantanamo Detainee Cases**	)	**04-CV-1144 (RWR), 04-CV-1164 (RBW),**
	)	**04-CV-1194 (HHK), 04-CV-1227 (RBW),**
	)	**04-CV-1254 (HHK), 04-CV-1897 (RMC)**
	)	
	)	
	)	
	)	

ORDER SUPPLEMENTING AND AMENDING FILING PROCEDURES CONTAINED IN NOVEMBER 8, 2004 AMENDED PROTECTIVE ORDER

In its November 8, 2004 Amended Protective Order, the Court set forth procedures for the filing of documents by counsel in these coordinated cases. Paragraph 46 governs the filing of documents by counsel for the petitioners and requires that all filings be first submitted under seal to the Court Security Officer ("CSO") to determine whether they contain classified or protected information. If the CSO, in consultation with the appropriate agency, concludes that a particular filing does not contain any classified or protected information, ¶ 46 requires the unsealing of the document by the CSO and the filing of the document in the public record. If the CSO, in consultation with the appropriate agency, concludes that a particular filing does contain classified or protected information, that information is to remain under seal and the unclassified and unprotected portions of the filing, if any, are to be placed in the public record. Paragraph 47 governs the filing of classified materials by counsel for the respondents and requires counsel to submit classified filings under seal to the Court through the CSO.

It has recently come to the Court's attention that some confusion and certain difficulties have arisen with respect to the filing of documents containing classified or protected information. Most of the difficulties have arisen as a result of the nature of the Court's CM/ECF electronic filing system. To clarify and, hopefully, to improve the filing system, it is hereby

ORDERED that the "Procedures For Filing Documents" contained on pages 13 through 14 of the November 8, 2004 Amended Protective Order are modified and supplemented as follows:

All documents filed by a petitioner shall be filed under seal with the Court through the Court Security Officer for determination by the appropriate agency as to whether the documents contain classified or protected information. At the time of making a submission to the CSO, the attorney shall file on the public record in the CM/ECF system a "Notice of Filing" notifying the Court that a submission has been made to the CSO and specifying in general terms the nature of the filing without disclosing any potentially classified or protected information. It is the Court's understanding that the CM/ECF system requires counsel to attach a document to any entry made by them on the system. Accordingly, the document to be attached to the Notice of Filing in the CM/ECF system shall be a one page submission repeating in general terms the nature of the filing without disclosing any potentially classified or protected information and disclosing the date and time the document was delivered to the CSO for her review.

In the event that the CSO informs counsel for a petitioner that a proposed filing does not contain any classified or protected information, counsel shall then promptly file the full submission in the CM/ECF system and counsel shall make specific reference to the earlier docket

entry notifying the Court that the document had been submitted to the CSO for review. The docket entry description shall also state that the CSO has approved of the public filing of the document. The underlying document filed in the CM/ECF system shall contain a notation in the upper right hand corner of the first page stating "PREVIOUSLY FILED WITH CSO AND CLEARED FOR PUBLIC FILING."

In the event that the CSO informs counsel for a petitioner that a proposed filing does in fact contain some or all classified or protected information, counsel shall then promptly file in the CM/ECF system a version of the document suitable for public viewing. Unless an entire document is deemed classified or protected, a "version of the document suitable for public viewing" shall mean a document in which the portions of the document containing classified or protected information are redacted. Such document shall contain a notification in the upper right hand corner of the first page stating "REDACTED VERSION FOR PUBLIC FILING CLEARED BY CSO." In the event an entire document is deemed classified or protected, a "version of the document suitable for public viewing" shall mean a one page "half sheet" containing the caption of the case, a version of the title of the document that does not disclose classified or protected information, and a brief statement that the CSO has informed counsel that the entire document is classified or protected. The docket entry description in the CM/ECF system for the document suitable for public viewing shall make specific reference to the earlier docket entry notifying the Court that the document had been submitted to the CSO for review.

Any pleading or other document filed by counsel for the respondents containing classified or protected information shall be filed under seal with the Court through the CSO. In addition,

counsel for respondents shall file in the CM/ECF system a version of the document suitable for public viewing as that phrase is defined in the preceding paragraph.

IT IS SO ORDERED.

December 13, 2004

/s/
JOYCE HENS GREEN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

ORDER ADDRESSING DESIGNATION PROCEDURES
FOR "PROTECTED INFORMATION"

On November 8, 2004, counsel for respondents in these coordinated cases filed a motion requesting the Court to designate as "protected information" the unclassified information contained in the respondents' factual returns to the petitions for writs of habeas corpus that is not filed on the public record. Counsel for certain petitioners filed responses stating that they could not take a position on the respondents' motion until they or a designated representative had an opportunity to review the material that the respondents seek to have declared "protected."

In the interest of the efficient administration of these proceedings, it is hereby

ORDERED that should counsel for respondents in these consolidated cases wish to have the Court deem any information "protected" pursuant to the Court's November 8, 2004 Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba, counsel for respondents shall disclose the information to qualified counsel for petitioners and attempt to reach an agreement regarding the designation of the information prior to filing a motion with the Court. "Qualified counsel" for petitioners means those counsel who have satisfied the necessary prerequisites set forth in the Amended

Protective Order for the viewing of protected information.

It is FURTHER ORDERED that counsel for petitioners shall treat such disclosed information as "protected" unless and until the Court rules that the information should not be designated as "protected."

It is FURTHER ORDERED that counsel for petitioners shall make their best efforts to designate one attorney as a representative to review the information on their behalf and to negotiate with counsel for respondents prior to the filing of any motions to deem information "protected."

With respect to the November 8, 2004 Motion to Designate as "Protected Information" Unclassified Information in Factual Returns to Petitions for Writ of Habeas Corpus That is Not Filed on the Public Record, it is hereby

ORDERED that counsel for respondents shall deliver the information they seek to be deemed "protected" to the Court Security Officer at the designated secured facility on or before November 17, 2004.

It is FURTHER ORDERED that the Court Security Officer shall notify counsel for the petitioners of the location of the secured facility on or before November 12, 2004.

It is FURTHER ORDERED that petitioners' counsel shall review at the secured facility the information at issue and shall notify the Court of their position with respect to the designation of the information on or before November 19, 2004.

IT IS SO ORDERED.
November 10, 2004

/s/
JOYCE HENS GREEN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOHSEN ABDRUB ABOASSY, *et al.*, Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 05-CV-0748 (HHK)
ADEL HAMLILY, *et al.*, Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 05-CV-0763 (JDB)
AHMED ABU IMRAN, *et al.*, Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 05-CV-0764 (CKK)

BENJAMIN MOHAMMED AL HABASHI, *et al.*, Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 05-CV-0765 (EGS)
ABDUL HADI IBN EL HATHILY AL HAMAMY, *et al.*, Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 05-CV-0766 (RJL)

(PROPOSED) ORDER

Having considered Respondents' Motion to Stay Proceedings Pending Related Appeals and for Continued Coordination, the oppositions filed thereto, and any reply, as well as the entire record in this case, and it appearing that good cause exists for granting the motion, it is hereby

ORDERED that the Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba, first issued on November 8, 2004 in In re Guantanamo Detainee Cases, 344 F. Supp. 2d 174 (D.D.C. 2004), the Order

Supplementing and Amending Filing Procedures Contained in November 8, 2004 Amended Protective Order, first issued on December 13, 2004 in In re Guantanamo Detainee Cases, and the Order Addressing Designation Procedures for "Protected Information," first issued on November 10, 2004 in In re Guantanamo Detainee Cases shall apply in the above-captioned cases. It is

FURTHER ORDERED that the above-captioned cases are stayed pending resolution of all appeals in Khalid et al. v. Bush, No. 04-CV-1142 (RJL), 2005 WL 100924 (D.D.C. Jan. 19, 2005), appeals docketed, Nos. 05-5062, 05-5063 (D.C. Cir. Mar. 2, 2005) and In re Guantanamo Detainee Cases, No. 02-CV-0299, et al., 2005 WL 195356 (D.D.C. Jan. 31, 2005), petition for interlocutory appeal granted, No. 05-8003 (D.C. Cir. Mar. 10, 2005).

IT IS SO ORDERED.

DATED: _____

_____
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BENJAMIN MOHAMMED AL HABASHI, et al.	)	
Petitioners,	)	
v.	)	No. 1:05CV00765 (EGS)
GEORGE WALKER BUSH, et al.	)	
Respondents.	)	

ORDER

Upon consideration of the unopposed motion for entry of protective order, it is hereby

ORDERED that the Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba, first issued on November 8, 2004, (344 F. Supp. 2d 174 (D.D.C. 2004)) and the Order Supplementing and Amending Filing Procedures Contained in November 8, 2004 Amended Protective Order, first issued on December 13, 2004, in the *In re Guantanamo Bay Detainee Cases* shall apply in this case. It is

FURTHER ORDERED that petitioners' counsel shall treat information designated by respondents as "protected" under the Amended Protective Order as "protected information" under the Amended Protective Order pending further order of this Court.

IT IS SO ORDERED.

Signed: Emmet G. Sullivan
United States District Judge
April 21, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BENJAMIN MOHAMMED AL HABASHI, *et al.*,	)	
Petitioners,	)	
v.	)	Civil Action No. 05-CV-0765 (EGS)
GEORGE W. BUSH, President of the United States, *et al.*,	)	
Respondents.	)	

RESPONDENTS' RESPONSE TO ORDER TO SHOW CAUSE

Respondents hereby submit this response to the April 21, 2005 docket entry in this matter, entitled "Order to Show Cause," directing the government to "show cause why this Writ of Habeas Corpus should not be granted." Petitioner Binyam Ahmed Mohammad (listed in the Petition as Benjamin Mohammed Al Habashi) has been determined to be an enemy combatant affiliated with al Qaeda for the reasons cited in the record of proceedings before the Combatant Status Review Tribunal ("CSRT") regarding petitioner.[1] Accordingly, petitioner is lawfully subject to detention pursuant to the President's power as Commander in Chief or otherwise and is being so detained. As explained below, the claims raised by petitioner do not warrant issuance

[1] The portion of that record that is suitable for public filing is submitted herewith as Exhibit 1; the portion of that record not suitable for public filing is being filed under seal concurrently herewith, see Notice of Submission of Certain Portions of Respondents' Response to Order to Show Cause under Seal (Apr. 26, 2005). The factual submissions demonstrate, in light of the applicable legal standards, that no writ of habeas corpus should issue in this case.

of a writ of habeas corpus in this case where petitioner has been determined to be an enemy combatant affiliated with al Qaeda.

It is alleged on behalf of petitioner Habashi that his detention violates the Fifth Amendment Due Process Clause of the United States Constitution; international law, including the International Covenant on Civil and Political Rights ("ICCPR"), and the American Declaration on the Rights and Duties of Man ("ADRDM"); the Geneva Conventions; the War Powers Clause of the United States Constitution; and Article 1 of the United States Constitution. See Petition (dkt. no. 1).

As an initial matter, the petition is problematic with regard to the respondents named therein. While petitioners name a number of respondents, Secretary Rumsfeld is the only proper respondent given petitioner's detention overseas by the Department of Defense, see Exhibit 1, and thus, all respondents other than Secretary Rumsfeld should be dismissed. See Rumsfeld v. Padilla, 124 S. Ct. 2711, 2718 n.9 (2004) (only the "custodian" is proper habeas respondent); Sept. 29, 2004 Mem. Op. and Order in Gherebi v. Bush, No. 04-CV-1164, at 7-8. Furthermore, the President is plainly not a proper respondent for an additional reason: It is long settled that a court of the United States "'has no jurisdiction . . . to enjoin the President in the performance of his official duties'" or otherwise to compel the President to perform any official act. Franklin v. Massachusetts, 505 U.S. 788, 803 (1992) (plurality opinion) (quoting Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 501 (1866)); 505 U.S. at 825 (Scalia, J., concurring in part and concurring in the judgment). While the Supreme Court has left open the question whether the President may be ordered to perform a purely "ministerial" duty, see 505 U.S. at 802, the relief petitioner seeks here – primarily, release from custody – is far from ministerial. As the Seventh Circuit explained

in a habeas case brought by an alien enemy combatant, "[n]aming the President as a respondent was not only unavailing but also improper" because "[s]uits contesting actions of the executive branch should be brought against the President's subordinates." Al-Marri v. Rumsfeld, 360 F.3d 707, 708 (7th Cir. 2004), cert. denied, 125 S. Ct. 34 (2004); see also Padilla v. Bush, 233 F. Supp. 2d 564, 582 (S.D.N.Y. 2002) (because "this court has no power to direct the President to perform an official act," the President was not a proper respondent in a habeas case brought by a citizen held as an enemy combatant), rev'd on other grounds, Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003), rev'd, 124 S. Ct. 2711, 2716 n.4 (2004).

In any event, to the extent the claims asserted in the Petition are properly raised on behalf of petitioner Habashi, see Petition Exhibit A, the claims raised are without merit for the reasons set forth in the Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss or for Judgment as a Matter of Law and Memorandum in Support, filed October 4, 2004, in the coordinated Guantanamo detainee cases. In the interest of economy and to avoid needless duplication, those reasons will not be restated here, but instead, the brief is attached as Exhibit 2 and incorporated herein. See also Khalid v. Bush, 355 F. Supp.2d 311, 314, 321 (D.D.C. 2005) ("no viable legal theory exists" by which the Court "could issue a writ of habeas corpus" in favor of Guantanamo detainees; aliens held at Guantanamo "possess no cognizable constitutional rights" including rights under the Fifth Amendment), appeals docketed, Nos. 05-5062, 05-5063 (D.C. Cir. Mar. 2, 2005); In re Guantanamo Detainee Cases, 355 F. Supp.2d 443, 479-81 (D.D.C. 2005) (dismissing Geneva Conventions claims of petitioners found by CSRTs to be al Qaeda, as well as claims under, inter alia, ICCPR and ADRDM), petition for interlocutory appeal granted, No. 05-8003 (D.C. Cir. Mar. 10, 2005).

For these reasons, a writ of habeas corpus should not issue in this case.[2]

Dated: April 26, 2005

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

KENNETH L. WAINSTEIN
United States Attorney

DAVID B. SALMONS
Assistant to the Solicitor General

DOUGLAS N. LETTER
Terrorism Litigation Counsel

/s/ Terry M. Henry
JOSEPH H. HUNT (D.C. Bar No. 431134)
VINCENT M. GARVEY (D.C. Bar No. 127191)
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Washington, DC 20530
Tel: (202) 514-4107
Fax: (202) 616-8470

Attorneys for Respondents

[2] Respondents have requested that further proceedings in this case be stayed pending the outcome of the appeals in Khalid and In re Guantanamo Detainee Cases, for the reasons stated in respondents Motion to Stay Proceedings Pending Related Appeals and for Continued Coordination (dkt. no. 5).

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BINYAM AHMED MOHAMMAD, *et al*	)	
Petitioners,	)	
v.	)	No. 1: 05CV00765 (EGS)
GEORGE WALKER. BUSH, *et al.*,	)	
Respondents.	)	

DECLARATION OF TERESA A. McPALMER

Pursuant to 28 U.S.C. § 1746, I, Commander Teresa A. McPalmer, Judge Advocate General's Corps, United States Navy, hereby state that to the best of my knowledge, information and belief, the following is true, accurate and correct:

1. I am the Legal Advisor to the Office for the Administrative Review of the Detention of Enemy Combatants (OARDEC) at U.S. Naval Base Guantanamo Bay, Cuba. In that capacity I am an advisor to the Director, Combatant Status Review Tribunals.

2. I hereby certify that the documents attached hereto constitute a true and accurate copy of the portions of the record of proceedings before the Combatant Status Review Tribunal related to petitioner Binyam Ahmed Mohammad that are suitable for public release. The portions of the record that are classified or considered law enforcement sensitive are not attached hereto. An OARDEC staff member redacted information that would personally identify certain U.S. Government personnel in order to protect the personal security of those individuals. The OARDEC staff member also redacted internee serial numbers because certain combinations of

internee serial numbers with other information relates to sensitive internal detention and intelligence operations that is not suitable for public release.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: 22 April 2005

Teresa A. McPalmer
CDR, JAGC, USN

Department of Defense
Director, Combatant Status Review Tribunals

OARDEC/Ser: 622

~~FOR OFFICIAL USE ONLY~~

16 JAN 2005

From: Director, Combatant Status Review Tribunal

Subj: **REVIEW OF COMBATANT STATUS REVIEW TRIBUNAL FOR DETAINEE ISN #[redacted]**

Ref: (a) Deputy Secretary of Defense Order of 7 July 2004
(b) Secretary of the Navy Order of 29 July 2004

1. I concur in the decision of the Combatant Status Review Tribunal that Detainee ISN #[redacted] meets the criteria for designation as an Enemy Combatant, in accordance with references (a) and (b).

2. This case is now considered final and the detainee will be scheduled for an Administrative Review Board.

J. M. McGARRAH
RADM, CEC, USN

Distribution:
NSC (Mr. John Bellinger)
DoS (Ambassador Prosper)
DASD-DA
JCS (J5)
SOUTHCOM (CoS)
COMJTFGTMO
OARDEC (Fwd)
CITF Ft Belvoir

~~FOR OFFICIAL USE ONLY~~

13 Jan 05

MEMORANDUM

From: Assistant Legal Advisor
To: Director, Combatant Status Review Tribunal
Via: Legal Advisor

Subj: LEGAL SUFFICIENCY REVIEW OF COMBATANT STATUS REVIEW TRIBUNAL FOR DETAINEE ISN #[redacted]

Ref: (a) Deputy Secretary of Defense Order of 7 July 2004
(b) Secretary of the Navy Implementation Directive of 29 July 2004

Encl: (1) Appointing Order for Tribunal #21 of 16 November 2004
(2) Record of Tribunal Proceedings

1. Legal sufficiency review has been completed on the subject Combatant Status Review Tribunal in accordance with references (a) and (b). After reviewing the record of the Tribunal, I find that:

a. The detainee was properly notified of the Tribunal process and affirmatively declined to participate. The detainee did request that the Personal Representative make an oral statement to the Tribunal.

b. The Tribunal was properly convened and constituted by enclosure (1).

c. The Tribunal substantially complied with all provisions of references (a) and (b).

d. The detainee did not request that any witnesses or evidence be produced.

e. The Tribunal's decision that detainee #[redacted] is properly classified as an enemy combatant was unanimous.

f. The detainee affirmatively chose not to participate in the CSRT process but did request that his Personal Representative make an oral statement to the Tribunal about the allegations contained in the unclassified summary. A letter from the Personal Representative initially assigned to represent the detainee at Guantanamo Bay, Cuba, reflects the detainee's elections and is attached to the Tribunal Decision Report as exhibit D-b. The Tribunal was held *in absentia* outside Guantanamo Bay with a new Personal Representative who was familiar with the detainee's file. This Personal Representative had the same access to information, evidence, and witnesses as the Personal Representative from Guantanamo Bay. The detainee's Personal Representative was given the opportunity to review the record of proceedings and declined to submit post-tribunal comments to the Tribunal.

Subj: LEGAL SUFFICIENCY REVIEW OF COMBATANT STATUS REVIEW TRIBUNAL FOR DETAINEE ISN #[redacted]

2. The proceedings and decision of the Tribunal as reflected in enclosure (2) are legally sufficient and no corrective action is required.

3. I recommend that the decision of the Tribunal be approved and the case be considered final.

BREE A. ERMENTROUT
CDR, JAGC, USNR

Department of Defense
Director, Combatant Status Review Tribunals

16 Nov 04

From: Director, Combatant Status Review Tribunals

Subj: APPOINTMENT OF COMBATANT STATUS REVIEW TRIBUNAL #21

Ref: (a) Convening Authority Appointment Letter of 9 July 2004

By the authority given to me in reference (a), a Combatant Status Review Tribunal established by "Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba" dated 29 July 2004 is hereby convened. It shall hear such cases as shall be brought before it without further action of referral or otherwise.

The following commissioned officers shall serve as members of the Tribunal:

MEMBERS:

[redacted], Colonel, U.S. Air Force; President

[redacted] Lieutenant Colonel, U.S. Air Force; Member

[redacted] Major, U.S. Air Force Reserve; Member (JAG)

J. M. McGARRAH
Rear Admiral
Civil Engineer Corps
United States Navy

[redacted]

(U) Combatant Status Review Tribunal Decision Report Cover Sheet

(U) This Document is UNCLASSIFIED Upon Removal of Enclosure (2).

(U) TRIBUNAL PANEL: #21

(U) ISN#: [redacted]

Ref: (a) (U) Convening Order for Tribunal #21 of 16 November 2004 (U)
(b) (U) CSRT Implementation Directive of 29 July 2004 (U)
(c) (U) DEPSECDEF Memo of 7 July 2004 (U)

Encl: (1) (U) Unclassified Summary of Basis for Tribunal Decision (U/~~FOUO~~)
(2) (U) Copies of Documentary Evidence Presented (S/NF)
(3) (U) Personal Representative's Record Review (U/~~FOUO~~)

1. (U) This Tribunal was convened by references (a) and (b) to make a determination as to whether the detainee meets the criteria to be designated as an enemy combatant as defined in reference (c).

2. (U) On 22 November 2004 the Tribunal determined, by a preponderance of the evidence, that Detainee [redacted] is properly designated as an enemy combatant as defined in reference (c).

3. (U) In particular, the Tribunal finds that this detainee is associated with al Qaida in support of military operations against the coalition, as more fully discussed in the enclosures.

4. (U) Enclosure (1) provides an unclassified account of the basis for the Tribunal's decision. A detailed account of the evidence considered by the Tribunal and its findings of fact are contained in enclosure (1).

[redacted]
Col, USAF
Tribunal President

DERV FM: Multiple Sources
DECLASS: XI

[redacted]

UNCLASSIFIED SUMMARY OF BASIS FOR TRIBUNAL DECISION

(Enclosure (1) to Combatant Status Review Tribunal Decision Report)

TRIBUNAL PANEL: #21
ISN #: [redacted]

1. Introduction

As the Combatant Status Review Tribunal (CSRT) Decision Report indicates, the Tribunal has determined that this detainee is properly classified as an enemy combatant and was associated with al Qaida in supporting military operations against the coalition. In reaching its conclusions, the Tribunal considered both classified and unclassified information. The following is an account of the unclassified evidence considered by the Tribunal and other pertinent information.

2. Synopsis of Proceedings

The Tribunal conducted the proceeding on 22 November 2004. The Recorder presented Exhibit R-1 during the unclassified portion of the Tribunal. The Unclassified Summary of Evidence, Exhibit R-1, indicates, among other things, that the detainee is a member of al Qaida and participated in military operations against the coalition.

The detainee did not attend the Tribunal hearing and affirmatively declined to participate. The detainee's decision is reflected on the Detainee Election Form (Exhibit D-a) and the Guantanamo Personal Representative's affidavit (Exhibit D-b). The Personal Representative presented the detainee's statement (Exhibit D-c) that detainee requested the Tribunal consider. The Personal Representative called no witnesses.

During the classified portion of the Tribunal hearing, the Recorder presented Exhibits R-2 through R-9. The Personal Representative reviewed these exhibits by prior to their presentation to the Tribunal. The Personal Representative presented no classified exhibits. The classified exhibits support the assertions on the Unclassified Summary of Evidence and the Tribunal found the detainee is properly classified as an enemy combatant.

3. Evidence Considered by the Tribunal

The Tribunal considered the following evidence in reaching its conclusions:

a. Exhibits: R-1 through R-9, D-a, D-b and D-c.

b. Testimony of the following persons: None.

c. Statement of the detainee: read by Personal Representative from Exhibit D-c.

4. Rulings by the Tribunal on Detainee Requests for Evidence or Witnesses

The detainee requested no witnesses.

The detainee requested no additional evidence be produced.

5. Discussion of Unclassified Evidence

The Recorder offered Exhibit R-1, the Unclassified Summary of Evidence, into evidence during the unclassified portion of the proceeding. While this summary is helpful in that it provides a broad outline of what the Tribunal can expect to see, it is not persuasive in that it provides only conclusory statements without supporting unclassified evidence. The detainee's statement provides support for the allegations listed in the Unclassified Summary of Evidence. The detainee's statement indicated that he did train at the [redacted] paramilitary training camp and received training on light weapons, explosives and principles of topography. Further, he admits that he prepared false documents and received training from senior al Qaida operative on how to encode telephone numbers. The detainee was further implicated as proposing plans to senior al Qaida leaders on attacking subway trains in the United States. Because there was no other unclassified evidence for the Tribunal to consider, the Tribunal had to look to the classified exhibits to support the assertions on the Unclassified Summary of Evidence and the Tribunal's conclusions.

6. Discussion of the Classified Evidence

During the classified portion of the Tribunal hearing, the Recorder presented Exhibits R-2 through R-9. While some exhibits were more persuasive than others, most of the classified exhibits fully supported the assertions on the Unclassified Summary of Evidence and the detainee's statement and were persuasive. Based upon these facts the Tribunal found the detainee is properly classified as an enemy combatant.

7. Consultations with the CSRT Legal Advisor

None

8. Conclusions of the Tribunal

Upon careful review of all the evidence presented in this matter, the Tribunal makes the following determinations:

a. The detainee chose not to participate in the Tribunal proceeding. No evidence was produced that caused the Tribunal to question whether the detainee was mentally and

physically capable of participating in the proceeding, had he wanted to do so. Accordingly, no medical or mental health evaluation was requested or deemed necessary.

b. The Personal Representative informed the Tribunal that the detainee understood the Tribunal process but chose not to participate, as indicated in Exhibit D-a and Exhibit D-b.

c. The detainee is properly classified as an enemy combatant because he was associated with al Qaida in supporting military operations against the coalition.

8. Dissenting Tribunal Member's report

None. The Tribunal reached a unanimous decision.

Respectfully submitted,

[redacted]

Colonel, U.S. Air Force
Tribunal President

UNCLASSIFIED//~~FOUO~~

DETAINEE ELECTION FORM

Date: 17 November 2004
Start Time: 1500 hrs
End Time: 1620 hrs

ISN#: [redacted]

Personal Representative: [redacted]
(Name/Rank)

Translator Required? YES Language? ENGLISH

CSRT Procedure Read to Detainee or Written Copy Read by Detainee? YES

Detainee Election:

☐ Wants to Participate in Tribunal

☒ Affirmatively Declines to Participate in Tribunal

☐ Uncooperative or Unresponsive

Personal Representative Comments:

Detainee does not desire to participate in the Tribunal but requests PR to make an oral statement on his behalf. There are neither witnesses nor documentary evidence to present. Detainee was very respectful and spoke perfect English (lived in US and UK).

Personal Representative: [redacted]
LCDR USN MAJ USAF
22NOV04

Exhibit: D-a

UNCLASSIFIED//~~FOUO~~

An initial interview was held with detainee Binyam Ahmed Mohammad (ISN [redacted] on 18 Nov 04

[redacted] The detainee spoke the language of the linguist and understood the linguist.

[redacted] The detainee was reminded that the U.S. government established a Combat Status Review Tribunal to review his designation as an enemy combatant.

[redacted] The detainee was advised that I am not an attorney nor his advocate, but will assist him in the CSRT process if he chooses to participate.

[redacted] The detainee was advised that a tribunal of military officers will review his enemy combatant designation even if he chooses not to participate.

[redacted] The detainee was advised that he will have an opportunity to speak on his own behalf and call witnesses and ask questions of the witnesses and tribunal members.

[redacted] The detainee was advised that he may choose not to appear at the Tribunal hearing or participate in the CSRT process, but that I could present information on his behalf.

[redacted] The detainee confirmed that he understood the process as explained to him and did not have any questions.

[redacted] The detainee affirmatively chose not to participate in the CSRT process (and does not want me to present information on his behalf.) (but requested that I present the following information on his behalf:).

I affirm that the information above is complete and accurate to the best of my knowledge.

[redacted] Major, USAF 18 Nov 04
Personal Representative [redacted]

Exhibit D-b

Combatant Status Review Board

TO: Personal Representative

FROM: OIC, CSRT (10 November 2004)

Subject: Summary of Evidence for Combatant Status Review Tribunal –MOHAMMAD, Binyam Ahmed

1. Under the provisions of the Secretary of the Navy Memorandum, dated 29 July 2004, *Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base Cuba*, a Tribunal has been appointed to review the detainee's designation as an enemy combatant.

2. An enemy combatant has been defined as "an individual who was part of or supporting the Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who committed a belligerent act or has directly supported hostilities in aid of enemy armed forces."

3. The United States Government has previously determined that the detainee is an enemy combatant. This determination is based on information possessed by the United States that indicates that the detainee is associated with al Qaida or the Taliban.

A. The detainee is associated with al Qaida or the Taliban.

1. The detainee is an Ethiopian who lived in the United States from 1992 to 1994, and in London, United Kingdom, until he departed for Pakistan in 2001.

2. The detainee arrived in Islamabad, Pakistan, in June 2001, and traveled to the [redacted] training camp in Afghanistan, to receive paramilitary training.

3. At the [redacted] camp, the detainee received 40 days of training in light arms handling, explosives, and principles of topography.

4. The detainee was taught to falsify documents, and received instruction from a senior al Qaida operative on how to encode telephone numbers before passing them to another individual.

5. The detainee proposed, to senior-al Qaida leaders, the idea of attacking subway trains in the United States.

6. The detainee was extracted from Afghanistan to Karachi, Pakistan, where he received explosives and remote-controlled-detonator training from an al Qaida operative.

7. The detainee met with an al Qaida operative and was directed to travel to the United States to assist in terrorist operations.

8. The detainee attempted to leave Pakistan for the United States but was detained and interrogated by Pakistani authorities, revealing his membership in al Qaida, the identities of Mujahidins he knew, and his plan to use a "dirty bomb" to carry out a terrorist attack in the United States.

4. The detainee has the opportunity to contest his designation as an enemy combatant. The Tribunal will endeavor to arrange for the presence of any reasonably available witnesses or evidence that the detainee desires to call or introduce to prove that he is not an enemy combatant. The Tribunal President will determine the reasonable availability of evidence or witnesses.

PERSONAL REPRESENTATIVE NOTES FROM ISN [redacted] INTERVIEWS

PR:	[redacted]
3 or 4 digit ISN:	[redacted]
Date:	18 Nov 04
Start Time:	1500
End Time:	1620

PR NOTES FROM INITIAL INTERVIEW WITH DETAINEE [redacted] (Binyam Ahmed Mohammed)

During the initial interview on 18 Nov 04, detainee elected to NOT to participate in the Tribunal. He had no witnesses or documentary evidence but requested that his Personal Representative provide statements made during the initial interview. Those statements follow:

- Detainee informed PR that the interrogators told him that the tribunals were a "pass by" to get to the courts. He stated that he had no evidence on him (plans, materials, weapons, etc.) when captured and was interrogated by the British Secret Service (M6) who said that he was not accused of anything. He told me he made statements while being (mentally and physically) tortured while in Pakistani jails. Detainee admitted items 3A1-4 on the UNCLASS summary of evidence, but stated he went for training to fight in Chechnya, which was not illegal. The detainee stated that the other items were rubbish or made under duress. He further stated that he traveled before 11 Sep 2001, which means he had different plans other than going to fight America. After 9/11, there was no way out of AF other than the groups who could get him out of AF, through PK, and back to Britian (namely al Qaida). Finally, detainee stated that his plane ticket at time of capture was a ticket from Karchi to Zur4ich to England, so how could he have plans to carry out attacks in the United States.

[redacted], Major, USAF
Personal Representative [redacted]

Exhibit D-C

Personal Representative Review of the Record of Proceedings

I acknowledge that on 23 November 2004 I was provided the opportunity to review the record of proceedings for the Combatant Status Review Tribunal involving ISN #[redacted]

[redacted] I have no comments.

___ My comments are attached.

[redacted]
Name

23 NOV 04
Date

[redacted]
Signature

[redacted]
Enclosure (3)

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID M. HICKS, Petitioner, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 02-CV-0299 (CKK)
FAWZI KHALID ABDULLAH FAHAD AL ODAH, *et al.* Plaintiffs, v. UNITED STATES OF AMERICA, *et al.*, Defendants.	Civil Action No. 02-CV-0828 (CKK)
MAMDOUH HABIB, *et al.* Petitioners, v. GEORGE WALKER BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 02-CV-1130 (CKK)

MURAT KURNAZ, *et al.* Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 04-CV-1135 (ESH)
O.K., *et al.* Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 04-CV-1136 (JDB)
MOAZZAM BEGG, *et al.* Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 04-CV-1137 (RMC)

RIDOUANE KHALID, *et al.* Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 04-CV-1142 (RJL)
JAMIL EL-BANNA, *et al.* Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 04-CV-1144 (RWR)
FALEN GHEREBI, *et al.* Petitioners, v. GEORGE WALKER BUSH, *et al.*, Respondents.	Civil Action No. 04-CV-1164 (RBW)

LAKHDAR BOUMEDIENE, *et al.* Petitioners, v. GEORGE WALKER BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 04-CV-1166 (RJL)
SUHAIL ABDUL ANAM, *et al.* Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 04-CV-1194 (HHK)
ISA ALI ABDULLA ALMURBATI, *et al.* Petitioners, v. GEORGE WALKER BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 04-CV-1227 (RBW)

MAHMOAD ABDAH, *et al.* Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	)	Civil Action No. 04-CV-1254 (HHK)

RESPONSE TO PETITIONS FOR WRIT OF HABEAS CORPUS AND MOTION TO DISMISS OR FOR JUDGMENT AS A MATTER OF LAW AND MEMORANDUM IN SUPPORT

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Pursuant to the Court's September 20, 2004 Coordination Order Setting Filing Schedule and Directing the Filing of Correspondence Previously Submitted to the Court, respondents hereby respond to the above-captioned petitions for writs of habeas corpus and move to dismiss or for judgment as a matter of law.

INTRODUCTION

In Rasul v. Bush, 124 S. Ct. 2686 (2004), the Supreme Court held for the first time that aliens apprehended abroad and detained at Guantanamo Bay, Cuba, as enemy combatants, "no less than citizens," can invoke the habeas jurisdiction of a district court under 28 U.S.C. § 2241. 124 S. Ct. at 2696. But the Court did nothing more. It did not overturn settled precedent that our Constitution affords no rights to aliens held abroad, or that the treaty and convention provisions relied upon by petitioners are somehow actionable in court; indeed, the Court expressly declined to address "whether and what further proceedings" would be appropriate after remand of the cases to the district court. See id. at 2699 (emphasis added). These questions remain for this Court in the first instance, and they have clear answers. The petitions must be rejected.

Petitioners demand an unprecedented judicial intervention into the conduct of war operations, based on the extraordinary, and unfounded, proposition that aliens captured outside this country's borders and detained outside the territorial sovereignty of the United States can claim rights under the U.S. Constitution. Petitioners proceed as if the actions of the Military in zones of active hostilities, and in preventing aliens from returning to the battle with the means and intent to bring fresh harm to United States and coalition forces, are no less amenable to searching review by the courts than routine actions of administrative agencies. Undaunted by the sheer absence of any historical precedent for the proceeding they want to stage, petitioners contend that the Supreme Court's recent decision sustaining the federal courts' statutory habeas jurisdiction over the detainees

at Guantanamo Bay allows them, and this Court, to dispense altogether with 200-plus years of history, and, without limitation, to revise the judgments of the President and his military commanders in prosecuting a war that Congress has specifically authorized.

Petitioners could not be more wrong. On a fundamental level, petitioners' objection to the Executive's power to capture and detain alien enemy combatants in foreign territory during ongoing hostilities is flatly inconsistent with the historical understanding of the President's role as Commander in Chief of the Armed Forces, and runs counter to Congress's specific authorization to 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 that occurred on September 11, 2001, or harbored such organizations or persons[.]" Authorization for Use of Military Force, Pub. L. 107-40, §2(a), 115 Stat. 224 (2001). While petitioners ask the Court to delineate the outer bounds of the President's authority to defend the country – for instance, to decide whether the President's power to detain extends to supporting personnel captured away from the front lines in Afghanistan – any such undertaking, on the terms petitioners suggest, would improperly embroil the Court in second-guessing decisions on sensitive issues that the Constitution entrusts to the Executive Branch.

The specific constitutional and other objections raised by petitioners are meritless in any event. The notion that the U.S. Constitution affords due process and other rights to enemy aliens captured abroad and confined outside the sovereign territory of the United States is contrary to law and history. Even if that threshold issue could be resolved favorably to petitioners, their due process objections would properly be dispensed with on the grounds that the enemy combatant status proceedings that the Department of Defense ("DoD") is completing provide all the process that

petitioners are due (and then some) in these circumstances. Similarly, petitioners' other claims – whether under the Constitution, international treaties and conventions that are not self-executing, statutory provisions, or military regulations – have no merit.[1] The petitions must be dismissed.

BACKGROUND

On September 11, 2001, the al Qaeda terrorist network launched a coordinated attack on the United States, killing approximately 3,000 persons. Congress responded by passing 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 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.

Authorization for Use of Military Force, Pub. L. 107-40, §§ 1-2, 115 Stat. 224 (2001) ("AUMF"). Congress emphasized that the forces responsible for the September 11th attacks "continue to pose an unusual and extraordinary threat to the national security," and that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." Id.

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[1] Because these constitutional, statutory, regulatory, and international law claims are each common to a significant number of the petitions, in the interest of simplifying these proceedings and providing the Court with a full appreciation of the legal principles applicable to all the issues raised pertaining to the legality of enemy combatant detention, respondents have consolidated their responses to the claims in this unified response and motion to dismiss or for judgment as a matter of law. And to assist the Court in identifying specific issues common among the cases, as well as issues that might be unique to some cases, included as an Appendix hereto is a chart identifying claims raised in each case and noting where those claims are addressed in this response or otherwise. Claims related to military commission proceedings for the trial of war crimes raised in the Hicks and in Hamdan v. Rumsfeld, No. 04-CV-1519(JR), are being addressed through separate, agreed-upon briefing ordered by the Court. In addition, a unified motion to dismiss respondents sued in their personal capacities is being filed separately in the eleven cases to which it applies.

Pursuant to this authorization and his authority under the Constitution, the President, as Commander in Chief, dispatched United States armed forces to seek out and subdue the al Qaeda terrorist network and the Taliban regime and others that had supported it. In the course of that campaign – which remains ongoing – the United States and its allies have captured thousands of individuals overseas, many of whom are foreign nationals. The Military has determined that many of those individuals should be detained during the conflict as enemy combatants. Approximately 550 of the foreign nationals designated for detention as enemy combatants are being held by DoD at the United States Naval Base at Guantanamo Bay, Cuba. The petitioners[2] in the above-captioned cases are among those being so detained.

The Guantanamo Bay detentions have been the subject of extensive diplomatic discussions between the Executive Branch and officials of the foreign governments of detainees' home countries. Some detainees have been released from Guantanamo to foreign governments. Others have been determined eligible for prosecution by a military commission for violations of the laws of war.

Currently, each petitioner's status as an enemy combatant is undergoing review by military tribunals, known as Combatant Status Review Tribunals ("CSRTs"), convened for that purpose. During the CSRT proceedings, the detainees are provided with notice of the factual basis for their classification as enemy combatants, they are allowed to present evidence on their own behalf, and the tribunal members then make an independent determination as to whether the detainees should continue to be designated as enemy combatants. Those who are not so designated have been and will be released. See infra § II.B.1.

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[2] The word "petitioners" is used in this sentence, and elsewhere in this brief to the extent the context requires, to mean the petitioners who are individuals detained by DoD at Guantanamo (as opposed to their "next friends" who are also petitioners in most of these cases).

The present response and motion concerns thirteen habeas petitions[3] brought by more than sixty aliens who were captured overseas in connection with the ongoing war against al Qaeda and its supporters and were transferred to Guantanamo Bay. In these cases, petitioners commonly raise claims under the Constitution and under federal and international law. Specifically, they allege violations of the United States Consitution, and also assert claims under the Administrative Procedure Act, 5 U.S.C. §§ 701-706; the Alien Tort Statute, 28 U.S.C. § 1350; and Army Regulation 190-8. Finally, with respect to international law, petitioners contend that respondents have violated, inter alia, the International Covenant on Civil and Political Rights and the American Declaration on the Rights and Duties of Man, as well as the Geneva Conventions.

For the reasons explained below, all of petitioners' claims should be rejected.[4]

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[3] Citations to "Petitions" in this brief are to the most recently amended petition/complaint filed in a particular case.

[4] It should be noted that, in asserting their claims, petitioners name a number of respondents. Secretary Rumsfeld, however, is the only proper respondent. See Rumsfeld v. Padilla, 124 S. Ct. 2711, 2718 n.9 (2004); Sept. 29, 2004 Mem. Op. and Order in Gherebi v. Bush, No. 04-CV-1164, at 7-8. There exists a jurisdictional issue as to whether Secretary Rumsfeld can be sued in this District, as opposed to the Eastern District of Virginia; respondents recognize, however, that the Court previously resolved this issue in Gherebi. Id. In any event, the respondents other than Secretary Rumsfeld should be dismissed. Indeed, the President is plainly not a proper respondent. It is long settled that a court of the United States "'has no jurisdiction . . . to enjoin the President in the performance of his official duties'" or otherwise to compel the President to perform any official act. Franklin v. Massachusetts, 505 U.S. 788, 803 (1992) (plurality opinion) (quoting Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 501 (1866)); 505 U.S. at 825 (Scalia, J., concurring in part and concurring in the judgment); al-Marri v. Rumsfeld, 360 F.3d 707, 708 (7th Cir. 2004) ("Naming the President as a respondent [to a habeas petition brought by an alien detainee] was not only unavailing but also improper" because "[s]uits contesting actions of the executive branch should be brought against the President's subordinates"), pet. for cert. filed, 72 U.S.L.W. 3659 (Apr. 9, 2004).

National Treasury Employees Union v. Nixon, 492 F.2d 587 (D.C. Cir. 1974), if it evens remains good law, is not to the contrary. NTEU involved an action for a writ of mandamus against the President where the statutory scheme at issue required the President – and only the President –

(continued...)

ARGUMENT

I. THE PRESIDENT'S POWER TO DETAIN ENEMY COMBATANTS DURING TIMES OF ARMED CONFLICT IS CONSTITUTIONALLY WELL-ESTABLISHED, INDEPENDENTLY SUPPORTED BY CONGRESSIONAL AUTHORIZATION, AND SUBJECT TO EXTRAORDINARY DEFERENCE

A common thread running through the petitions at issue in this litigation is that petitioners allege that they have been erroneously detained at Guantanamo Bay – that, for example, they supposedly never bore arms against U.S. and coalition forces or provided protection for or otherwise collaborated with al Qaeda leaders. Perhaps petitioners mean, implicitly, to acknowledge what should almost go without saying: that the President's power to wage war includes the power to detain those determined to be enemy combatants. If so, the concession is wise, for the Executive Branch's detention power in such circumstances could not be more clear. The Executive Branch may detain individuals whom it has determined are enemy combatants. That power exists as a matter of the President's inherent authority under Article II of the Constitution. And it is particularly free from doubt where, as here, Congress has authorized the use of "all necessary and appropriate force," including the detention of enemy combatants,[5] through the Authorization for the Use of Military

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[4](...continued)
to take nondiscretionary ministerial action by a specified date. The present case is distinguishable in several respects. First, the executive action at issue here is not subject to a writ of mandamus because it involves discretionary action taken by the President pursuant to his authority under Article II and the AUMF. Second, the President is not an indispensable party to the petitions because the cases may proceed against Secretary Rumsfeld. Compare id. at 615 ("Thus, no federal official other than the President can be properly named as defendant herein in the place of the President.... [T]he sole defendant they can appropriately name in asserting their claims is the President of the United States."). In any event, the D.C. Circuit has questioned the continuing validity of NTEU in light of Franklin. See Swan v. Clinton, 100 F.3d 973, 978-79 (D.C. Cir. 1996) ("It is not entirely clear, of course, whether, and to what extent, [NTEU] remain[s] good law after Franklin.").

[5] See Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2639 (2004) (plurality opinion). In Hamdi, the (continued...)

Force. See AUMF § 2(a).[6]

What is equally clear, also, is that any role that the courts have in reviewing the substantive bases for the Commander in Chief's exercise of this authority to determine the combatant status of detainees is extremely circumscribed. Indeed, such deference by the Judiciary to military determinations during wartime is a hallmark of the separation of powers principle. It is grounded upon the fact that, as explained below, the Constitution squarely entrusts the President with Commander in Chief authority and the grave responsibility to ensure national security. And the need for such deference is heightened by mutually reinforcing prudential factors explained infra at § II.B.2, namely, the dangers posed by judicial intervention into and second-guessing of determinations necessary in the conduct of war, and the limited institutional capacity of the courts to evaluate such determinations. In fact, some of the substantive issues raised by the petitions in these cases – for example, whether enemy aliens taken into custody outside Afghanistan, or first

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[5](...continued)
Plurality "d[id] not reach the question whether Article II provides such authority [to detain enemy combatants]," because it found that "Congress has in fact authorized Hamdi's detention, through the AUMF." Id. Of course, this approach is in keeping with the Court's policy of not "entertain[ing] constitutional questions in advance of the strictest necessity," Parker v. Los Angeles County, 338 U.S. 327, 333 (1949), and cannot reasonably be read to signal disagreement or doubt concerning the President's authority under Article II. Both matters are addressed herein to provide a full and complete exposition of the basis for Executive action in these circumstances.

[6] Many of the petitions discuss extensively an Order of the President dated November 13, 2001, as though the detentions at issue in these cases were pursuant to that Order. See Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001). However, with respect to most of the petitioners herein, the November 13, 2001 Order is a red herring because it applies only to a subset of detainees whom the President has determined are "individual[s] subject to this order." Id. § 2(a). The detention of the vast majority of the petitioners herein, who have not been so designated, is not pursuant to the November 13, 2001 Order, but, as explained infra, pursuant to the President's general authority as Commander in Chief, the congressional Authorization for Use of Military Force, and the international law of war.

captured by coalition forces and delivered into U.S. custody, may be detained as enemy combatants – even rise to the level of quintessential political questions, the answers to which must be supplied in this context exclusively by the Executive Branch.[7] The courts' role in resolving claims such as those presented in these petitions, in all events, must be extraordinarily deferential, and with respect to certain issues presented, would be proscribed altogether.

A. Detention of Enemy Combatants Is an Integral and Inexorable Part of the Commander in Chief's Power to Defend the Nation and Vanquish the Enemy

The Constitution specifically vests the political branches and, in particular, the Commander in Chief, with the power necessary to "provide for the common defense," U.S. Const. preamble, including the authority to vanquish the enemy and repel foreign attack in time of war. See Ex parte Quirin, 317 U.S. 1, 26 (1942) (listing the enumerated war powers). Specifically, Article II, § 2, cl. 1 of the Constitution states that "[t]he President shall be Commander in Chief of the Army and Navy of the United States." As the Supreme Court stressed in Johnson v. Eisentrager, 339 U.S. 763 (1950), it is "of course" the case that the textual "grant of war power includes all that is necessary and proper for carrying [it] into execution." Id. at 788. And, "[f]rom the very beginning of its history [the] Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as enemy individuals." Quirin, 317 U.S. at 27-28.

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[7] See Baker v. Carr, 369 U.S. 186, 217 (1962) (controversy is nonjusticiable political question where there is textually demonstrable commitment to coordinate political branch; lack of judicially discoverable and manageable standards; impossibility of deciding case without making a political policy determination; impossibility of undertaking independent resolution without expressing lack of respect due coordinate branches of government; unusual need for unquestioning adherence to a political decision already made; potentiality of embarrassment from multiple pronouncements by various departments on a question).

"The war power of the national government 'is the power to wage war successfully.'" Lichter v. United States, 334 U.S. 742, 767 n.9 (1948) (quoting Hughes, War Powers Under the Constitution, 42 A.B.A. Rep. 232, 238). Thus, the President has the authority to "employ [U.S. forces] in the manner he may deem most effectual to harass and conquer and subdue the enemy." Fleming v. Page, 50 U.S. (9 How.) 603, 615 (1850); see also Quirin, 317 U.S. at 28 ("An important incident to the conduct of war is the adoption of measures by the military command . . . to repel and defeat the enemy . . . ."). This power "is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict." In re Yamashita, 327 U.S. 1, 12 (1946).

It is axiomatic that this war power includes the power not only to use lethal force when necessary against enemy forces engaged in hostilities against the United States, but also to subdue and incapacitate the enemy by the lesser means of capturing and detaining individuals who are part of or support those enemy forces, or who have committed a belligerent act or directly supported hostilities. The "universal agreement and practice" under "the law of war" holds that lawful and unlawful combatants alike are "subject to capture and detention." Quirin, 317 U.S. at 30-31; see also Eisentrager, 339 U.S. at 786 ("This Court has characterized as 'well-established' the 'power of the military to exercise jurisdiction over members of the armed forces, those directly connected with such forces, . . . enemy belligerents, [and] prisoners of war.' ") (quoting Duncan v. Kahanamoku, 327 U.S. 304, 313-14 (1946)); Moyer v. Peabody, 212 U.S. 78, 84-85 (1909) (holding that a state governor's power to call out troops to quash an insurrection means "that he may kill persons who resist and, of course, that he may use the milder measure of seizing the bodies of those whom he considers to stand in the way of restoring peace. Such arrests are . . . . by way of precaution to

prevent the exercise of hostile power."); William E.S. Flory, Prisoners of War 41-42 (1942); Howard S. Levie, Prisoners of War in International Armed Conflict, 59 Int'l Law Studies 5 n.18 (U.S. Naval War College 1977); 2 L. Oppenheim, International Law §§ 107-108, at 280 (H. Lauterpacht ed., 5th ed. 1935); William Winthrop, Military Law and Precedents 788 (2d ed. 1920); John Shuckburgh Risley, The Law of War 108 (1897).[8]

Indeed, at least five Justices of the Supreme Court appear to find this proposition self-evident. The four-Justice Hamdi plurality, while grounding its reasoning in the congressional Authorization for Use of Military Force rather than in the President's inherent Article II powers, held that detention of enemy combatants – even, unlike in this case, detention of citizen enemy combatants – "is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use." 124 S. Ct. at 2640. The Plurality explained:

> The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by "universal agreement and practice," are "important incident[s] of war." Ex parte Quirin, 317 U.S., at 28, 63 S. Ct. 2. The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again. Naqvi, Doubtful Prisoner-of-War Status, 84 Int'l Rev. Red Cross 571, 572 (2002) ("[C]aptivity in war is 'neither revenge, nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war'") (quoting decision of Nuremberg Military Tribunal, reprinted in 41 Am. J. Int'l L. 172, 229 (1947)); W. Winthrop, Military Law and Precedents 788 (rev. 2d ed. 1920) ("The time has long passed when 'no quarter' was the rule on the battlefield. . . . It is now recognized that 'Captivity is neither a punishment nor an act of vengeance,' but 'merely a temporary detention which is devoid of all penal character.' . . . 'A prisoner of war is no convict; his imprisonment is a simple war measure.' " (citations omitted)); cf. In re Territo, 156

[8] The practice of capturing and detaining enemy combatants in wartime is deeply rooted in this Nation's history, having been a part of every major war in which the United States has been engaged. See Lt. Col. G. Lewis & Capt. J. Mewha, History of Prisoner of War Utilization by the United States Army 1776-1945, Dep't of the Army Pamphlet No. 20-213 (1955).

> F.2d 142, 145 (C.A.9 1946) ("The object of capture is to prevent the captured individual from serving the enemy. He is disarmed and from then on must be removed as completely as practicable from the front, treated humanely, and in time exchanged, repatriated, or otherwise released" (footnotes omitted)).

Id.[9] Justice Thomas, while dissenting from the Court's ultimate judgment in Hamdi, expressed full agreement that the President's war power "quite obviously includes the ability to detain those . . . who fight against our troops or those of our allies." Id. at 2679 (Thomas, J., dissenting).[10]

Perhaps because it was so clear that the Government's allegations concerning petitioner Hamdi, if accepted, placed him squarely within the core of what it means to be an enemy combatant, the Plurality in Hamdi did not undertake to define the outer boundaries of that category, even with respect to United States citizens. Rather, the Plurality remarked that "[t]he legal category of enemy combatant has not been elaborated upon in great detail" and left "[t]he permissible bounds of the category [to] be defined by the lower courts as subsequent cases are presented to them." 124 S. Ct. at 2642 n.1.[11] The cases before this Court, of course, involve the delineation of the "permissible

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[9] Detention is equally vital to the war effort for a second reason: it enables the Military to gather vital intelligence from captured combatants concerning the capabilities, internal operations, and intentions of the enemy. See Levie, supra, at 108-09 (emphasizing importance of interrogation of enemy detainees; "[s]eeking such information has . . . become an important technique in modern warfare"); Encyclopedia of Prisoners of War and Internment 147-48 (Jonathan F. Vance ed., 2000) ("Prisoners of war have always been regarded as vital sources of information by the armies that capture them . . . ."). Such intelligence-gathering is especially critical in the current conflict because of the unconventional way in which the enemy operates.

[10] This express recognition by at least five Justices that detention of enemy combatants is, at a minimum, a form of "necessary and appropriate force" under the congressional Authorization for Use of Military Force is fatal to the claims of many of the petitioners that their detention violates the War Powers Clause, U.S. Const. art. I, § 8, cl. 11, for lacking congressional authorization.

[11] In another part of its opinion, the Plurality quoted language appearing in the Government's brief, which in turn was quoted from an informal DoD "fact sheet" generally describing the enemy combatants who are being detained at Guantanamo. See 124 S. Ct. at 2639 (quoting Brief for

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bounds" of wartime detention of enemy aliens, outside U.S. sovereign territory, rather than the detention of citizens in the United States. But even if the Hamdi Plurality's discussion were fully applicable to the circumstances here, nothing therein suggests that the Executive's authority to detain enemy combatants is narrowly confined by factual details of Hamdi's situation, such as the particular country in which he was fighting or captured, or the fact that he was carrying a weapon when captured. To the contrary, both the Court's reasoning and the longstanding principles it cites from the law of war militate against drawing any such arbitrary lines.

As reflected in the Order establishing the CSRTs, an enemy combatant is "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." CSRT Order ¶ a. It is difficult to conceive how this articulation of the criteria for enemy combatant status would not be within the Executive's war-making power, both under Article II and pursuant to authority under the AUMF, in the current war. "The object of capture is to prevent the captured individual from serving the enemy," In re Territo, 156 F.2d 142, 145 (9th Cir. 1946), quoted in

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[11](...continued)
Respondents at 3 (quoting Dep't of Defense, Fact Sheet: Guantanamo Detainees <www.defenselink.mil/news/Feb2004/d20040220det.pdf.>)). The Government did not intend for this language to serve as a functional legal definition and did not submit it to the Court as such, and the Court used it only as a construct "for this particular case," rather than as a conclusive definition set in stone to govern all future cases. Id. at 2639. In any event, the quoted language is not materially different from the definition being employed by DoD in the CSRT procedures applied to Guantanamo Bay detainees. Compare Hamdi Brief for Respondents at 3 (" 'was part of or supporting forces hostile to the United States or coalition partners, and engaged in an armed conflict against the United States' "), with July 7, 2004 Order Establishing Combatant Status Review Tribunal ("CSRT Order") ¶ a ("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") (submitted herewith as Ex. A).

Hamdi, 124 S. Ct. at 2640. Obviously, this object is well served, and not exceeded, by defining as enemy combatants those who "are part of or supporting" the enemy, including those who have "committed a belligerent act or [] directly supported hostilities." CSRT Order ¶ a; cf. Quirin, 317 U.S. at 45 (using language "part of or associated with the armed forces of the enemy" to delineate those subject to detention under the law of war).

B. No Basis Exists in the Constitution, the Laws of War, or Otherwise for Petitioners' Attempts to Place Arbitrary Limits on the Commander in Chief's Detention Authority

Petitioners variously contend that the Executive's detention powers do not cover enemy combatants captured outside Afghanistan and/or captured in the first instance by forces of a country other than the United States, or do not allow detention of individuals who were not carrying a weapon at the time of their capture. They apparently draw these contentions by latching onto the particular facts of Hamdi's case (i.e., Hamdi was captured with a rifle in Afghanistan), as if those facts defined exclusive prerequisites for all enemy combatant detentions, including the detention of aliens. Petitioners also protest what they characterize as detention for an "indefinite" period. None of these bids to limit the power of the President, under both Article II and under Congress's authorization, has any merit.

The detention powers of the Executive, no less than the terrorist threat they aim to repel and defeat, obviously do not stop at the geographic borders of Afghanistan. In Quirin, the seven enemy combatants whose detention was upheld were captured in New York and Chicago, not sites of active combat and thousands of miles from the World War II theater of operations. 317 U.S. at 21. The Court, nevertheless, soundly rejected the argument that they were "any the less belligerents if . . .

they have not . . . entered the theatre or zone of active military operations." Id. at 38.[12] Moreover, there is no textual basis in the AUMF for an Afghanistan-specific limitation; to the contrary, the AUMF speaks broadly of "'all necessary and appropriate force against those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks' or 'harbored such organizations or persons, in order to prevent any future acts of international terrorism . . . .'" Hamdi, 124 S. Ct. at 2635 (quoting 115 Stat. 224) (emphasis added). Although Afghanistan had served as a home base or hub for al Qaeda, that organization's far-flung terrorist activities have hardly been confined to that country. The September 11, 2001 attacks occurred on American soil, their plot having been hatched and preparations made in places as scattered as Malaysia, Germany, the United Arab Emirates, and Pakistan, by nationals of a number of different countries.[13] Prior to September 11, 2001, al Qaeda had perpetrated prior acts of terrorism against the United States in locations as far from Afghanistan as the port of Aden in Yemen, Kenya, and Tanzania,[14] and since September 11, 2001, deadly attacks on civilians in, among other places, Spain,

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[12] Accord King v. Superintendent of Vine Street Police Station; Ex parte Liebmann, 1916-1 K.B. 268, 277-78 (justifying the World War I era detention of a German national taken into custody in England, far from the battlefield, on the ground that "[t]he inventions and discoveries of recent years, and especially the existing means of communications, have so widened the fields of possible hostility that there is scarcely any limit on the earth, in the air, or in the waters which it is possible to put upon the exercise of acts of hostility, and real danger to the realm may therefore exist, although impossible of discovery, at distances far from where the actual clash of arms is taking place.").

[13] The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States 156-68, 236-37 (2004) ("9/11 Report"). The Commission remarked that "[i]t should by now be apparent how significant travel was in the planning undertaken by a terrorist organization as far-flung as al Qaeda. The story of the plot includes references to dozens of international trips." Id. at 168.

[14] 9/11 Report at 115-16, 190-91.

Turkey, Indonesia, Morocco, Iraq, and Saudi Arabia have been attributed to al Qaeda and its affiliates. It defies both common sense and elementary notions of security to suggest that, in confronting this unambiguously global menace, the President and his Armed Forces are somehow powerless to take appropriate action to immobilize enemy combatants who, by definition, have participated in or supported enemy forces, see CSRT Order ¶ a, just because they were taken into custody somewhere other than in Afghanistan.

It is similarly without moment that a particular enemy combatant was transferred to United States custody after having been initially captured by another government or organization. Of course, the United States is allied and collaborating with many other nations in both the military campaign in Afghanistan and the war against al Qaeda more generally. It is common practice for allies to transfer enemy combatant detainees amongst themselves. See Levie, supra, at 104-06; Lewis & Mewha, supra, at 58 (referring to "influx of prisoners of war" under American control in World War I, "caused by transfers from the Allies"), 83 (U.S. accepted transfer of 150,000 British-captured prisoners-of-war in World War II); cf. Article 12 of the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316 (provisions regarding transfer of prisoners of war between multiple detaining powers).

Nor is the category of enemy combatants limited to individuals observed to be personally carrying weapons at the moment of capture. The most hardened and dangerous terrorist might, by sheer happenstance, not have a firearm on his person (or might have expediently discarded or hidden it) when taken into custody. Or enemy combatants may prefer types of weapons that are not

necessarily personally issued and hand-carried.[15] As the September 11 attacks make clear, non-traditional weapons can be deadly on a massive scale. Furthermore, it is settled under the law of war that the Military's authority to detain individuals extends beyond traditional combatants and includes individuals such as clerks, laborers, and even "civil[ian] persons engaged in military duty or in immediate connection with an army." Winthrop, supra, at 789.[16]

Petitioners also have protested about their detention being temporally "indefinite," which they maintain exceeds the Executive's powers under the laws of war. It is sufficient to note, however, that circumstances have not changed materially in the little over three months since the Hamdi Plurality observed that hostilities remain ongoing, 124 S. Ct. at 2642-43, thus amply justifying continued

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[15] In Quirin, although the Supreme Court's opinion does not address in certain terms whether or not the seven individuals it held were properly detained as enemy combatants possessed weapons on their persons at the time of their capture, it seems likely that they did not, since the Court mentioned that upon landing at Atlantic beaches they buried their supplies (including weapons) and proceeded in civilian dress, and that their intent was to engage in acts of sabotage rather than conventional combat. 317 U.S. at 21.

[16] Accord Territo, 156 F.2d at 144 (noting, and not disturbing on appeal, district court's conclusion that "whether petitioner was a combatant or non-combatant member of the armed forces of the Italian army" was immaterial to legality of American military authorities' detention of Italian private who served doing manual labor in army engineers corps); Lewis & Mewha, supra, at 214-15 (discussing Allied capture and custody in France of members of German non-uniformed paramilitary construction organization); Digest of Opinions of the Judge Advocate General of the Army 392 (William Winthrop ed., 1880) (synopsizing Civil War era decision: "An engineer captured while doing duty on a steamer of the enemy, held properly detained as a prisoner of war; civil employees of the enemy serving with its army in the field being regarded as on the same footing in this respect with the soldiers of such army."); Liebmann, 1916-1 K.B. at 274-75 (upholding World War I era detention of non-combatant German national on the ground that "a German civilian in this country may be a danger in promoting unrest, suspicion, doubts of victory, in communicating intelligence, in assisting in the movements of submarines and Zeppelins – a far greater danger, indeed, than a German soldier or sailor"); cf. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4(A)(4), 6 U.S.T. 3316, 3320 (recognizing right of detaining power to seize and confine "[p]ersons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces").

detentions of enemy combatants for the time being.[17] The daily headlines make equally clear that the war against al Qaeda continues to rage outside of Afghanistan, with recent bombings in Indonesia and other locations and beheadings of civilians in Iraq attributed to al Qaeda or its affiliates or cobelligerents, as well as messages from al Qaeda's leadership threatening fresh strikes against the United States.[18]

In any event, even if hostilities against Taliban remnants and al Qaeda persist for some time into the future, that does not necessarily imply that any particular present detainee's confinement as an enemy combatant will be equally prolonged. Detainees at Guantanamo Bay are continually being released or transferred to the custody of another government (generally, their home government) based on factors such as whether the detainee is of further intelligence value to the United States, and whether the detainee is believed to pose a continuing threat to the United States or its allies. As of the date this brief is filed, more than 200 Guantanamo Bay detainees, including some who once maintained habeas petitions in this Court, have been so released or transferred.[19] Further releases and/or transfers are likely to occur in the future, as a result of recently established Administrative

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[17] See, e.g., Amir Shah, Attackers Kill Three Afghan Soldiers, Wash. Post A20 (Sept. 30, 2004) (describing skirmishes between Afghan and U.S. troops and Taliban insurgents in Zabul and Paktika provinces on September 27 and 29, 2004); Associated Press, U.S. Forces Kill 22 Afghan Insurgents, N.Y. Times (Sept. 13, 2004) (reporting on combat between U.S. troops and Taliban and al Qaeda-linked insurgents in Zabul province and Kandahar, Afghanistan on September 12, 2004).

[18] Dan Eggen & Dana Priest, No. 2 Al Qaeda Leader Urges Attacks Against U.S. and Allies, Wash. Post A17 (Oct. 2, 2004); Steve Fainaru, Group Says It Has Killed Another American Hostage, Wash. Post A21 (Sept. 22, 2004); James Risen, In Tape, Top Aide to bin Laden Vows New Strikes at U.S., N.Y. Times (Sept. 10, 2004); Jane Perlez, Blast in Indonesia Kills 8 Near Australian Embassy, N.Y. Times (Sept. 9, 2004).

[19] See DoD Press Release No. 932-04, dated Sept. 22, 2004, available at <<http://www.defenselink.mil/releases/2004/nr20040922-1306. html>>.

Review Procedures to assess at least annually whether each enemy combatant at Guantanamo Bay (not subject to charge or under sentence from a military commission) should be released, transferred, or continue to be detained.[20] Conversely, some Guantanamo detainees are being tried or will be tried by military commissions for war crimes. See generally Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, § 4 (Nov. 13, 2001). If such a detainee were adjudged guilty and sentenced to imprisonment, his future detention would be a function of the (definite) criminal sentence resulting from that legal process, consistent with both Supreme Court precedent and longstanding principles of the laws of war.[21]

For all these reasons, the present enemy combatant detentions at Guantanamo while hostilities remain ongoing simply cannot be reasonably criticized as "indefinite." If ever there will

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[20] See Memorandum dated September 14, 2004, re: Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba, available at <<http://www.defenselink.mil/news/Sep2004/ d20040914adminreview.pdf>> ("ARB Memo"); see infra note 56. Consistent with the nature of the determination and other factors, the Administrative Review Procedures will permit each enemy combatant to explain why he believes he is no longer a threat to the United States and its allies in the ongoing armed conflict against al Qaeda and its affiliates and supporters or why his release would otherwise be appropriate. The process will also involve, where not inconsistent with national security interests, permitting a detainee's home country and relatives to submit information to the Review Board. See ARB Memo Encl. (3) ¶¶ 3.d, 3.e.2, 3.f(1)(a), Encl. (4) ¶¶ 1.d, 1.g, 1.m, 2.c.

[21] See Madsen v. Kinsella, 343 U.S. 341, 360 (1952) ("The authority for such [military] commissions does not necessarily expire upon cessation of hostilities or even, for all purposes, with a treaty of peace."); Application of Matsushita, 327 U.S. 1, 12 (1946) ("[I]n most instances the practical administration of the system of military justice under the law of war would fail if such authority [for trial by military commission] were thought to end with the cessation of hostilities."); Eisentrager, 339 U.S. at 786 ("The jurisdiction of military authorities, during or following hostilities, to punish those guilty of offenses against the laws of war is long-established." (emphasis added)); cf. Article 119 of the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316 ("Prisoners of war against whom criminal proceedings for an indictable offence are pending may be detained until the end of such proceedings, and, if necessary, until the completion of the punishment. The same shall apply to prisoners of war already convicted for an indictable offence.").

be an occasion when the temporal bounds of enemy combatant detention are an appropriate subject of judicial resolution,[22] now is not that time and this is not that case.

II. PETITIONERS' CONSTITUTIONAL CLAIMS SHOULD BE DISMISSED

A. Because Petitioners Are Aliens Held Outside the Sovereign Territory of the United States, They Have No Basis to Challenge the Constitutionality of Their Detentions

Petitioners' challenges to their detention based on the Constitution fail as a matter of law. None of the petitioners is a United States citizen. Each was detained in foreign territory and is being held at Guantanamo Bay, Cuba. As aliens detained by the Military outside the sovereign territory of the United States, see Rasul, 124 S. Ct. at 2691-93, and lacking a sufficient connection to this country, petitioners have no cognizable constitutional rights.

"It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." Zadvydas v. Davis, 533 U.S. 678, 693 (2001). In particular, the Supreme Court has concluded that neither the Fourth nor Fifth Amendments obtains with respect to aliens outside the United States territory. See United States v. Verdugo-Urquidez, 494 U.S. 259, 266 (1990) (rejecting proposition that the Fourth Amendment "was intended to restrain the actions of the Federal Government against aliens outside

[22] As with the other substantive challenges raised in the petitions, determining the timing of the cessation of hostilities, defined by one scholar as "a cessation of hostilities as the result of surrender or of such circumstances or conditions of an armistice as to render it out of the question for the defeated party to resume hostilities," Levie, supra, at 427-28 (internal quotation omitted), is so "delicate, complex, and involve large elements of prophecy," Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948), that it is nonjusticiable. See Ludecke v. Watkins, 335 U.S. 160, 169 (1948) ("Whether and when it would be open to this Court to find that a war though merely formally kept alive had in fact ended, is a question too fraught with gravity even to be adequately formulated when not compelled."); United States v. The Three Friends, 166 U.S. 1, 63 (1897) ("[I]t belongs to the political department to determine when belligerency shall be recognized, and its action must be accepted according to the terms and intention expressed.").

of the United States territory"); Johnson v. Eisentrager, 339 U.S. 763, 783-85 (1950) (rejecting claim that aliens outside the territory of the United States are entitled to Fifth Amendment rights). The D.C. Circuit, for its part, has repeatedly noted that a "'foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise.'" 32 County Sovereignty Comm. v. Department of State, 292 F.3d 797, 799 (D.C. Cir. 2002) (quoting People's Mojahedin Org. of Iran v. Department of State, 182 F.3d 17, 22 (D.C. Cir. 1999)) (emphasis added).[23]

The bar on extraterritorial assertion of constitutional rights by aliens undoubtedly applies here. As the Supreme Court's decision in Eisentrager makes clear, in a holding unaffected by the Supreme Court's subsequent decision in Rasul, the determination of whether an alien is present in the United States for purposes of evaluating the availability of constitutional protection turns not on whether the alien is located within territory over which the United States exercises control, but on whether the alien is within territory over which the United States exercises sovereignty. In Eisentrager, the Supreme Court denied a petition for a writ of habeas corpus brought by a group of German civilians who had been captured in China by United States forces during World War II, convicted by a military commission of violating the laws of war, and imprisoned in Germany under the control of the United States Army. The Court rejected the petitioners' attempt to invoke a "constitutional right" to bring a habeas petition, reasoning that the "prisoners at no relevant time were

[23] See also Jifry v. FAA, 370 F.3d 1174, 1182 (D.C. Cir. 2004) ("The Supreme Court has long held that non-resident aliens who have insufficient contacts with the United States are not entitled to Fifth Amendment protections."); Harbury v. Deutch, 233 F.3d 596, 603 (D.C. Cir. 2000) (rejecting extraterritorial application of Fifth Amendment), rev'd in part on other grounds sub nom. Christopher v. Harbury, 536 U.S. 403 (2002); Pauling v. McElroy, 278 F.2d 252, 254 n.3 (D.C. Cir. 1960) ("The non-resident aliens here plainly cannot appeal to the protection of the Constitution or laws of the United States.").

within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial, and their punishment were all beyond the territorial jurisdiction of any court of the United States." 339 U.S. at 778 (emphasis added). The Court went on to overturn the determination by the Court of Appeals that the prisoners possessed Fifth Amendment liberty interests, highlighting concerns about "extraterritorial application of organic law." Id. at 781-785. Thus, while the petitioners in Eisentrager were imprisoned under the control of the United States government, the absence of United States sovereignty precluded the attachment of constitutional rights. As the Supreme Court later explained, the Court in Eisentrager "rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." Verdugo-Urquidez, 494 U.S. at 269 (emphasis added); see also id. (Eisentrager's "rejection of extraterritorial application of the Fifth Amendment was emphatic").

The distinction for constitutional purposes between sovereignty on the one hand and control or jurisdiction on the other is not meaningless semantics. Rather, it flows directly from the historical origin of the Constitution as a compact between the people of the country and the government.[24] Because overseas aliens are not a part of the contract that created the United States, they are not beneficiaries of its protections. See United States v. Verdugo-Urquidez, 856 F.2d 1214, 1233 (9th Cir. 1988) ("No one can seriously doubt that the compact applies only to the people who empowered

[24] See Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 471 (1793) (Jay, C.J.) ("[T]he Constitution of the United States is . . . a compact made by the people of the United States to govern themselves."); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (Marshall, C.J.) ("The government of the Union . . . is, emphatically and truly, a government of the people. In form, and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."); League v. De Young, 52 U.S. (11 How.) 185, 203 (1850) ("The Constitution of the United States was made by, and for the protection of, the people of the United States.").

the government of the United States for the benefit of themselves and their posterity, not to other peoples of the world who neither ceded authority to it in exchange for certain guarantees of liberty nor otherwise consented to its rule.") (opinion of Judge Wallace, dissenting from the majority opinion that was subsequently overruled by the Supreme Court at 494 U.S. 259 (1990)); Paul B. Stephan, III, Constitutional Limits on International Rendition of Criminal Suspects, 20 Va. J. Int'l L. 777, 782 (1980) (noting "the long held understanding that, in general, foreign nationals abroad are neither parties to nor beneficiaries of the agreement between the federal government and its people embodied in the Constitution."). Thus, as the Supreme Court has stated plainly, "[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens." United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936).[25]

Here, it is clear that the Guantanamo Bay Naval Base is outside the sovereign territory of the United States. As the Supreme Court observed in Rasul, under the 1903 Lease Agreement executed between the United States and Cuba, "'the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased areas],' while 'the Republic of Cuba consents

[25] Although aliens are not parties to the social contract of the Constitution while they are on foreign shores, their constitutional status can improve if they voluntarily enter and are received into the borders of this country, because then they begin to join the people of the United States and assume correlative obligations. See Eisler v. United States, 170 F.2d 273, 279 (D.C. Cir. 1948) ("Once an alien lawfully enters and resides in this country he becomes invested with the rights, except those incidental to citizenship, guaranteed by the Constitution to all people within our borders. Correlatively, an alien resident owes a temporary allegiance to the Government of the United States, and he assumes duties and obligations which do not differ materially from those of native-born or naturalized citizens . . . .") (citation omitted). The aliens in the cases at bar, who were apprehended on foreign soil and brought to a naval base in Cuba, have none of these lawful connections to the United States, no duties of allegiance, and, therefore, no reciprocal constitutional protections.

that . . . the United States shall exercise complete jurisdiction and control over and within said areas.'" Rasul, 124 S. Ct. at 2690-91 (emphasis added). Indeed, the Supreme Court posited a distinction between "plenary and exclusive jurisdiction" and "'ultimate sovereignty'" at Guantanamo Bay even as it framed the specific question for its review. Id. at 2693; cf. United States v. Spelar, 338 U.S. 217, 221-22 (1949) (lease for military air base in Newfoundland "effected no transfer of sovereignty with respect to the military bases concerned"); Vermilya-Brown Co. v. Connell, 335 U.S. 377, 380-81 (1948) (U.S. naval base in Bermuda, controlled by United States under lease with Great Britain, was outside United States sovereignty).[26]

Given the absence of U.S. sovereignty over Guantanamo Bay and petitioners' status as aliens, it is plain that petitioners lack cognizable constitutional rights with respect to their detentions. Indeed, in a similar case, the Eleventh Circuit concluded that alien migrants located at the Guantanamo Bay Naval Base have "no First Amendment or Fifth Amendment rights which they can assert." See Cuban Am. Bar Ass'n, Inc. v. Christopher, 43 F.3d 1412, 1428-29 (11th Cir. 1995). As a predicate to its decision, the court specifically rejected the contention that "'control and jurisdiction' is equivalent to sovereignty" for the purpose of assessing the applicability of constitutional provisions to aliens. Id. at 1424-25. Like the court in Cuban American Bar Ass'n, this Court should dismiss any contention that the Constitution provides actionable rights to aliens located at a U.S. military facility within the sovereign territory of another nation. See also Haitian Refugee Center,

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[26] In its Memorandum Opinion originally dismissing the petition in the Rasul case, this Court (Judge Kollar-Kotelly) previously concluded that the military base at Guantanamo Bay is outside the sovereign territory of the United States. See Rasul v. Bush, 215 F. Supp. 2d 55, 72 (D.D.C. 2002), aff'd, Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003), reversed and remanded on other grounds, Rasul v. Bush, 124 S. Ct. 2686 (2004). This conclusion was not disputed by the D.C. Circuit or the Supreme Court.

Inc. v. Baker, 953 F.2d 1498, 1513 (11th Cir. 1992) (Haitians interdicted by U.S. Coast Guard on the high seas "have no recognized substantive rights under the laws or Constitution of the United States.").[27]

Even if this Court were to disagree with the Eleventh Circuit and conclude that Guantanamo

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[27] Petitioners may attempt to rely on the vacated decision in Haitian Centers Council, Inc. v. McNary, 969 F.2d 1326 (2d Cir. 1992), vacated as moot, Sale v. Haitian Centers Council, Inc., 509 U.S. 918 (1993), which involved claims by migrants interdicted by the Coast Guard and housed at Guantanamo Bay. The Second Circuit in that case indicated that there were "serious questions going to the merits of appellees' claim that the fifth amendment applies to non-accused, non-hostile aliens held incommunicado on a military base within the exclusive control of the United States." Id. at 1343 (emphasis omitted). The court "note[d] that, in the present case, applying the fifth amendment would not appear to be either 'impracticable' or 'anomalous' since the United States has exclusive control over Guantanamo Bay, and given the undisputed applicability of the federal criminal laws to incidents that occur there and the apparent familiarity of the governmental personnel at the base with the guarantees of due process, fundamental fairness and humane treatment that this country purports to afford to all persons." Id.; see also Gherebi v. Bush, 374 F.3d 727, 737 n.14 (9th Cir. 2004). The court concluded that, "based upon the unique facts and circumstances of this case," there were "serious questions" as to whether, once the migrants had been "screened in" – i.e., found by the government to possess a credible fear of returning to their country of origin that would allow them to pursue a claim for asylum in the United States – they could "avail themselves of the due process clause of the fifth amendment." McNary, 969 F.2d at 1345-46.

Any reliance by petitioners on McNary would be misplaced. To begin with, the petitioners here are not "non-accused, non-hostile aliens" seeking asylum in the United States, see id. at 1343; they are enemy combatants detained for national security reasons during a time of ongoing military conflict. The "unique facts and circumstances" of McNary are thus far removed from the equally unique facts and circumstances here. In addition, more broadly, the suggestion in McNary that the Fifth Amendment may have application to aliens outside the sovereign territory of the United States is simply wrong. As discussed above, Eisentrager and its progeny make clear that the touchstone for the application of the Constitution to aliens is sovereignty, not control. Whether or not Congress may have extended criminal law to Guantanamo Bay by statute is irrelevant to the question of whether the Constitution extends to aliens there. Finally, the specific holding in McNary – that there are serious questions as to whether "screened in" aliens may assert particular due process interests – has no bearing here. Under the Second Circuit's analysis, once the aliens in McNary had been deemed to have a credible fear of persecution that would allow them to pursue a claim of asylum in the United States, they had a "reasonable expectation . . . in not being wrongly repatriated" that was protected by due process. See id. at 1345. Petitioners here do not seek refuge in the United States and have no reasonable expectation of imminent release; they are enemy combatants who may be detained until the ongoing military conflict ends.

Bay were the equivalent of U.S. sovereign territory for purposes of assessing the applicability of constitutional provisions, the Supreme Court's decision in United States v. Verdugo-Urquidez, 494 U.S. 259 (1990), would still bar the assertion of constitutional rights by petitioners. In Verdugo-Urquidez, the Court considered whether the Fourth Amendment applied to the search and seizure by United States agents of property in Mexico owned by a non-resident alien who had been arrested and transported to the United States prior to the search. The Court noted that certain previous cases "establish only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." Id. at 271 (emphasis added); see also Jifry, 370 F.3d at 1182; People's Mojahedin Org., 182 F.3d at 22. The Court reasoned that presence in the United States that is "lawful but involuntary [] is not of the sort to indicate any substantial connection with our country." Verdugo-Urquidez, 494 U.S. at 271.[28] Respondent in that case, "an alien who ha[d] had no previous significant voluntary connection with the United States" and was being held in the United States against his will, was not entitled to the protection of the Fourth Amendment. Id. Even more clearly here, petitioners – who do not allege to have any "significant voluntary connection with the United States" and whose detentions in Guantanamo Bay by the Military are instead "involuntary" – do not have a sufficient connection with the United States to give rise to constitutional protection.[29]

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[28] The need for an alien to have a voluntary connection to the United States in order to receive constitutional protections is consistent with the notion of the Constitution as a social contract. See supra note 25.

[29] In People's Mojahedin Organization, the D.C. Circuit stated, "'[A]liens receive constitutional protections [only] when they have come within the territory of the United States and developed substantial connections with this country.'" 182 F.3d at 22 (quoting Verdugo-Urquidez, 494 U.S. at 271 (alterations in People's Mojahedin Organization)); see also Jifry, 370 F.3d at 1182 (continued...)

Nothing in the Supreme Court's opinion in Rasul undermines the foregoing analysis or the conclusion that invariably flows from Eisentrager and its progeny – that aliens, such as petitioners, who are outside the sovereign territory of the United States and lack a sufficient connection to the United States may not assert rights under the Constitution. To begin with, the Court in Rasul repeatedly emphasized that its decision that petitioners have a right to seek a writ of habeas corpus was based on an interpretation of the habeas statute, 28 U.S.C. § 2241, not on a reading of the Constitution. The question framed by the Court in Rasul was "whether the habeas statute confers a right to judicial review" for aliens detained in Guantanamo Bay. 124 S. Ct. at 2693 (emphasis added). The Court, in turn, "h[e]ld 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." Id. at 2698. The Court repeatedly distinguished the decision in Eisentrager, emphasizing that the Court in Eisentrager was concerned with the "question of the prisoners' constitutional entitlement to habeas corpus" and "had far less to say on the question of the petitioners' statutory entitlement to habeas review." Id. at 2693-94 (emphases in original); see also id. at 2694 (Eisentrager opinion "devoted . . . little attention to question[s] of statutory jurisdiction"); id. at 2694 n.8 (the Court in Eisentrager "clearly understood the Court of Appeals' decision to rest on constitutional and not statutory grounds"). Rasul thus left intact Eisentrager's constitutional holding that non-resident

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[29](...continued)
(aliens may be accorded some constitutional protections where they "have come within the territory of the United States and established 'substantial connections' with this country . . . ."). However, in National Council of Resistance of Iran v. Department of State, 251 F.3d 192, 201-02 (D.C. Cir. 2001), a separate panel of the D.C. Circuit queried, but did not decide, whether a "substantial" connection to the United States is necessary. Even that court, however, appeared to assume that some connection was required. See id. at 202. Regardless, the fact that petitioners lack any "voluntary connection with the United States" (and are not subject to criminal trial in the U.S.) makes constitutional protection unavailable. See Verdugo-Urquidez, 494 U.S. at 271.

aliens in U.S. custody overseas do not have constitutional rights that can be enforced in a proceeding seeking a writ of habeas corpus. See Eisentrager, 339 U.S. at 778.[30]

More importantly, the Court in Rasul made no attempt – and had no occasion – to revisit Eisentrager's specific rejection of an extraterritorial application of the Fifth Amendment in that case. See id. at 785. Indeed, nothing in Rasul detracts from Eisentrager's powerful admonition against extension of the Amendments in the Bill of Rights to aliens detained by the Military outside the United States:

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[30] In Rasul, the Court also noted that certain aspects of Eisentrager had been overruled by Braden v. 30th Jud. Cir. Ct. of Ky., 410 U.S. 484 (1973). But the Rasul Court made clear that Braden's impact on Eisentrager was limited merely to the statutory question of the availability of habeas review. It held that "Braden overruled the statutory predicate to Eisentrager's holding," and thus that "Eisentrager plainly does not preclude the exercise of § 2241 jurisdiction over petitioner's claims." 124 S. Ct. at 2695. That "statutory predicate" was that the "presence" of the habeas petitioner within the "jurisdiction" of the habeas court constituted a statutory prerequisite to habeas jurisdiction. Rasul, 124 S. Ct. at 2694. Because this predicate had been established in the Court's decision in Ahrens v. Clark, 335 U.S. 188, 192 (1948) (reading the phrase "within their respective jurisdiction" as used in the habeas statute, 28 U.S.C. § 2241(a), to require a petitioner's actual presence within the district court's territorial jurisdiction), and since the petitioners in Eisentrager were not within the presence of the habeas court's jurisdiction, the Eisentrager Court had "proceeded from the premise that 'nothing in our statutes' conferred federal-court jurisdiction." Rasul, 124 S. Ct. at 2694 (quoting Eisentrager, 339 U.S. at 768).

But the Rasul Court held that this predicate had been overruled by the Court's subsequent decision in Braden, which "held, contrary to Ahrens, that the prisoner's presence within the territorial jurisdiction of the district court [in which the habeas petition is filed] is not 'an invariable prerequisite' to the exercise of district court jurisdiction under the federal habeas statute." Rasul, 124 S. Ct. at 2695. Based on the Braden decision, Rasul explained that "Braden overruled the statutory predicate to Eisentrager's holding," that is, Braden overruled the requirement that a petitioner must be within the territorial jurisdiction of the district court to file a statutory habeas petition. Braden, however, did not undermine Eisentrager's constitutional holding that aliens outside the sovereign territory of the United States are not afforded the protections of constitutional rights. Indeed, Braden did not even mention Eisentrager and it is unreasonable to conclude that the Court dramatically changed existing jurisprudence regarding the extraterritorial application of the Constitution in a case that dealt with little more than an Alabama prisoner's ability to seek statutory habeas relief in Kentucky.

> Such a construction would mean that during military occupation irreconcilable enemy elements, guerrilla fighters, and 'were-wolves'[31] could require the American Judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, right to bear arms as in the Second, security against 'unreasonable' searches and seizures as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments.
>
> Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. None of the learned commentators on our Constitution has ever hinted at it. The practice of every modern government is opposed to it.

339 U.S. at 784-85 (internal citation omitted).

In particular, despite petitioners' arguments to the contrary, footnote 15 of Rasul ("Petitioners' allegations . . . unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States'. 28 U.S.C. § 2241(c)(3).") does not sub silentio overrule Eisentrager and other repeated holdings of the Supreme Court that aliens outside sovereign United States territory and with insufficient connection to the United States lack constitutional rights. E.g., Verdugo-Urquidez, 494 U.S. at 266; Zadvydas, 533 U.S. at 693.

As an initial matter, the mere notation in the footnote that the allegations described "'custody in violation of the Constitution or laws or treaties of the United States'" (emphasis added) says nothing about the Constitution in particular, as opposed to "laws" or "treaties," and does not resolve the fundamental antecedent question of whether petitioners are entitled to the protection of any or all of the listed items. In any event, footnote 15 must be read in the crucial context of the paragraph

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[31] "Were-wolves" were special covert forces that the Nazis began training shortly before Germany's surrender to conduct terrorist activities during the impending Allied occupation. Al Odah v. United States, 321 F.3d 1134, 1140 (D.C. Cir. 2003) (citing <<http://www.archives.gov/iwg/declassified_records/oss_records_263_wilhelm_hoettl.html>>), reversed and remanded on other grounds sub nom. Rasul v. Bush, 124 S. Ct. 2686 (2004).

in which it is embedded, a paragraph bookended by sentences clearly and unmistakenly limiting its scope to jurisdiction. The first sentence of that paragraph says, "In the end, the answer to the question presented is clear." 124 S. Ct. at 2698 (emphasis added). The "question presented" is that which framed the four corners of the Supreme Court's review, i.e., "Whether 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."[32] Likewise, the paragraph concludes, "We therefore hold that § 2241 confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges . . . ." 124 S. Ct. at 2698, strongly militating against construing any language in the body of the paragraph to transcend statutory jurisdiction and prejudge the case's ultimate merits on remand.

If there were any doubt that the Court's ruling confined itself to the jurisdictional question, that doubt ought to be put to rest by the second-to-last sentence of the opinion: "What is presently at stake is only whether the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing."[33] 124 S. Ct. at 2699 (emphasis added). Indeed, the Court remanded Rasul to this

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[32] This language appears verbatim both in the Court's original grant of certiorari, 124 S. Ct. 534 (2003), and in the first sentence of the majority opinion, 124 S. Ct. at 2690. Indeed, the original grant of certiorari is notable because the Court limited its grant to that question presented, rejecting other questions presented proposed by the Rasul petitioners. The narrowness of what was before the Court in Rasul was again reinforced at oral argument, in questions distinguishing between the merits of the petitioners' claims – which were not before the Court – and the jurisdiction of the Court to consider them. See Rasul v. Bush Oral Arg. Tr., 2004 WL 943637, at 12-13.

[33] Supreme Court precedent specifically counsels against conflating jurisdiction and the merits. In Feres v. United States, 340 U.S. 135 (1950), the Supreme Court held that a servicemember cannot sue the United States under the Federal Tort Claims Act for negligent torts incident to military service. Considering the statutory jurisdictional issue at the outset, the Court (continued...)

Court "to consider in the first instance the merits of petitioners' claims." Id. at 2698 (emphasis added). Thus, any argument by petitioners that the Supreme Court reached a decision on the merits of the constitutional claims raised in Rasul must be rejected.

This Court should heed the Supreme Court's warning, follow clear and still binding Circuit precedent, and resist any assertion that constitutional rights may be raised by non-resident aliens detained by the Military outside the sovereign United States. Petitioners' various claims under the Constitution should be rejected.

B. Assuming Arguendo That Petitioners Possess Cognizable Constitutional Rights, Those Rights Are Not Violated by the Detention in Question

As shown above, petitioners – enemy combatant aliens detained by the Military outside the United States and without a sufficient connection to the United States – lack any cognizable constitutional rights. Assuming, arguendo, that the Constitution applies to petitioners, however, the constitutional claims asserted in the petitions do not provide a basis for relief.

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[33](...continued)
stated:

> Looking to the detail of the Act, it is true that it provides, broadly, that the District Court 'shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages * * *.' This confers jurisdiction to render judgment upon all such claims. But it does not say that all claims must be allowed. Jurisdiction is necessary to deny a claim on its merits as matter of law as much as to adjudge that liability exists. We interpret this language to mean all it says, but no more. Jurisdiction of the defendant now exists where the defendant was immune from suit before; it remains for courts, in exercise of their jurisdiction, to determine whether any claim is recognizable in law.

Id. at 140-41 (footnote omitted). Illustratively, the Supreme Court went on to affirm, in two of the three cases consolidated in Feres, dismissals by the lower courts for failure to state a claim upon which relief may be granted. Feres thus puts the lie to any contention that, simply because petitioners' allegations have been determined to meet the jurisdictional prerequisites as defined in the relevant statute, those allegations necessarily must state meritorious claims.

1. The Combatant Status Review Tribunals Satisfy the Due Process Clause of the Fifth Amendment

As discussed above in the Background section, each and every one of the petitioners is having his status as an enemy combatant reviewed in a Combatant Status Review Tribunal ("CSRT"). As a result, even assuming the applicability of the Fifth Amendment's Due Process Clause to petitioners' circumstances, the detentions pass muster because the CSRTs provide each petitioner with process that is more than constitutionally adequate.

The Fifth Amendment provides that the Government may not "depriv[e]" any "person . . . of . . . liberty . . . without due process of law." U.S. Const., amend. V. However, it has long been clear that constitutional due process does not require a proceeding with the entire panoply of features associated with conventional judicial-type hearings. At least since Mathews v. Eldridge, 424 U.S. 319 (1976), it has been recognized that "[t]he judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances." Id. at 348. Rather, "[t]he essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.'" Id. (quoting Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring)) (alteration in original); see also Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ("due process is flexible and calls for such procedural protections as the particular situation demands"); Jifry v. FAA, 370 F.3d 1174, 1183 (D.C. Cir. 2004) (where national security considerations at stake, due process held satisfied where subject of decision had opportunity to file a written reply, and entire administrative record was independently reviewed by a higher authority within the agency).

Indeed, in Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004), discussing the due process

entitlements of a United States citizen designated as an enemy combatant, a plurality of the Supreme Court held that the Due Process Clause requires nothing more than "notice of the factual basis for [the citizen-detainee's] classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." Id. at 2648. The Plurality went on to emphasize that, in light of the core separation-of-powers concerns and military exigencies at stake, the Due Process Clause would not be offended by tailoring such proceedings to include aspects – such as permitting hearsay from the Government, establishing a presumption in favor of the Government, and limiting factual disputes to the alleged combatant's acts – that are not characteristic of traditional judicial proceedings. Id. at 2648, 2649. The Plurality also observed that "[t]here remains the possibility that the [due process] standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal," and proffered as a benchmark for comparison the tribunals, generally known as Article 5 Tribunals, that determine the status of enemy detainees who assert prisoner-of-war status under the Geneva Conventions. Id. at 2651 (citing Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Regulation 190-8, § 1-6 (1997)).

At the outset, one powerful indication that the CSRTs satisfy constitutional due process is that they are modeled directly on the very Article 5 Tribunals cited approvingly by the Hamdi Plurality. It would be anomalous for the Hamdi Plurality to have cited the Article 5 Tribunals as an exemplar of an "an appropriately authorized and properly constituted military tribunal" that could provide "such process" meeting "the standards we have articulated" if there were any serious constitutional problem with them. Hamdi, 124 S. Ct. at 2651. And it necessarily follows that procedures for the CSRTs, which as discussed below are patterned after the Article 5 Tribunals and in fact exceed them in the degree of process given, do not fall constitutionally short of what is

required. The CSRTs and the Article 5 Tribunals have the following features, among others, in common:

- Tribunals are composed of three commissioned officers plus a non-voting officer to serve as recorder;[34]
- Tribunal members are sworn to faithfully and impartially execute their duties;[35]
- The detainee has the right to attend the open portions of the proceedings;[36]
- An interpreter is provided to the detainee if necessary;[37]
- The detainee has the right to (a) call witnesses if reasonably available, (b) question witnesses called by the tribunal, and (c) testify or otherwise address the tribunal;[38]
- The detainee may not be forced to testify;[39]

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[34] Compare CSRT Order ¶ e; CSRT Implementation Memorandum Encl. (1) ¶ C, with Army Reg. 190-8, § 1-6(c). The "CSRT Order" as cited herein is the July 7, 2004 Order Establishing Combatant Status Review Tribunal, submitted herewith as Ex. A, and also available online at <<http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>>. The "CSRT Implementation Memorandum" as cited herein is the Memorandum dated July 29, 2004 regarding Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba, submitted herewith as Ex. B, and also available online at <<http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>>. The pertinent portions of Army Reg. 190-8 cited herein are submitted herewith as Ex. C, and the full Regulation is available online at <<http://www.army.mil/usapa/epubs/pdf/r190_8.pdf>>.

[35] Compare CSRT Order ¶ g(2); CSRT Implementation Memorandum Encl. (1) ¶ H(1), with Army Reg. 190-8, § 1-6(e)(1). See also CSRT Implementation Memorandum Encl. (8), p. 2 (language of oath).

[36] Compare CSRT Order ¶ g(4); CSRT Implementation Memorandum Encl. (1) ¶ F(3), with Army Reg. 190-8, § 1-6(e)(5).

[37] Compare CSRT Order ¶ g(5); CSRT Implementation Memorandum Encl. (1) ¶ F(5), with Army Reg. 190-8, § 1-6(e)(5).

[38] Compare CSRT Order ¶¶ g(8), g(10); CSRT Implementation Memorandum Encl. (1) ¶¶ F(6), F(7), with Army Reg. 190-8, § 1-6(e)(6), (e)(7).

[39] Compare CSRT Order ¶ g(11); CSRT Implementation Memorandum Encl. (1) ¶¶ F(4), (continued...)

- The tribunals make decisions by majority vote;[40]
- The decision is made based on a preponderance of the evidence;[41]
- The tribunals create a written report of their decision;[42] and
- The tribunal record is reviewed by the Staff Judge Advocate for legal sufficiency.[43]

In fact, in a number of respects, the CSRTs provide more process, and additional protections, compared to the Article 5 Tribunals. For instance, the CSRTs contain express qualifications to ensure the independence and lack of prejudgment of the tribunal. See CSRT Order ¶ e (tribunal members are not to have been "involved in the apprehension, detention, interrogation, or previous determination of status of the detainee"). There is no comparable language in the regulations for the Article 5 Tribunals. The CSRTs, unlike the Article 5 Tribunals, give the detainee a personal representative to assist him in preparing his case. See CSRT Order ¶ c; Implementation Memorandum Encl. (1) ¶ C(3), Encl. (3). In the CSRTs, but not in the Article 5 Tribunals, the Recorder is obligated to search government files for, and provide to the Tribunal, any "evidence to suggest that the detainee should not be designated as an enemy combatant." See Implementation

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[39](...continued)
F(7), with Army Reg. 190-8, § 1-6(e)(8).

[40] Compare CSRT Order ¶ g(12); CSRT Implementation Memorandum Encl. (1) ¶ G(12), with Army Reg. 190-8, § 1-6(e)(9).

[41] Compare CSRT Order ¶ g(12); CSRT Implementation Memorandum Encl. (1) ¶ G(11), with Army Reg. 190-8, § 1-6(e)(9).

[42] Compare CSRT Implementation Memorandum Encl. (1) ¶ H(9), with Army Reg. 190-8, § 1-6(e)(10).

[43] Compare CSRT Order ¶ h; CSRT Implementation Memorandum Encl. (1) ¶¶ C(4), I(7), with Army Reg. 190-8, § 1-6(g).

Memorandum Encl. (2), ¶ B(1). In the CSRTs, unlike in the Article 5 Tribunals, the detainee is provided with an unclassified summary of the evidence supporting his classification in advance of the hearing. See CSRT Order ¶ g(1); Implementation Memorandum Encl. (1) ¶¶ F(8), H(5). The CSRTs allow the detainee to introduce relevant documentary evidence, whereas the Article 5 Tribunals contain no analogous provision. See CSRT Order ¶ g(10); Implementation Memorandum Encl. (1) ¶ F(6). Finally, the result of every CSRT is automatically reviewed by a higher authority, who is empowered to return the record to the tribunal for further proceedings if appropriate; there is no counterpart provision in the Article 5 Tribunals. See CSRT Order ¶ h; Implementation Memorandum Encl. (1) ¶ I(8).[44]

Aside from their resemblance to the Article 5 Tribunals that received the Hamdi Plurality's imprimatur, the CSRTs clearly pass muster under the traditional test for analyzing due process issues. The Hamdi Plurality held that what process is due to U.S. citizens detained as enemy combatants is governed by the test articulated in Mathews v. Eldridge, 424 U.S. 319 (1976). Hamdi, 124 S. Ct. at 2646. "Mathews dictates that the process due in any given instance is determined by weighing 'the private interest that will be affected by the official action' against the Government's asserted interest, 'including the function involved' and the burdens the Government would face in providing greater process." Id. (quoting Mathews, 424 U.S. at 335). The Hamdi Plurality discussed these competing interests, acknowledging "the weighty and sensitive governmental interests in

[44] The CSRT procedures differ from the Article 5 Tribunals in the respect that in the former there exists a rebuttable presumption in favor of the genuineness and accuracy of the Government's evidence. However, the Hamdi Plurality clearly stated that "the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided." Hamdi, 124 S. Ct. at 2649. In the CSRTs, the presumption by its very terms is rebuttable, and, as discussed below, the detainee clearly has a fair opportunity to present evidence to the Tribunal in an attempt to rebut the evidence.

ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States," id. at 2647, as well as the need to "tailor[] [enemy combatant proceedings] to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict," id. at 2658. Beyond the handful of specific suggestions discussed supra,[45] however, the Court generally left for the lower courts the delineation of exactly what procedures suffice as due process in these circumstances.

Particularly given the grave national security interests on the other side of the ledger,[46] the CSRT proceedings more than satisfy the Due Process Clause's simple and unadorned requirement, if applicable, that the enemy combatant detainee receive "notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." Hamdi, 124 S. Ct. at 2648. At the outset, "the Recorder shall provide the detainee in advance of the proceedings with notice of the unclassified factual basis for the detainees' designation as an enemy combatant." CSRT Order ¶ g(1). To the extent that petitioners may claim the notice falls short of what is constitutionally required because they only receive unclassified information, Circuit precedent clearly forecloses any argument that petitioners are entitled to receive classified information as part of the notice contemplated by the Due Process Clause. See Jifry v.

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[45] See Hamdi, 124 S. Ct. at 2648, 2649 (approving use of hearsay, presumption that classification was proper, and limiting factual disputes to the alleged combatant's acts).

[46] Setting forth a precursor to the Mathews v. Eldridge balancing test that became the foundation for the Court's modern due process jurisprudence, Justice Frankfurter called the Government's interest in national security "the greatest of all public interests." Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 164 (1951) (Frankfurter, J., concurring). The Justice also stressed that, in the context of national security, core separation of powers concerns dictate that the weighing of interests be conducted "with due regard to the fact that this Court is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government." Id.

FAA, 370 F.3d 1174, 1184 (D.C. Cir. 2004); People's Mojahedin Org. v. Dep't of State, 327 F.3d 1238, 1242 (D.C. Cir. 2003) (citing Nat'l Council of Resistance of Iran v. Dep't of State, 251 F.3d 192, 207-09 (D.C. Cir. 2001)). Indeed, it would approach absurdity to suggest that the Military is constitutionally obligated to disregard laws governing the handling of national security information, and release to presumed enemy combatants at war with the United States information the disclosure of which would harm national security.[47]

Likewise, the CSRT proceedings afford an enemy combatant detainee with "a fair opportunity to rebut the Government's factual assertions." Hamdi, 124 S. Ct. at 2648. The Recorder of the Tribunal is obligated to gather all "such reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant," CSRT Implementation Memorandum Encl. (1), ¶ E(3), including "evidence to suggest that the detainee should not be designated as an enemy combatant," id. Encl. (2), ¶ B(1) (emphasis added). The personal representative is given access to this universe of evidence for use in assisting the detainee to develop his case. Id. Encl. (3), ¶¶ B(1), C(2), C(4). The detainee is permitted to attend the open portions of the proceedings. CSRT Order ¶ g(4); CSRT Implementation Memorandum Encl. (1) ¶ F(3). The detainee is permitted to call witnesses if reasonably available; to submit alternative forms of testimony, including affidavits or other memorializations of witness testimony (obtained with the assistance of CSRT staff); and to question those witnesses called by

[47] Moreover, not being able personally to see classified information will not prejudice a detainee in having his case presented to the Tribunal, because the detainee's personal representative, who by qualification must have a security clearance, has access to such information, and "may, outside the presence of the detainee, comment upon classified information submitted by the Recorder that bears upon the presentation made on the detainee's behalf, if it would aid the Tribunal's deliberations." CSRT Implementation Memorandum Encl. (2), ¶ C(4), Encl. (3), ¶¶ A(2), C(5).

the Tribunal. CSRT Order ¶ g(8); CSRT Implementation Memorandum Encl. (1) ¶¶ F(6), H(7), H(9). The detainee may testify or otherwise address the Tribunal in oral or written form (although he cannot be compelled to testify), and may introduce relevant documentary evidence. CSRT Order ¶ g(10); CSRT Implementation Memorandum Encl. (1) ¶¶ F(7). Moreover, as noted above, the detainee has a personal representative and, if necessary, an interpreter. CSRT Order ¶¶ c, g(5); CSRT Implementation Memorandum Encl. (1) ¶¶ C(3), F(5), Encl. (3). These procedures more than suffice to "meet the goal of ensuring that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error while giving due regard to the Executive once it has put forth meaningful support for its conclusion that the detainee is in fact an enemy combatant." Hamdi, 124 S. Ct. at 2649. In the circumstances of this case, due process requires nothing more.[48]

Finally, the opportunity for rebuttal is "before a neutral decisionmaker." The CSRT Order

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[48] The limitation that only "reasonably available" witnesses may be called by the detainee does not cause the CSRTs to fall short of providing due process. It is long settled that the Due Process Clause does not contain a right to compel the attendance of witnesses. Low Wah Suey v. Backus, 225 U.S. 460, 470-71 (1912); Hyser v. Reed, 318 F.2d 225, 239-40 (D.C. Cir. 1963). In particular, it cannot seriously be argued that due process would require empowering a presumed enemy combatant to call U.S. military personnel to appear physically at a hearing when doing so "would adversely affect combat or support operations" (the standard for when U.S. military witnesses are deemed not "reasonably available"). CSRT Implementation Memorandum Encl. (1) ¶ G(9); see also Johnson v. Eisentrager, 339 U.S. 763, 779 (1950) ("It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home."). Indeed, it is in light of such military exigencies that the Hamdi Plurality opinion explicitly stated that proceedings to determine status could rely on written or other hearsay evidence in lieu of live testimony. Hamdi, 124 S. Ct. at 2649, 2652. The Due Process Clause does not inherently favor live testimony over other forms of information-gathering. See Mathews, 424 U.S. at 343-44; cf. Wolff v. McDonnell, 418 U.S. 539, 566 (1974) (holding that inmate facing possible revocation of good-time credits was not entitled under the Due Process Clause to "the unqualified right to call witnesses," because such an "unrestricted right to call witnesses . . . carries obvious potential for disruption" and prison officials "must have the necessary discretion without being subject to unduly crippling impediments").

provides that "[a] Tribunal shall be composed of three neutral commissioned officers of the U.S. Armed Forces, each of whom possesses the appropriate security clearance and none of whom was involved in the apprehension, detention, interrogation, or previous determination of status of the detainee." CSRT Order ¶ e (emphasis added). Under the Supreme Court's due process jurisprudence, the mere fact that the members of the Tribunal are drawn from the vast United States Military is not a valid basis for questioning their impartiality. See Wolff v. McDonnell, 418 U.S. 539, 570-71 (1974) (holding that it did not violate due process for prison adjustment committee charged with determining whether to revoke good-time credits to be composed of three prison officials).[49] Moreover, any such argument would prove too much, because, as noted above, the Supreme Court plurality in Hamdi invoked as a potential model of due process in these circumstances the Article 5 Tribunals, which, of course, have the same composition of three uniformed officers (and do not even have the limitations, embodied in the CSRT procedures, that they be "neutral" and that they not have been "involved in the apprehension, detention, interrogation,

[49] It is common, and clearly does not offend due process, for decisionmaking bodies in adjudicatory regimes within government agencies to be composed of in-house officials of the agency. Indeed, 5 U.S.C. § 554(d) ("An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review"), presupposes such situations. The Supreme Court has sustained over due process objections even systems in which the decisionmaker had participated in developing the facts himself. See Withrow v. Larkin, 421 U.S. 35, 49 (1975) ("[W]e have sustained against due process objection a system in which a Social Security examiner has responsibility for developing the facts and making a decision as to disability claims, and observed that the challenge to this combination of functions 'assumes too much and would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity.'") (citing and quoting Richardson v. Perales, 402 U.S. 389, 410 (1971)). It necessarily follows that there is no due process violation where, as in the case of the CSRTs, the procedures are crafted to screen out from participation any person who has been "involved in the apprehension, detention, interrogation, or previous determination of status of the detainee." CSRT Order ¶ e.

or previous determination of status of the detainee").

The CSRTs have drawn objections that the process does not include representation by counsel or access to retained counsel. But no valid constitutional basis exists for such an objection.[50] In Wolff v. McDonnell, the Court held that the Due Process Clause of the Fifth Amendment did not require that prisoners be permitted to retain counsel in informal proceedings to revoke good-time credits. 418 U.S. at 569-70; accord Burgener v. Cal. Adult Auth., 407 F. Supp. 555, 559 (N.D. Cal. 1976) (holding that prisoners were not entitled under the Due Process Clause to be represented by counsel at term-fixing hearings). The Wolff Court reasoned that "[t]he insertion of counsel into the disciplinary process would inevitably give the proceedings a more adversary cast and tend to reduce their utility as a means to further correctional goals." 418 U.S. at 570; see also Gagnon v. Scarpelli, 411 U.S. 778, 787 (1973) (fact that "lawyers, by training and disposition, are advocates and bound by professional duty to present all available evidence and arguments in support of their clients' positions and to contest with vigor all adverse evidence and views" counseled against according categorical right to counsel in informal parole and probation revocation proceedings because it would lend those proceedings an undesired adversarial bent and cause them to become more prolonged and costly).[51] Those concerns are magnified exponentially here, where the context is not

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[50] In this section we focus on the Due Process Clause, but, as discussed infra, no other constitutional provision provides a basis for a right to counsel either. See infra § II.B.3 (discussing Sixth Amendment and Self-Incrimination Clause of the Fifth Amendment).

[51] The Wolff Court suggested that inmates who were illiterate or otherwise unable to marshall the appropriate facts in a complex case should be permitted to "seek the aid of a fellow inmate, or if that is forbidden, to have adequate substitute aid in the form of help from the staff or from a sufficiently competent inmate designated by the staff." Wolff, 418 U.S. at 570. In the CSRTs, a personal representative, who is a senior commissioned officer of the U.S. Armed Forces in the rank or grade of O-4 or above, is provided universally to all detainees – not just those with some mental (continued...)

the administration of domestic prisons but the Executive's carrying out the incidents of its warmaking function. The CSRTs are not trials to adjudicate detainees' guilt or innocence, but a fact-gathering exercise where the goal is to determine a detainee's classification, based on as much relevant data and information as can be assembled. Involving counsel could frustrate this goal by polarizing the atmosphere, dragging out proceedings, and impeding the tribunal's objective appraisal of the facts. Wolff, 418 U.S. at 570; Gagnon, 411 U.S. at 787; see also Henry J. Friendly, "Some Kind of Hearing", 123 U. Pa. L. Rev. 1267, 1288 (1975) ("Under our adversary system the role of counsel is not to make sure the truth is ascertained but to advance his client's cause by any ethical means. Within the limits of professional propriety, causing delay and sowing confusion not only are his right but may be his duty.").

Weighed against these "burdens that the additional or substitute procedural requirement would entail," "the probable value, if any," of counsel participation in CSRTs is slight. Mathews, 424 U.S. at 335, cited in Hamdi, 124 S. Ct. at 2646. The CSRTs' focus is limited: whether the detainee "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." CSRT Order ¶ (a) (definition of enemy combatant); see also Hamdi, 124 S. Ct. at 2649 (suggesting that "factual disputes at enemy-combatant hearings [could be] limited to the alleged combatant's acts"). There is no reason to suspect that a detainee needs a lawyer's assistance to bring out the plain facts in his possession that bear on that question. Moreover, the absence of lawyers in this process is mitigated by the presence of personal representatives, an enhancement that goes well beyond the Article 5 Tribunals cited

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[51](...continued)
limitation or faced with a particularly complicated case – to assist them through all aspects of the process.

approvingly by the Hamdi Plurality. The personal representative fulfills many of the functions that counsel, if present, might provide: "explain[ing] the nature of the CSRT process to the detainee, explain[ing] his opportunity to present evidence and assist[ing] the detainee in collecting relevant and reasonably available information and in preparing and presenting information to the Tribunal."[52] CSRT Implementation Memorandum Encl. (3), ¶ B(1).

In short, the traditional adversarial model of justice, with full representation by counsel, is not required in every context. The Due Process Clause is flexible enough to recognize as much. See Mathews, 424 U.S. at 348 ("The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances."); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162-63 (1951) (Frankfurter, J., concurring) ("'[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. . . . It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process."). And what is at stake here is a classification decision during wartime, rather than a determination of a detainee's guilt or innocence. Assuming petitioners have rights under the Due Process Clause in the first place, the CSRTs have plainly given them all the process to which they are entitled.[53]

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[52] Petitioners have complained that the personal representative does not owe an ethical obligation to the detainee and that no attorney-client privilege attaches to communications with a detainee. The situation is fully disclosed to the detainee, however; to guard against any misunderstanding of the relationship, the CSRT procedures provide that "[u]pon first contact with the detainee, the Personal Representative shall explain to the detainee that no confidential relationship exists or may be formed between the detainee and the Personal Representative." CSRT Implementation Memorandum Encl. (3) ¶ C(1).

[53] It follows then that petitioners are entitled to no additional process for purposes of evidentiary development in this Court. See Hamdi, 124 S. Ct. at 2651 ("In the absence of such (continued...)

2. Any Judicial Review of the Results of the Combatant Status Review Tribunals Must Be Extraordinarily Deferential

If petitioners can claim protection under the Constitution at all (respondents, again, submit that they cannot), the fact that petitioners will have received via the CSRTs all the process to which they are entitled on the question of their combatant status counsels an extraordinarily circumscribed role for this Court in examining the outcome of that process. The nature of any such examination is constrained by profound separation of powers concerns, alluded to earlier, that would be implicated were the Judiciary to second-guess the factual bases for the Commander in Chief's exercise of his authority to determine the combatant status of detainees.

Indeed, "courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." Dep't of the Navy v. Egan, 484 U.S. 518, 530 (1988); see Hamdi, 124 S. Ct. at 2647 ("Without doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them"); Franklin v. Massachusetts, 505 U.S. at 818 (stating that the principle of judicial deference "pervades the area of national security"); Haig v. Agee, 453 U.S. 280, 292 (1981) (recognizing that "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention"). The Executive's determinations with respect to who should be and who are enemy combatants is a quintessentially military judgment, representing a core exercise of the Commander in Chief authority. See Hamdi, 124 S. Ct. at 2647;

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[53](...continued)
process [akin to that provided in Article 5 Tribunals], however, a court that receives a petition for a writ of habeas corpus from an alleged [citizen-]enemy combatant must itself ensure that the minimum requirements of due process are achieved.") (emphasis added).

see also id. at 2640 (capture and detention of combatants is an "important incident of war").[54] Moreover, the Executive has a unique institutional capacity to determine enemy combatant status. In the course of hostilities, the Military, through its operations and intelligence-gathering, has an unmatched vantage point from which to learn about an enemy and make such judgments for the purpose of waging war successfully to completion. At the same time, the Executive is politically accountable for decisions made in prosecuting war and in defending the Nation. See Hamdi, 124 S. Ct. at 2647; cf. Ludecke v. Watkins, 335 U.S. 160, 170 (1948) (determination of state of war and status of individual as enemy alien are political judgments for which judges "have neither technical competence nor official responsibility").

By contrast, the judiciary lacks institutional competence, experience, and accountability to make such military judgments at the core of the war-making powers. See Tozer v. LTV Corp., 792 F.2d 403, 405 (4th Cir. 1986) ("The judicial branch contains no Department of Defense or Armed Services Committee or other ongoing fund of expertise on which its personnel may draw. Nor is it seemly that a democracy's most serious decisions, those providing for common survival and defense, be made by its least accountable branch of government."); Curran v. Laird, 420 F.2d 122, 130 (D.C. Cir. 1969) (en banc) ("It is – and must – be true that the Executive should be accorded wide and normally unassailable discretion with respect to the conduct of the national defense and the prosecution of national objectives through military means."). These concerns are especially pronounced given the unconventional nature of the current war and enemy, involving individuals of

[54] Cf. Hirota v. MacArthur, 338 U.S. 197, 215 (1949) (Douglas, J., concurring) ("[T]he capture and control of those who were responsible for the Pearl Harbor incident was a political question on which the President as Commander-in-Chief, and as spokesman for the nation in foreign affairs, had the final say.").

many nationalities fighting without uniform or insignia and often in an unorthodox or covert fashion. Cf. Zadvydas, 533 U.S. at 696 (noting that "terrorism or other special circumstances" may counsel "heightened deference to the judgments of the political branches with respect to matters of national security").

Involvement of the judiciary in second-guessing the determinations of the Military regarding combatant status would embroil the courts in making judgments beyond their ken concerning the propriety and need for detention to prevent individuals or classes of individuals from potentially returning to the fight or the support thereof, or the need for such detention for intelligence gathering purposes during ongoing hostilities. Criteria for and determinations of combatant status strike at the heart of the Military's ability to conduct war successfully and implicate the safety of the Nation's troops and, ultimately, its citizens, as well as the safety and support of allied and coalition forces and countries. In fact, certain aspects of the substantive issues raised by the petitions in these cases are suffused with quintessential political questions – for example, whether enemy aliens taken into custody outside Afghanistan, or first captured by coalition forces and delivered into U.S. custody, may be detained – and the answers to such questions are reserved to the political branches and, in the context of these cases and in light of the AUMF, to the Executive in particular.[55] Thus, the need for extraordinary deference to decisions of the Military regarding enemy combatant status is manifest. See Eisentrager, 339 U.S. at 779 (noting that litigation by enemy combatants over the

[55] See Baker v. Carr, 369 U.S. 186, 217 (1962) (controversy is nonjusticiable political question where there is textually demonstrable commitment to coordinate political branch; lack of judicially discoverable and manageable standards; impossibility of deciding case without making a political policy determination; impossibility of undertaking independent resolution without expressing lack of respect due coordinate branches of government; unusual need for unquestioning adherence to a political decision already made; potentiality of embarrassment from multiple pronouncements by various departments on a question).

propriety of their detention could result in "a conflict between judicial and military opinion highly comforting to the enemies of the United States").

This need is particularly clear-cut and appropriate in cases, such as these, involving the detention of alien enemy combatants, for in dealing with alien enemies, the President acts not only as Commander in Chief, but as "the guiding organ in the conduct of our foreign affairs." See Ludecke, 335 U.S. at 173; see also Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952) ("any policy towards aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government"); Eisentrager, 339 U.S. at 769-76 (describing circumscribed rights of aliens as compared to citizens, especially during wartime).

Given these factors, the only proper role for the Court with respect to an enemy combatant status determination resulting from the CSRT process would be, at most, merely to confirm that a factual basis exists supporting the Military's determination that a detainee is, indeed, an enemy combatant, taking into account the constitutionally sensitive nature of the determination.[56] In habeas

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[56] As previously explained, see supra note 26, a determination, in addition to and separate from the determination of enemy combatant status, has also been and will be made periodically by the Military concerning whether the continuing detention of one properly designated as an enemy combatant is in the interest of the United States. This determination is more complex than the determination of an individual detainee's enemy combatant status; it involves a weighing of threat risks, intelligence value, and other factors to determine whether continued detention of the enemy combatant (as opposed to release or transfer to the custody of another government) is appropriate. See id. This determination of whether an enemy combatant may nonetheless be released or transferred is not relevant to the issues before the Court, given that the Military may properly detain an enemy combatant for the duration of hostilities. See supra pp. 16-19. In any event, it is beyond question that the Court would have absolutely no role in reviewing such a determination; the weighing of factors by the Executive in such a case is not justiciable. See Dist. No. 1, Pacific Coast Dist., Marine Engs. Beneficial Ass'n v. Maritime Admin., 215 F.3d 37, 42 (D.C. Cir. 2000) (Executive's "judgments on questions of foreign policy and national interest . . . are not subjects fit

(continued...)

challenges to other analogous, but much less constitutionally sensitive, executive determinations arising from administrative processes, the Supreme Court has applied a "some evidence" standard of review. That standard, if any, should apply in these cases to the extent the Court reaches the issue of whether petitioners are properly designated enemy combatants.

The Court applied the "some evidence" standard, for example, in Superintendent v. Hill, 472 U.S. 445 (1985). Hill involved judicial examination of the determination of an informal prison disciplinary proceeding concerning the revocation of good-time credits and the concomitant extension of the prisoner-plaintiffs' incarceration.[57] The Court, sensitive to the context of the case,

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[56](...continued)
for judicial involvement"). Indeed, the D.C. Circuit has specifically held that the Executive Branch's determination regarding the existence of a national security risk is not justiciable. See People's Mojahedin Org. of Iran v. United States Dep't of State, 182 F.3d 17, 23 (D.C. Cir. 1999) (determination by the Secretary of State that "'the terrorist activity of the organization threatens the security of United States nationals or the national security of the United States'" was "nonjusticiable."). Thus, the balancing of national security risk levels and other factors involved in a determination concerning the appropriateness of the continued detention of an enemy combatant is a matter entirely inappropriate for judicial review. There simply would be no "judicially discoverable and manageable standards" for resolving the propriety of the Executive Branch's decision in this circumstance. See Baker v. Carr, 369 U.S. 186, 217 (1962); see also Nat'l Fed'n of Fed. Employees v. United States, 905 F.2d 400, 405 (D.C. Cir. 1990) (APA claim challenging decisions concerning closure and realignment of military bases was nonjusticiable due to lack of judicially manageable standards because it would "necessarily involve second-guessing the Secretary's assessment of the nation's military force structure and the military value of the bases within that structure"; "We think the federal judiciary is ill-equipped to conduct reviews of the nation's military policy."); Industria Panificadora, S.A. v. United States, 763 F. Supp. 1154, 1160 (D.D.C. 1991) ("[D]ecisions which affect our national security involve policy decisions beyond the scope of judicial expertise. 'To attempt to decide such a matter without the necessary expertise and in the absence of judicially manageable standards would be to entangle the court in matters constitutionally given to the executive branch.'" (citation omitted)), aff'd on other grounds, 957 F.2d 886 (D.C. Cir. 1992).

[57] Such proceedings also were at issue in Wolff v. McDonnell, 418 U.S. 539 (1974). There, the Court held that due process in such proceedings required written notice of charges; an opportunity, consistent with safety and correctional goals, to present evidence; and a written
(continued...)

determined that due process is satisfied if "'there [i]s some evidence from which the conclusion of the administrative tribunal could be deduced.'" Id. at 455 (quoting United States ex rel. Vajtauer v. Comm'r, 273 U.S. 103, 106 (1927)). Applying the standard does not require

> examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. Instead, the relevant question is whether there is any evidence in the record that could support the conclusion reached . . . .

472 U.S. at 455-56; see also id. at 457 (even "meager" evidence is sufficient to meet "some evidence" standard). According to the Court, "[r]equiring a modicum of evidence" to support a decision ensures that the "record is not so devoid of evidence that the findings" are "without support or otherwise arbitrary." 472 U.S. at 455-57. See also, e.g., INS v. St. Cyr, 533 U.S. 289, 306 (2001) (noting with respect to deportation orders under historical immigration laws that "the sole means by which an alien could test the legality of his or her deportation order was by bringing a habeas corpus action in district court. In such cases, other than the question whether there was some evidence to support the order, the courts generally did not review factual determinations made by the Executive.") (citations omitted); Eagles v. Samuels, 329 U.S. 304, 312 (1946) (in habeas proceeding attacking selective service panel determination, necessary showing requires more than mere error in the proceeding or its result; rather, absent deprivation of "fundamental" procedural safeguards, or action beyond legal authority or "without evidence to support" it, "the inquiry is at an end"); United States ex rel. Vajtauer v. Comm'r, 273 U.S. 103, 106 (1927) (holding with respect to deportation orders that "[u]pon a collateral review in habeas corpus proceedings, it is sufficient that there was some evidence from which the conclusion of the administrative tribunal could be deduced").

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[57](...continued)
statement of evidence relied on by the decisionmaker and the reasons for the decision. Id. at 563-67; see supra pp. 39, 40-41. Hill involved review of the outcome of such a proceeding.

If there is to be any review at all, application of the "some evidence" standard to petitioners' enemy combatant status determinations would be consistent with the profound separation of powers concerns and the limited competence and experience of the Judiciary in undertaking to review such military judgments and, in effect, second-guess a military tribunal's determination. Because the standard functions as an aspect of due process and not as a truly substantive review of the decision considered,[58] it accounts for considerations of separation of powers and judicial restraint, while assuring that an individual is not being detained merely arbitrarily, consistent with the purpose of habeas review.

Application of the some evidence standard also would be consistent with the Hamdi decision. The Hamdi Plurality rejected an argument in that case that the Court should accept the "some evidence" standard as a standard of proof, i.e., a standard for the quantum of evidence by which it could be determined in the first instance that a citizen-detainee was an enemy combatant, at least in the absence of process being provided the citizen-detainee to challenge the military's factual assertions pertaining to combatant status. See 124 S. Ct. at 2651 ("This ['some evidence'] standard therefore is ill suited to the situation in which a habeas petitioner has received no prior proceedings before any tribunal and had no prior opportunity to rebut the Executive's factual assertions before a neutral decisionmaker."). The Plurality, however, specifically noted the applicability of "some evidence" as a standard of review for courts to use in examining decisions emanating from administrative-type proceedings in which appropriate process had been provided, that is, proceedings

[58] See Butler v. Oak Creek-Franklin School Dist., 172 F. Supp. 2d 1102, 1118 (E.D. Wis. 2001) ("some evidence" standard not intended as "substantive check on accuracy" of fact-finding).

"with process at least of the sort . . . constitutionally mandated [by Hamdi[59]] in the citizen enemy-combatant setting." Id.

Accordingly, if judicial review of the outcomes of individual CSRT proceedings is required at all, it should go no further than to determine whether there is "some evidence" supporting the findings of activity or status that the President, in the exercise of his powers as Commander in Chief, has determined to warrant removal of an alien from the field of battle.

As to application of this standard to specific CSRT determinations of enemy combatant status in these cases, pursuant to the September 20, 2004 Coordination Order Setting Filing Schedule and Directing the Filing of Correspondence Previously Submitted to the Court, respondents are filing individual factual returns pertaining to each petitioner in these cases[60] on a rolling basis through the week of October 18, 2004. The factual returns submitted to date describe or include unclassified evidence demonstrating that the petitioners to whom the returns pertain were affiliated with or provided assistance or armed aid to Taliban or al Qaeda forces.[61] A complete demonstration of the factual bases for the determinations that petitioners are enemy combatants will await respondents' submission of the classified and unclassifed portions of all of the pertinent CSRT records, and

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[59] See supra § II.B.1.

[60] With respect to one petitioner in the Abdah case, Aref Abd Il Rheem, respondents have no record indicating that petitioner is a detainee. Counsel for respondents has asked counsel for petitioner for additional information that may assist in identifying petitioner. In the absence of proof or acknowledgment that the petitioner is detained by respondents, however, the claims pertaining to this petitioner should be dismissed.

[61] See Factual Returns for Petitioners O.K. (filed in O.K. Sept. 15, 2004), Al Ajmi (filed in Al Odah Sept. 17, 2004), Al Zamil (filed in Al Odah Sept. 17, 2004), Al Haj (filed in Anam Sept. 17, 2004), Ali Almarwalh (filed in Anam Oct. 1, 2004), Obaid (filed in Abdah Oct. 1, 2004), Othman (filed in Abdah Oct. 1, 2004).

further briefing explaining the evidence supporting the enemy combatant status determinations would be appropriate. These submissions will demonstrate, at a minimum, that some evidence exists supporting each determination of enemy combatant status, such that the habeas petitions in these cases should be dismissed without further evidentiary proceedings.

3. Petitioners' Remaining Constitutional Arguments Are Without Merit

Beyond Fifth Amendment claims, some of the petitioners raise, or at least elliptically refer to, the Sixth, Eighth, or Fourteenth Amendments, and the Suspension Clause, as potential constitutional bases for relief. The Sixth Amendment does not provide petitioners with a right to counsel to challenge their enemy combatant status. The plain text of the Sixth Amendment provides that the "accused" in a "criminal proceeding" shall "have the Assistance of Counsel for his defense." U.S. Const. amend VI. Therefore, the Sixth Amendment is not triggered until the government commences a criminal proceeding against the accused. See Texas v. Cobb, 532 U.S. 162, 167-68 (2001). With respect to the issue of whether petitioners are properly detained as enemy combatants, the Sixth Amendment simply does not apply, and petitioners fail to state a Sixth Amendment claim. See Hamdi v. Rumsfeld, 124 S. Ct. at 2640 (explaining that captivity in war is not criminal punishment).[62]

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[62] Likewise, petitioners also lack a right to counsel under the Self-Incrimination Clause of the Fifth Amendment. In Miranda v. Arizona, 384 U.S. 436 (1966), the Supreme Court recognized that, in order to protect a suspect's Fifth Amendment right not to incriminate himself, a suspect must be warned prior to custodial interrogation that he has the right to remain silent and the right to have an attorney present. The Court has since explained, however, that the Fifth Amendment's Self-Incrimination Clause is "a fundamental trial right of criminal defendants." Verdugo-Urquidez, 494 U.S. at 264. Accordingly, "a constitutional violation occurs only at trial." Id.; see Chavez v. Martinez, 538 U.S. 760, 767 (2003) (plurality) ("Statements compelled by police interrogations of course may not be used against a defendant at trial, but it is not until their use in a criminal case that a violation of the Self-Incrimination Clause occurs.") (internal citation omitted).

Similarly, the Cruel and Unusual Punishment Clause of the Eighth Amendment does not apply with respect to the issue of whether petitioners are properly detained as enemy combatants because this provision applies only after an individual is convicted of a crime. See, e.g., City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983); Ingraham v. Wright, 430 U.S. 651, 667-71 (1977). In fact, the government "does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt" in a criminal prosecution. City of Revere, 463 U.S. at 244. And here, detention as an enemy combatant is not "punitive" in nature. See Hamdi, 124 S. Ct. at 2640.

Any Fourteenth Amendment argument by petitioners also fails as a matter of law. The Due Process Clause of the Fourteenth Amendment applies only to the states, not the federal government. See U.S. Const. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property without due process of law"). Petitioners' claims implicate the federal government, so they lack a cause of action under the Fourteenth Amendment due process clause.

Finally, a number of petitioners purport to assert "claims" that the President's Order of November 13, 2001 violates the Suspension Clause.[63] See, e.g., Anam Petition ¶ 92 ("To the extent the Executive Order of November 13, 2001, disallows any challenge to the legality of Detained Petitioners' detention by way of habeas corpus, the Order and its enforcement constitute an unlawful Suspension of the Writ, in violation of Article I of the United States Constitution."). However, this is not a true "claim" in the sense of an independent ground entitling petitioners to release or other relief, but merely a legal argument about the jurisdiction of the courts. More to the point, it is a legal

[63] U.S. Const. art. I, § 9, cl. 2 ("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.").

argument attacking a strawman, and the Court need not address it. Respondents do not contend that the President's Order of November 13, 2001 operates to suspend the habeas corpus jurisdiction of the federal courts. Indeed, the fact that these cases are pending and being litigated demonstrates that it has not been construed this way. In addition, as discussed above, see supra note 6, since respondents do not rely upon the President's Order of November 13, 2001 as a basis for enemy combatant detention, that Order has nothing to do with any of the petitioners save for a tiny minority whom the President has determined in writing to be "individual[s] subject to this order."[64] Thus, petitioners' Suspension Clause "claims" do not entitle them to any form of relief.

III. PETITIONERS' NON-CONSTITUTIONAL CLAIMS PROVIDE NO BASIS FOR RELIEF AND SHOULD BE DISMISSED

Petitioners also attempt to contest their detentions under statutes such as the Alien Tort Statute and the APA, international law, and military regulation. These challenges fail, just as petitioners' constitutional challenges fail.

A. Petitioners Fail to State Claims Under the Alien Tort Statute

A number of the petitioners challenge their detention under the Alien Tort Statute ("ATS"), which provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

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[64] Similarly, the allegations on behalf of petitioner in O.K. that military trial jurisdiction under the Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. §§ 801, 821, cannot be exercised over him as a minor, see O.K. Petition at ¶¶ 43-47, provide petitioner no basis for relief. Petitioner has not been subjected to trial by a military commission. In addition, by its terms, the UCMJ applies to courts-martial, but does not constrain trials by military commission. See 10 U.S.C. § 821 ("The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions . . . of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions."). In any event, the UCMJ does not require any minimum age to exert military jurisdiction over an enemy combatant. Moreover, petitioner O.K. is no longer a minor, making these allegations moot. See O.K. Petition at ¶ 13.

28 U.S.C. § 1350. These claims should be rejected.

1. The Court Lacks Jurisdiction to Consider Petitioners' ATS Claims

a. The ATS Does Not Waive Sovereign Immunity

The United States is subject to suit only to the extent that it has explicitly waived its sovereign immunity. Dep't of the Army v. Blue Fox, Inc., 525 U.S. 255, 260 (1999). In other words, the Court has jurisdiction over petitioners' ATS claims against the United States only if a waiver is provided either in the ATS or elsewhere. Id. The D.C. Circuit has squarely held, however, that "[t]he [ATS] itself does not provide a waiver of sovereign immunity." Industria Panificadora, S.A. v. United States, 957 F.2d 886, 887 (D.C. Cir.) (1992) (per curiam); see also Goldstar (Panama) S.A. v. United States, 967 F.2d 965, 968 (4th Cir. 1992); Sanchez-Espinoza v. Reagan, 770 F.2d 202, 207 (D.C. Cir. 1985); Canadian Transp. Co. v. United States, 663 F.2d 1081, 1082 (D.C. Cir. 1980). Accordingly, considering the ATS alone, the United States and its agencies are immune from ATS litigation under petitioners' claims.

b. The APA Waiver of Sovereign Immunity Is Not Applicable To Petitioners' ATS Claims

Petitioners also fail to establish that the United States has consented to ATS suits under statutes separate from the ATS. Goldstar, 967 F.2d at 968. Petitioners cite the APA, 5 U.S.C. § 701 et seq., at various places in their petitions, but any suggestion that the APA waives sovereign immunity for petitioners' ATS or other claims is misguided.[65] See, e.g., El-Banna Petition ¶ 4;

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[65] Many petitioners also purport to assert independent claims for relief under the APA. However, a suit for judicial review of agency action will lie only to the extent that the grievance being asserted is one that is "within the meaning of a relevant statute." 5 U.S.C. § 702; see Am. Fed'n of Gov't Employees, AFL-CIO v. Rumsfeld, 321 F.3d 139, 144-45 (D.C. Cir. 2003) (affirming dismissal of action and rejecting plaintiffs' reliance on § 702 where plaintiffs cited no "relevant (continued...)

Almurbati Petition ¶ 5. The APA waives the government's immunity from suits challenging administrative agency action and seeking relief other than money damages. It provides as follows:

> An action . . . seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States.

5 U.S.C. § 702. For the reasons explained below, the APA does not apply or provide the necessary waiver of sovereign immunity that would confer jurisdiction on the Court over petitioners' ATS (or other) claims.[66]

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[65](...continued)
statute"); Rasmussen v. United States, 421 F.2d 776, 779 (8th Cir. 1970) ("It is quite clear from the text of the APA that it alone will not supply standing to obtain judicial review. The person must point to a separate 'aggrieved person' statute which applies to him."). In other words, a claim for review must be grounded in a federal statute apart from the APA itself so that the Court will have a meaningful basis for evaluating whether the agency's action was valid and conformed to law. Here, other than perhaps the ATS, petitioners cite no "relevant statute" apart from the APA itself. Hence, their APA claims should be dismissed. In any event, for all the reasons discussed in this memorandum, DoD's detention of the petitioners as enemy combatants is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," nor are any of the other grounds for setting aside agency action under the APA present. 5 U.S.C. § 706.

[66] In Sanchez-Espinoza v. Reagan, 770 F.2d at 207, the Court suggested in dictum that the APA's waiver of sovereign immunity might be "arguably available" for tort claims brought under the ATS. The Court did not speculate as to the circumstances under which the waiver could be available for such claims. In fact, the Court held that under the circumstances before it, sovereign immunity was not waived. It found that the case involved sensitive foreign policy matters best left to the political branches of government, so the Court would be abusing its discretion by interceding to grant the wholly discretionary relief requested. Id. at 208. For the Court to grant relief in the instant case not only would constitute an abuse of discretion, but also would violate a series of established APA principles, as further explained below.

i. The Exercise of Military Authority Challenged in This Litigation is Excepted From Review Under the APA

The APA expressly exempts from its limited waiver of immunity suits challenging "military authority exercised in the field in time of war or in occupied territory," 5 U.S.C. § 701(b)(1)(G), as well as suits seeking judicial review of "courts martial and military commissions," id. § 701(b)(1)(F). As the D.C. Circuit has recognized, § 701(b)(1)(G) insulates from judicial review "dispute[s] over military strategy," and applies not only to the exercise of military authority "in combat zones," but also to the exercise of such authority "in the aftermath of . . . battle." Doe v. Sullivan, 938 F.2d 1370, 1380 (D.C. Cir. 1980). As explained supra, petitioners' detentions are a " fundamental and accepted . . . incident" to the ongoing war. See Hamdi, 124 S. Ct. at 2640. Consequently, their challenges fall directly within these exceptions to judicial review.

The term "in the field" is not restricted to the field of battle. Al Odah v. United States, 321 F.3d 1134, 1150 (D.C. Cir. 2003) (Randolph, J., concurring), reversed and remanded on other grounds, Rasul v. Bush, 124 S. Ct. 2686 (2004); see also Ex parte Quirin, 317 U.S. 1, 21 (1942) (rejecting the argument that enemy combatants were any less belligerents because they had not entered the zone of active military operations). Moreover, it is of no moment that petitioners were captured without Congress having formally declared war against any foreign state, since "'[t]ime of war,' as the APA uses it, is not so confined." Al Odah, 321 F.3d at 1150. Instead, "the military actions ordered by the President, with the approval of Congress, are continuing; those military actions are part of the war against the al Qaeda terrorist network; and those actions constitute 'war,' not necessarily as the Constitution uses the word, but as the APA uses it." Id.; cf. Koohi v. United States, 976 F.2d 1328, 1333-35 (9th Cir. 1992) (holding that the term "time of war" in Federal Tort

Claims Act, 28 U.S.C. § 2680(j), does not require an express declaration of war but includes "an organized series of hostile encounters on a significant scale with the military forces of another nation"). Although there has been no formal congressional declaration of war, the United States has committed its forces into combat, and the judiciary should not be thrust into reviewing military decision-making that is excluded from the APA's coverage. Al Odah, 321 F.3d at 1150 (Randolph, J., concurring).

ii. Because it Would Be an Abuse of Discretion for the Court to Provide Discretionary Nonmonetary Relief with Respect to Sensitive Military and Foreign Affairs Matters Involved in This Litigation, the APA Does Not Apply to Provide a Waiver of Sovereign Immunity for Petitioners' Claims

Review of petitioners' detention claims in this case is also precluded under 5 U.S.C. § 702(1), which states that the APA's judicial review provision does not affect "other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground." This provision compels the denial of petitioners' requests for declaratory and injunctive relief. Such types of relief are within the Court's discretion to grant or deny,[67] and the Court's interference with the sensitive national security and foreign affairs matters at issue is not warranted. Thus, the APA does not apply to provide a waiver of sovereign immunity for petitioners' ATS claims.

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[67] See TVA v. Hill, 437 U.S. 153, 193-94 (1978) ("a federal judge sitting as a chancellor is not mechanically obligated to grant an injunction for every violation of law," and "[s]ince all or almost all equitable remedies are discretionary, the balancing of equities and hardships is appropriate in almost any case as a guide to the chancellor's discretion") (internal quotation marks and citation omitted).

In Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985), the Court determined that it would be an abuse of discretion to grant nonmonetary relief under the ATS and APA where the Court would be required to intercede in sensitive foreign affairs matters. Id. at 208. The suit challenged the United States' alleged support of "Contra" forces bearing arms against the Nicaraguan government. The Court found that all the bases for nonmonetary relief, including injunction and declaratory judgment, were discretionary. Id. at 207-08. Pursuant to 5 U.S.C. § 702(1), it held that "[a]t least where the authority for our interjection into so sensitive a foreign affairs matter as this are statutes no more specifically addressed to such concerns than the Alien Tort Statute and the APA, we think it would be an abuse of our discretion to provide discretionary relief." Id. at 208.

The legislative history of § 702 reinforces this conclusion. The provision was enacted as part of the 1976 amendments implementing the recommendations of the Administrative Conference of the United States, which were designed, inter alia, to ensure that the waiver of sovereign immunity in the APA did not allow courts to "decide issues about foreign affairs, military policy, and other subjects inappropriate for judicial action." See Sovereign Immunity Hearing Before the Subcomm. on the Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 91st Cong., 2d Sess. 135 (1970) (report of the Administrative Conference Committee on Judicial Review).

In the present case, petitioners seek a declaration that their detentions in connection with active hostilities involving the United States are unlawful, and they seek an order requiring their release from custody. As in Sanchez-Espinoza, this declaratory and injunctive relief is discretionary. The determination of their claims would unavoidably enmesh the Court in foreign affairs and national security matters that are at least as sensitive as the activities at issue in Sanchez-Espinoza. Therefore, under § 702, it would be an abuse of discretion for the Court to declare activities of the

President and the Secretary of Defense unlawful or to enjoin them from further detaining petitioners. Thus, the APA does not apply to provide a waiver of sovereign immunity for petitioners' ATS claims.

iii. The APA's Waiver of Immunity Does Not Apply Because The President Is Not an "Agency" and "Other Adequate Remedies" Are Available

Section 704 of the APA provides that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. Thus, it provides for the review only of agency action for which there is "no other adequate remedy in a court." With respect to the first of these requirements, petitioners have challenged action which is not that of an "agency" subject to review. Petitioners allege that they have been wrongfully detained pursuant to the President's orders and authorization.[68] Indeed, the detentions at issue were the direct result of action taken by or in response to the orders of the President[69] pursuant to the exercise of his constitutional powers and the express congressional authorization in the AUMF. However, "the President is not an agency within the meaning of the

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[68] See, e.g., Almurbati Petition ¶¶ 20, 21 (alleging detention pursuant to the September 18, 2001 Authorization for Use of Military Force; the November 13, 2001 Executive Order on Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism; and under the President's authority as Commander in Chief); Al Odah Petition ¶¶ 9-13 (same); Khalid Petition ¶¶ 21-22 (same); El-Banna Petition ¶¶ 3, 29, 34 (same); O.K. Petition ¶ 6 (same); Kurnaz Petition ¶¶ 9-10, 20, 25-27 (same).

[69] The duties of the other respondents in this case, who are DoD officials, are to implement the orders of the President as Commander in Chief. See, e.g., U.S. Const. Art. II, § 2, cl. 1 (providing that "[t]he President shall be Commander in Chief of the Army and Navy of the United States"); id. (providing that the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective offices . . . ."); Mitchell v. Forsyth, 472 U.S. 511, 536-37 (1985) (Burger, C.J., concurring) (Cabinet officer "is an 'aide' and arm of the President in the execution of the President's constitutional duty to 'take Care that the Laws be faithfully executed.'").

Act." Franklin v. Massachusetts, 505 U.S. at 796; see Dakota Central Tel. Co. v. State of South Dakota, 250 U.S. 163, 184 (1919); Armstrong v. Bush, 924 F.2d 282, 289 (D.C. Cir. 1991). Therefore, his actions are "not subject to" APA requirements. Franklin, 505 U.S. at 801. With respect to petitioners' detentions, then, "there is no final agency action that may be reviewed under the APA standards." Id. at 796.[70]

Regarding the second requirement of 5 U.S.C. § 704, petitioners have an adequate, alternative judicial remedy for the alleged wrongful actions. See Bowen v. Massachusetts, 487 U.S. 879, 903 (1988) ("Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action"). Alleging that they are incarcerated and being indefinitely held in unlawful custody, petitioners assert jurisdiction under the habeas statutes, 28 U.S.C. §§ 2241, 2242. See, e.g., El-Banna Complaint ¶¶ 4, 5; Almurbati Complaint ¶¶ 5, 6; see Preiser v. Rodriguez, 411 U.S. 475, 484 (1973) ("[T]he essence of habeas corpus is an attack by a person in custody upon the legality of that custody"). Habeas corpus is not only an adequate remedy for petitioners' claims; it is the exclusive remedy. It is well settled that "[c]hallenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus." Muhammad v. Close, 540 U.S. 749, 124 S. Ct. 1303, 1304 (2004); accord Preiser, 411 U.S. at 489-90; Bourke v. Hawk-Sawyer, 269 F.3d 1072, 1074 (D.C. Cir. 2001); Chatman-Bey v.

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[70] It is also doubtful that the President's orders and decisions regarding detention of enemy combatants even constitute "agency action" for whose judicial review the APA waives sovereign immunity. See 5 U.S.C. § 702 (waiver of sovereign immunity predicated on "agency action"); 5 U.S.C. § 551(13) (defining "agency action" as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act"); see also 5 U.S.C. § 701(b)(2) (incorporating definitions from § 551 for purposes of Chapter 7). At best, they are "unusual candidates" for agency action. See Franklin, 505 U.S. at 796; see also Armstrong, 924 F.2d at 289 (finding that the President is not required "to comply with APA rulemaking procedures when issuing executive orders").

Thornburgh, 864 F.2d 804, 809-10 & n.5 (D.C. Cir. 1988); Monk v. Secretary of the Navy, 793 F.2d 364, 366 (D.C. Cir. 1986). In fact, the APA makes express that a plaintiff may not resort to the general provisions of the APA to maintain a legal action that should be brought (if at all) in habeas. 5 U.S.C. § 703;[71] see also Valenti v. Clark, 83 F. Supp. 167, 168 (D.D.C. 1949) (ruling that complaint cannot be maintained under APA because plaintiff's sole remedy is by way of habeas petition).

Moreover, habeas is the only appropriate federal remedy even if petitioners put a different label on their pleadings. See Preiser, 411 U.S. at 489-90. For example, they cannot escape jurisdiction under the habeas statutes merely by attacking alleged aspects of their detention to demonstrate its unlawfulness, when in fact the relief they seek is release. Monk, 793 F.2d at 367 (stating that when a prisoner challenges action other than his underlying conviction, the nature of the relief requested determines whether habeas corpus is the exclusive remedy, and if the prisoner seeks relief that will result in immediate or more speedy release, then habeas is the exclusive remedy); Razzoli v. Federal Bureau of Prisons, 230 F.3d 371, 373 (D.C. Cir. 2000) ("[W]e adhere to Chatman-Bey: for a federal prisoner, habeas is indeed exclusive even when a non-habeas claim would have a merely probabilistic impact on the duration of custody"); Rasul v. Bush, 215 F. Supp. 2d at 63-64 (same). All but one of the petitioners seek a declaration that their detention is unlawful and expressly request this remedy in their prayers for relief.[72] Because the essence of their complaint is

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[71] "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 . . . habeas corpus, in a court of competent jurisdiction."

[72] A variation occurs in the Al Odah amended complaint, whose prayer for relief asks for a (continued...)

a challenge to the fact of custody, a petition for writ of a habeas corpus is their only avenue for relief. Rasul, 215 F. Supp. 2d at 63-64.

That certain petitioners seek damages[73] also does not alter the conclusion that the challenge to their detentions must be treated as a writ for habeas corpus.[74] Petitioners seek damages that result directly from the fact of their detentions as enemy combatants. See Monk, 793 F.2d at 368. In order to grant the damages petitioners request, therefore, the Court must first determine the lawfulness of those detentions. See id.; cf. Heck v. Humphrey, 512 U.S. 477, 487 (1994) (imprisonment must be declared invalid by writ of habeas corpus or otherwise before prisoner can recover damages the award of which would imply invalidity of imprisonment). Yet because the determination sought by petitioners might result in their release from custody, it must be made in an action for habeas corpus. See Monk, 793 F.2d at 368.

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[72](...continued)
hearing before a neutral tribunal. However, this prayer for relief, like those of petitioners in the other cases, "is nothing more than a frontal assault on [plaintiffs'] confinement." Rasul, 215 F. Supp. 2d at 63. Similarly, the Al Odah petitioners' requests "to meet with their families," "be informed of the charges, if any, against them," and "designate and consult with counsel of their choice" are "directly related to their request to be brought before a court which would determine the extent of their entitlement to rights." Id. The crucial fact is that the Al Odah petitioners have not "brought a declaratory judgment action seeking to invalidate some procedure that would not impact the duration of their confinement." Id. at 64. Instead, the declaratory relief they seek would end their confinement. Therefore, habeas is the exclusive federal remedy. Id.

[73] See Almurbati, El Banna, Khalid, Kurnaz, and O.K. Petitions.

[74] Even if these petitioners did not have an adequate remedy under the habeas statutes and could properly sue under the APA, or under the ATS pursuant to the APA's waiver of sovereign immunity, a damages claim against the government would not be available to them because the APA waives the government's sovereign immunity from suit only in actions seeking relief "other than money damages." 5 U.S.C. § 702.

Finally, petitioners have no right to maintain an action under the APA even if they believe they could obtain a more effective remedy under that statute than under the habeas provisions. See Council of and for the Blind of Del. County Valley, Inc. v. Regan, 709 F.2d 1521, 1532 (D.C. Cir. 1983) (en banc) (observing that the other available remedy was adequate even if less effective than the APA remedy). This reflects Congress's intent that the APA not create an additional remedy for particular agency action for which Congress has established a specific review process. Bowen v. Massachusetts, 487 U.S. 879, 903 (1988); Women's Equity Action League v. Cavazos, 906 F.2d 742, 750-51 (D.C. Cir. 1990) (holding that APA review is precluded where another statutory remedy exists for the specific form of discrimination alleged) (citing Council of and for the Blind, 709 F.2d at 1531-33). This is even true notwithstanding the fact that the party before the court may not be entitled to that remedy. See Correctional Servs. Corp. v. Malesko, 534 U.S. 61, 72 (2001) (noting that in FDIC v. Meyer, 510 U.S. 471 (1994), the Court "found sufficient" a remedy against the individual officer "which respondent did not timely pursue"); see also Mitchell v. United States, 930 F.2d 893, 897 (Fed. Cir. 1991) (holding that available remedy in Claims Court was adequate even though the plaintiff's claim in that court may have been time-barred); McGregor v. Greer, 748 F. Supp. 881, 884 (D.D.C. 1990) (holding that Civil Service Reform Act provided an adequate remedy for employee to challenge discharge even though the Act specifically exempted her, as a Schedule C excepted service employee, from its remedial provisions). Therefore, petitioners can challenge the legality of their detention only in a proper habeas petition; the APA does not apply to provide a waiver of sovereign immunity for petitioners' ATS claims.

iv. The Challenged Actions Are Excepted from the APA Waiver Provision to The Extent They Are Committed to Agency Discretion by Law

The APA does not apply to agency action that "is committed to agency discretion by law." 5 U.S.C. § 701(a)(2); see Lincoln v. Vigil, 508 U.S. 182, 191 (1993) (section 701(a)(2) covers matters that have been "traditionally left to agency discretion"). A law can be taken to have committed the decisionmaking to the agency's judgment absolutely when it "is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." Heckler v. Chaney, 470 U.S. 821, 830 (1985). Thus, the presumption of substantive judicial review in administrative law "runs aground when it encounters concerns of national security." Dep't of the Navy v. Egan, 484 U.S. 518, 527 (1988). It similarly "runs aground" with respect to foreign policy matters. Franklin, 505 U.S. at 818-19.

As explained supra at pages 6-8, some of the substantive issues raised by the petitions in these cases – for example, whether enemy aliens taken into custody outside Afghanistan, or first captured by coalition forces and delivered into U.S. custody, may be detained – rise to the level of quintessential political questions, the answers to which are reserved in this context to the Executive Branch and, thus, are committed to agency discretion. Indeed, in the AUMF, Congress authorizes the President "to use all necessary and appropriate force" against those persons "he determines" were involved in the September 11, 2001 terrorist attacks. 115 Stat. 224 (emphasis added). The purpose of this authorization is "to prevent any future acts of international terrorism" against the United States by such persons. Id. Congress observed that these acts of violence "continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States." 115 Stat. 224. Thus, Congress expressly accorded the President full decisionmaking power in order

to enable him to protect national security and properly conduct foreign policy. Moreover, the President's authority to carry out the AUMF stems from his power as Commander in Chief. See supra § I.A. Thus, the APA's waiver of sovereign immunity would not apply with respect to matters inextricably tied to the exercise of the President's core power as Commander in Chief to the extent such matters are committed to his discretion.[75]

2. Petitioners Have Failed to State a Cognizable Claim Under the ATS

Even if the United States' sovereign immunity could be assumed away, petitioners nonetheless have not stated a cognizable cause of action under the ATS insofar as they ask the Court to declare their detentions unlawful. The Supreme Court recently held that courts should exercise "judicial caution" in recognizing private causes of action under the ATS, which erects "a high bar to new private causes of action for violating international law." Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2763 (2004). In Sosa, a Mexican national, who was acquitted of murder after being abducted and transported to the United States to face prosecution, brought an action under the ATS against the Mexican citizen hired by the DEA to abduct him. Construing the ATS as encompassing only a "modest number of international law violations with a potential for personal liability," the Court stated that any claim based on the present-day law of nations should "rest on a norm of international character accepted by the civilized world and defined with . . . specificity." Id. at 2761-62. The Court held that the petitioner's arbitrary detention claim did not support the creation of a federal remedy under the ATS.

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[75] As argued supra at § II.B.2, the most that a court could do with respect to the detention issue is to ascertain whether "some evidence" exists for a detainee-specific classification decision. This mere function of confirming that due process has occurred does not contemplate a truly substantive reconsideration of the issues involved in detention that are committed to the President's power as Commander in Chief.

As the rationale for its decision, the Court stated that it was reluctant to infer intent to provide a private cause of action where the statute did not supply one expressly. Id. at 2763. It further reasoned that "attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences," and, thus, courts should be "particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." Id.

Applying this reasoning to the present case, the Court should not grant declaratory relief in connection with petitioners' detention claims. There are no clear international legal norms recognizing a cause of action for such equitable relief. See, e.g., Sosa, 124 S. Ct. at 2767 (finding no self-executing rule of international law prohibiting arbitrary arrest or detention). Judicial restraint is particularly appropriate in view of the sensitive foreign policy and national security concerns that underlie the President's decision to detain petitioners.

These foreign policy considerations provide an additional, independent justification for withholding relief here based on what the Court in Sosa called "a policy of case-specific deference to the political branches." Sosa, 124 S. Ct. at 2766 n.20. The Court explained that, aside from the other principles limiting the availability of relief in federal courts for violations of customary international law, "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy." Id. Thus, the potential for judicial interference in the conduct of foreign and national security affairs, by itself, defeats jurisdiction under the ATS for petitioners' detention claims.

B. Petitioners Fail to State a Claim Under International Law

Petitioners likewise fail to state a claim under international law. They generally allege that respondents have violated "customary international law" and "obligations" of the United States under international law, see, e.g., Khalid Petition ¶ 59, but the only specific examples they provide are the Geneva Conventions, the International Covenant on Civil and Political Rights (ICCPR), and the American Declaration on the Rights and Duties of Man (ADRDM).[76] None of their claims is valid.

Petitioners are being held under the law of war, and there is an entire body of international law that applies during armed conflict to regulate interactions between governments and members of enemy forces. That body of law includes treaties such as the Geneva Conventions, which were developed with the exigencies of warfare in mind and address specifically and in detail a nation-state's obligations with respect to detainees seized in combat. See, e.g., Geneva Convention Relative to the Treatment of Prisoners of War of Aug. 12, 1949, 6 U.S.T. 3316 ("Third Geneva Convention").

Even assuming that petitioners are protected by this specialized law of war, including the Geneva Conventions, the Supreme Court has held "responsibility for observance and enforcement" of any such law "is upon political and military authorities," not United States courts. Eisentrager, 339 U.S. at 789 n.14 (holding that although "prisoners claim to be and are entitled to" the protections of the Geneva Conventions, these claims are not cognizable in federal court because the rights of aliens "are vindicated under [the Geneva Conventions] only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention"). Although the Supreme Court in Eisentrager addressed the 1929 Geneva Convention, not the current conventions, its analysis is fully applicable here.

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[76] O.K. raises additional examples allegedly applicable to minors. These are addressed infra.

This fundamental principle of international law has been distilled to a general rule that international treaties do not create rights that are privately enforceable in federal courts; instead, enforcement is reserved to the executive authority of the governments who are parties to the treaties. See, e.g., Committee of United States Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 937-38 (D.C. Cir. 1988); United States v. Emuegbunam, 268 F.3d 377, 389-90 (6th Cir. 2001); Matta-Ballesteros v. Henman, 896 F.2d 255, 259 (7th Cir. 1990). As explained by the Supreme Court:

> A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamation, so far as the injured parties choose to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress.

Head Money Cases, 112 U.S. 580, 598 (1884).

Accordingly, international treaties do not provide private litigants with enforceable rights unless their terms are implemented by appropriate legislation or intended to be self-executing.[77] See Whitney v. Robinson, 124 U.S. 190, 194 (1888) ("When the stipulations [of a treaty] are not self-executing, they can only be enforced pursuant to legislation to carry them into effect."); see also Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, C.J.) (holding that a non-self-executing treaty "addresses itself to the political, not the judicial department; and the

[77] Of course, the reference in 28 U.S.C. § 2241 to "custody in violation of . . . treaties" does not render every United States treaty automatically self-executing for habeas purposes. See, e.g., Bannerman v. Snyder, 325 F.3d 722, 724 (6th Cir. 2003) ("§ 2241 cannot be construed as an implementation of non-self-executing provisions of treaties so as to render them judicially enforceable").

legislature must execute the [treaty] before it can become a rule for the Court"), overruled on other grounds by United States v. Percheman, 32 U.S. (7 Pet.) 51, 64 (1833).[78]

The Geneva Conventions do not create privately enforceable rights, and Congress has never sought to create such rights through implementing legislation. Instead, as the Court recognized in Eisentrager with respect to the 1929 Geneva Convention – the predecessor treaty to the current Geneva Conventions – the "obvious scheme" of the Geneva Conventions is that the "responsibility for observance and enforcement" of their provisions is "upon political and military authorities," not the courts. 339 U.S. at 789 n.14. Indeed, the courts are virtually unanimous in the conclusion that the Geneva Conventions are not self-executing. See Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 434, 439 n.16 (D.N.J. 1999); see Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808-09 (D.C. Cir. 1984) (Bork, J., concurring) (concluding that the Third Geneva Convention is not self-executing); Huynh Thi Anh v. Levi, 586 F.2d 625, 629 (6th Cir. 1978) (concluding that there is "no evidence" that the Fourth Geneva Convention was "intended to be self-executing or to create private rights of action in the domestic courts of the signatory countries"); Handel v. Artukovic, 601 F. Supp. 1421, 1424-25 (C.D. Cal. 1985) (concluding that the Third Geneva Convention is not self-executing); see also Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 442 & n.10 (1989) (holding

[78] There is a strong presumption that international treaties do not create privately enforceable rights. See Goldstar (Panama) S.A. v. United States, 967 F.2d 965, 968 (4th Cir. 1992) (en banc) ("International treaties are not presumed to create rights that are privately enforceable."); see also United States v. Li, 206 F.3d 56, 67 (1st Cir. 2001) (en banc) (Selya, J., concurring) ("It is surpassingly difficult to accept the idea that, in most instances, either the Executive Branch or the ratifying Senate imagined that it was empowering federal courts to involve themselves in enforcement on behalf of private parties who might be advantaged or disadvantaged by particular readings of particular treaty provisions.").

that the Geneva Convention on the High Seas, which provides that an illegally boarded merchant ship "shall be compensated for any loss or damage that may have been sustained" does "not create private rights of action" enforceable in United States courts); FTC v. A.P.W. Paper Co., 328 U.S. 193, 203 (1946) (holding that with respect to the Geneva Convention of 1929, the "undertaking 'to prevent the use by private persons' of the words or symbol [of the Red Cross] is a matter for the executive and legislative departments").[79]

This conclusion is supported by the text of the treaties, which contain no explicit provision for enforcement by any form of private petition. Furthermore, the terms of the treaties relating to enforcement focus on vindication by the various diplomatic means available to sovereign nations. See, e.g., Third Geneva Convention, art. 11 (stating that "in cases of disagreement between the Parties to the conflict as to the application or interpretation of the provisions of the present Convention, the Protecting Powers shall lend their good offices with a view to settling the disagreement"); Fourth Geneva Convention, 1956 WL 54810 (U.S. Treaty), T.I.A.S. No. 3365, 6 U.S.T. 3516, art. 12 (same). Put simply, "the corrective machinery specified in the treaty itself is nonjudicial." Holmes v. Laird, 459 F.2d 1211, 1222 (D.C. Cir. 1972). Consequently, petitioners fail to state a claim for relief under the Conventions.[80]

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[79] Although one federal judge described the Third Geneva Convention as self-executing, see United States v. Lindh, 212 F. Supp. 2d 541, 553-54 (E.D. Va. 2002), his view was not supported by persuasive authority, but merely by a single law review article that, itself, does not contain any assertion that the Third Geneva Convention is self-executing, and the decision lies in sharp contrast to the uniform rulings of other courts that have concluded that the Conventions is not self-executing.

[80] Even if the Third Geneva Convention were somehow self-executing, petitioners' claims based on the Convention would still fail on the merits, because, among other things, the President has determined that the Third Geneva Convention does not apply at all to the al Qaeda detainees, because it is not a state party to the Convention, and that neither the Taliban nor al Qaeda detainees (continued...)

Petitioners' claims under the International Covenant on Civil and Political Rights (ICCPR), Art. 14, 999 U.N.T.S. 171, 6 I.L.M. 368 (1992), are similarly invalid. The United States ratified the ICCPR with numerous reservations and with the express declaration that the ICCPR is not self-executing. See International Covenant on Civil and Political Rights, 102d Cong., 138 Cong. Rec. S4781, S4784 (April 2, 1992). Accordingly, the ICCPR does not create privately enforceable rights in United States courts. See Sosa, 124 S. Ct. at 2767 (ICCPR was ratified "on the express understanding that it was not self-executing and so did not create obligations enforceable in the federal courts").

A claim also does not exist under the American Declaration on the Rights and Duties of Man (ADRDM), O.A.S. Off. Rec. OEA/Ser. LV/I.4 Rev. (1965). This provision is simply a multinational resolution that the United States has not ratified; thus, it does not have the force or effect of law. See Garza v. Lappin, 253 F.3d 918, 925 (7th Cir. 2001) (stating that the American Declaration on the Rights and Duties of Man "is an aspirational document" that "did not create any enforceable

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[80](...continued)
are entitled to prisoner of war status under the terms of the Convention. See White House Fact Sheet (Feb. 7, 2002), available at <<http://www.whitehouse.gov/news/releases/2002/02>>. This determination is not reviewable, given the foreign policy and national security concerns implicated in the present context and the Presidential prerogatives in those domains. See cases cited supra note 56 (matters related to foreign policy and national security are not fit subjects for judicial review); see also Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) ("[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative."). But even if it were, it would at least be entitled to substantial deference. See Kolovrat v. Oregon, 366 U.S. 187, 194 (1961) ("While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight.").

obligations on the part of any" member nations).[81]

C. Petitioners Cannot Assert a Claim Under Army Regulation 190-8

Petitioners attempt to overcome their inability to assert a claim under the Geneva Conventions themselves by invoking unspecified "military regulations" or Army Regulation 190-8 (entitled "Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees"). But nothing in the language or structure of that regulation suggests that it creates any private right of action for a detainee. The regulation instead merely constitutes the implementation of the 1949 Geneva Convention by the Executive Branch. See Army Regulation 190-8 § 1-1.b (submitted herewith as Ex. C). In particular, it "provides policy, procedures, and responsibilities" for the Military with respect to "the administration, treatment, employment, and compensation" of detainees, see id. § 1-1.a., and states expressly that "[i]n the event of conflicts or discrepancies between this regulation and the Geneva Conventions, the provisions of the Geneva Conventions take precedence,"

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[81] To the extent petitioners' general allegations of international law violations encompass the American Convention on Human Rights (ACHR), 1144 U.N.T.S. 123, 9 I.L.M. 673 (1969), they are similarly misguided. Like the ADRDM, the ACHR is unratified and therefore lacks the force or effect of law. See Flores v. Southern Peru Copper Corp., 343 F.3d 140, 162-64 (2d Cir. 2003) (stating that "the United States has declined to ratify the American Convention [on Human Rights] for more than three decades").

Petitioner in O.K. alleges claims under two additional treaties – the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, S. Treaty Doc. No. 106-37, 2000 WL 33366017 ("Optional Protocol"), and the International Labour Organization's Convention 182, Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, S. Treaty Doc. No. 106-5, 1999 WL 33292717 ("ILO Convention 182"). See O.K. Petition ¶¶ 57-59, 72-76. These claims are also invalid because neither treaty creates privately enforceable rights in United States courts and, even they did, neither treaty addresses the detention of children as enemy combatants. Both the Optional Protocol and ILO Convention 182 condemn the compulsory recruitment for the armed forces of persons younger than 18, but neither precludes voluntary military service of persons under 18. See Optional Protocol, art. 2, 3.3; ILO Convention 182, art. 3(a). Regardless, any claims that could be raised under these treaties are now moot because petitioner O.K. has reached the age of 18. See O.K. Petition ¶ 13.

id. § 1-1.b.(4).

Petitioners' mere reliance on 28 U.S.C. § 2241 does not automatically create a viable claim under Army Regulation 190-8. As emphasized above, it is "obvious" that "responsibility for observance" of the rights conferred by the Geneva Conventions "is upon political and military authorities." Eisentrager, 339 U.S. at 789 n.14. Here, by promulgating Army Regulation 190-8, the Executive Branch has exercised its prerogative to ensure internal compliance with the Geneva Conventions by providing guidance for the Military with respect to treatment of detainees. See Army Reg. 190-8 § 1-1.a; see also preliminary statement to Army Reg. 190-8 ("This regulation implements Department Of Defense Directive 2310.1 and establishes policies and planning guidance for the treatment, care, accountability, legal status, and administrative procedures for" detainees (emphasis added)); Department of Defense Directive 2310.1 ¶ 3 ("It is DoD policy that . . . [t]he U.S. Military Services shall comply with the principles, spirit, and intent of the international law of war, both customary and codified, to include the Geneva Conventions." (citations omitted)) (available at <<http://www.dtic.mil/whs/directives/corres/html2/d23101x.htm>>). The issuance of the regulation – which was undertaken as a matter of discretion by the Executive Branch without statutory direction by Congress – therefore cannot be understood to have created actionable rights or somehow opened the door to lawsuits by detainees who otherwise would be unable to seek relief via habeas under the Geneva Conventions themselves. To conclude otherwise would undermine the holdings of the numerous cases that have concluded that the Geneva Conventions does not create judicially enforceable rights, and, furthermore, would discourage the Executive Branch from exercising its prerogative to use regulations as a means of providing internal guidance for compliance with treaties.

Moreover, the Court should be particularly reluctant to allow any challenge under Army

Regulation 190-8, given that the regulation and any application thereof lie at the intersection of two areas particularly ill-suited to judicial resolution – foreign policy and national security. See Haig, 453 U.S. at 292 ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention."). The Supreme Court has explained that "[t]he very nature of executive decisions as to foreign policy is political, not judicial," and indeed, such "decisions [are] of a kind for which the Judiciary has neither aptitude, facilities nor responsibility." Chicago & S. Air Lines, 333 U.S. at 111. See cases cited supra note 56. Here, were the Court to decide whether the Military had complied with Army Regulation 190-8, which implements the Geneva Conventions, it would essentially be forced to opine on whether the Military's treatment of detainees satisfied the terms of the Conventions. Given the Executive's constitutional prerogatives with respect to military policy, especially during a time of war, as well as the implications for international diplomacy of the Executive's decisions concerning internal enforcement of the Geneva Conventions, the Court should decline petitioners' invitation to find a justiciable claim with respect to alleged violations of Army Regulation 190-8.

Apparently recognizing the limitations of any direct challenge under Army Regulation 190-8, petitioners in some of the pending cases erroneously rely on the APA to assert a claim that the Military has violated Army Regulation 190-8. See, e.g., O.K. Petition at ¶¶ 64-66, 80-82. However, the APA does not provide a waiver of sovereign immunity which would be necessary for such a claim to be justiciable. As noted above, Army Regulation 190-8 implements international law relating to detainees, and in particular, establishes policies and procedures for carrying out the terms of the Geneva Convention. Army Reg. 190-8, § 1-1.b. Because it embodies the foreign policy of the United States with respect to international treaties, which is a matter traditionally left to the

exclusive discretion of the Executive Branch, the regulation and the decisions whether and to what extent it should apply, constitute agency actions that are "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), and, therefore, beyond the reach of the judiciary. See supra § III.A.1.b.iv.[82] Thus, the APA does not waive the sovereign immunity of the United States in connection with petitioners' claims under Army Regulation 190-8, and those claims must be rejected.

CONCLUSION

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

Dated: October 4, 2004

Respectfully submitted,

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[82] The detentions here are also not reviewable for other reasons discussed supra at §§ III.A.1.b.i, ii, iii.

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APPENDIX – CLAIMS RAISED IN PETITIONS WITH RESPECT TO LEGALITY OF DETENTION AS ENEMY COMBATANT

CASE	NO.	5th Am.	6th Am	8th Am.	14th Am	War Powers Clause	Susp. of Writ	Alien Tort Statute	Admin. Proc. Act	Geneva Conv	"Military Regulations"	ICCPR/ ADRDM
Hicks[1]	02-CV-299(CKK)	X		X				X	X	X	X	X
Al Odah	02-CV-828(CKK)	X						X	X			
Habib	02-CV-1130(CKK)	X				X	X			X	X	X
Kurnaz	04-CV-1135(ESH)	X				X	X	X	X	X	X	X
O.K.[2]	04-CV-1136(JDB)	X				X		X	X	X	X	X
Begg	04-CV-1137(RMC)	X				X	X		X	X	X	X
Khalid	04-CV-1142(RJL)	X				X	X	X	X	X	X	X
El-Banna	04-CV-1144(RWR)	X				X	X	X	X	X	X	X
Gherebi[3]	04-CV-1164(RBW)	X	X	X	X					X		
Boumediene	04-CV-1166(RJL)	X				X	X			X	X	X
Anam	04-CV-1194(HHK)	X				X	X		X	X	X	X
Almurbati	04-CV-1227(RBW)	X				X	X	X	X	X	X	X
Abdah	04-CV-1254(HHK)	X				X	X		X	X	X	X
PLACE WHERE ADDRESSED IN RESPONDENTS' BRIEF:		II.A, II.B.1	II.A, II.B.3	II.A, II.B.3	II.A, II.B.3	I, n.10	II.B.3	III.A	III.A.1.b, n. 65	III.B	III C	III.B

1. Petitioner Hicks also raises certain claims specific to the issue of the legality of his trial by military commission, which are to be addressed in separate briefing ordered by the Court. See Minute Order in Hicks dated Sept. 29, 2004.

2. Petitioner O.K. also raises certain claims specific to the issue of the legality of detention of enemy combatants under 18 years of age, which are addressed in respondents' brief at page 53, n.64, and page 72, n.81.

3. Petitioner Gherebi's claims are subject to a motion to dismiss previously filed in that case. The arguments in that motion are repeated in this Response

Exhibit A to Respondents' Motion to Dismiss or for Judgment

DEPUTY SECRETARY OF DEFENSE
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- 7 JUL 2004

MEMORANDUM FOR THE SECRETARY OF THE NAVY

SUBJECT: Order Establishing Combatant Status Review Tribunal

This Order applies only to foreign nationals held as enemy combatants in the control of the Department of Defense at the Guantanamo Bay Naval Base, Cuba ("detainees").

a. Enemy Combatant. For purposes of this Order, the term "enemy combatant" shall mean 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. Each detainee subject to this Order has been determined to be an enemy combatant through multiple levels of review by officers of the Department of Defense.

b. Notice. Within ten days after the date of this Order, all detainees shall be notified of the opportunity to contest designation as an enemy combatant in the proceeding described herein, of the opportunity to consult with and be assisted by a personal representative as described in paragraph (c), and of the right to seek a writ of habeas corpus in the courts of the United States.

c. Personal Representative. Each detainee shall be assigned a military officer, with the appropriate security clearance, as a personal representative for the purpose of assisting the detainee in connection with the review process described herein. The personal representative shall be afforded the opportunity to review any reasonably available information in the possession of the Department of Defense that may be relevant to a determination of the detainee's designation as an enemy combatant, including any records, determinations, or reports generated in connection with earlier determinations or reviews, and to consult with the detainee concerning that designation and any challenge thereto. The personal representative may share any information with the detainee, except for classified information, and may participate in the Tribunal proceedings as provided in paragraph (g)(4).

d. Tribunals. Within 30 days after the detainee's personal representative has been afforded the opportunity to review the reasonably available information in the possession of the Department of Defense and had an opportunity to consult with the detainee, a Tribunal shall be convened to review the detainee's status as an enemy combatant.

e. Composition of Tribunal. A Tribunal shall be composed of three neutral commissioned officers of the U.S. Armed Forces, each of whom possesses the appropriate security clearance and none of whom was involved in the apprehension,

detention, interrogation, or previous determination of status of the detainee. One of the members shall be a judge advocate. The senior member (in the grade of 0-5 and above) shall serve as President of the Tribunal. Another non-voting officer, preferably a judge advocate, shall serve as the Recorder and shall not be a member of the Tribunal.

f. Convening Authority. The Convening Authority shall be designated by the Secretary of the Navy. The Convening Authority shall appoint each Tribunal and its members, and a personal representative for each detainee. The Secretary of the Navy, with the concurrence of the General Counsel of the Department of Defense, may issue instructions to implement this Order.

g. Procedures.

(1) The Recorder shall provide the detainee in advance of the proceedings with notice of the unclassified factual basis for the detainee's designation as an enemy combatant.

(2) Members of the Tribunal and the Recorder shall be sworn. The Recorder shall be sworn first by the President of the Tribunal. The Recorder will then administer an oath, to faithfully and impartially perform their duties, to all members of the Tribunal to include the President.

(3) The record in each case shall consist of all the documentary evidence presented to the Tribunal, the Recorder's summary of all witness testimony, a written report of the Tribunal's decision, and a recording of the proceedings (except proceedings involving deliberation and voting by the members), which shall be preserved.

(4) The detainee shall be allowed to attend all proceedings, except for proceedings involving deliberation and voting by the members or testimony and other matters that would compromise national security if held in the presence of the detainee. The detainee's personal representative shall be allowed to attend all proceedings, except for proceedings involving deliberation and voting by the members of the Tribunal.

(5) The detainee shall be provided with an interpreter, if necessary.

(6) The detainee shall be advised at the beginning of the hearing of the nature of the proceedings and of the procedures accorded him in connection with the hearing.

(7) The Tribunal, through its Recorder, shall have access to and consider any reasonably available information generated in connection with the initial determination to hold the detainee as an enemy combatant and in any subsequent reviews of that determination, as well as any reasonably available records, determinations, or reports generated in connection therewith.

(8) The detainee shall be allowed to call witnesses if reasonably available, and to question those witnesses called by the Tribunal. The Tribunal shall determine the

reasonable availability of witnesses. If such witnesses are from within the U.S. Armed Forces, they shall not be considered reasonably available if, as determined by their commanders, their presence at a hearing would affect combat or support operations. In the case of witnesses who are not reasonably available, written statements, preferably sworn, may be submitted and considered as evidence.

(9) The Tribunal is not bound by the rules of evidence such as would apply in a court of law. Instead, the Tribunal shall be free to consider any information it deems relevant and helpful to a resolution of the issue before it. At the discretion of the Tribunal, for example, it may consider hearsay evidence, taking into account the reliability of such evidence in the circumstances. The Tribunal does not have the authority to declassify or change the classification of any national security information it reviews.

(10) The detainee shall have a right to testify or otherwise address the Tribunal in oral or written form, and to introduce relevant documentary evidence.

(11) The detainee may not be compelled to testify before the Tribunal.

(12) Following the hearing of testimony and the review of documents and other evidence, the Tribunal shall determine in closed session by majority vote whether the detainee is properly detained as an enemy combatant. Preponderance of evidence shall be the standard used in reaching this determination, but there shall be a rebuttable presumption in favor of the Government's evidence.

(13) The President of the Tribunal shall, without regard to any other provision of this Order, have authority and the duty to ensure that all proceedings of or in relation to the Tribunal under this Order shall comply with Executive Order 12958 regarding national security information.

h. The Record. The Recorder shall, to the maximum extent practicable, prepare the record of the Tribunal within three working days of the announcement of the Tribunal's decision. The record shall include those items described in paragraph (g)(3) above. The record will then be forwarded to the Staff Judge Advocate for the Convening Authority, who shall review the record for legal sufficiency and make a recommendation to the Convening Authority. The Convening Authority shall review the Tribunal's decision and, in accordance with this Order and any implementing instructions issued by the Secretary of the Navy, may return the record to the Tribunal for further proceedings or approve the decision and take appropriate action.

i. Non-Enemy Combatant Determination. If the Tribunal determines that the detainee shall no longer be classified as an enemy combatant, the written report of its decision shall be forwarded directly to the Secretary of Defense or his designee. The Secretary or his designee shall so advise the Secretary of State, in order to permit the Secretary of State to coordinate the transfer of the detainee for release to the detainee's

country of citizenship or other disposition consistent with domestic and international obligations and the foreign policy of the United States.

j. This Order is intended solely to improve management within the Department of Defense concerning its detention of enemy combatants at Guantanamo Bay Naval Base, Cuba, and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law, in equity, or otherwise by any party against the United States, its departments, agencies, instrumentalities or entities, its officers, employees or agents, or any other person.

k. Nothing in this Order shall be construed to limit, impair, or otherwise affect the constitutional authority of the President as Commander in Chief or any authority granted by statute to the President or the Secretary of Defense.

This Order is effective immediately.

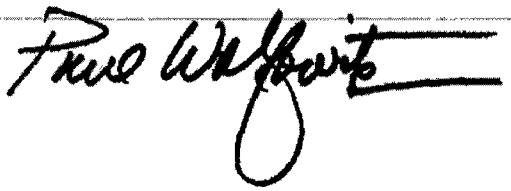

Exhibit B to Respondents' Motion to Dismiss or for Judgment

THE SECRETARY OF THE NAVY
WASHINGTON, D.C. 20350-1000

29 July 2004

MEMORANDUM FOR DISTRIBUTION

Subj: Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantanamo Bay Naval Base, Cuba

Ref: (a) Deputy Secretary of Defense Order of July 7, 2004
(b) Convening Authority Appointment Letter of July 9, 2004

Encl: (1) Combatant Status Review Tribunal Process
(2) Recorder Qualifications, Roles and Responsibilities
(3) Personal Representative Qualifications, Roles and Responsibilities
(4) Combatant Status Review Tribunal Notice to Detainees
(5) Sample Detainee Election Form
(6) Sample Nomination Questionnaire
(7) Sample Appointment Letter for Combatant Status Review Tribunal Panel
(8) Combatant Status Review Tribunal Hearing Guide
(9) Combatant Status Review Tribunal Decision Report Cover Sheet

1. Introduction

By reference (a), the Secretary of Defense has established a Combatant Status Review Tribunal (CSRT) process to determine, in a fact-based proceeding, whether the individuals detained by the Department of Defense at the U.S. Naval Base Guantanamo Bay, Cuba, are properly classified as enemy combatants and to permit each detainee the opportunity to contest such designation. The Secretary of the Navy has been appointed to operate and oversee this process.

The Combatant Status Review Tribunal process provides a detainee: the assistance of a Personal Representative; an interpreter if necessary; an opportunity to review unclassified information relating to the basis for his detention; the opportunity to appear personally to present reasonably available information relevant to why he should not be classified as an enemy combatant; the opportunity to question witnesses testifying at the Tribunal; and, to the extent they are

Subj: Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantanamo Bay Naval Base, Cuba

reasonably available, the opportunity to call witnesses on his behalf.

2. Authority

The Combatant Status Review Tribunal process was established by Deputy Secretary of Defense Order dated July 7, 2004 (reference (a)), which designated the undersigned to operate and oversee the Combatant Status Review Tribunal process. The Tribunals will be governed by the provisions of reference (a) and this implementing directive, which sets out procedures for Tribunals and establishes the position of Director, Combatant Status Review Tribunals. Reference (b) designates the Director, CSRT, as the convening authority for the Tribunal process.

3. Implementing Process

The Combatant Status Review Tribunal Process is set forth in enclosure (1). Enclosures (2) and (3) set forth detailed descriptions of the roles and responsibilities of the Recorder and Personal Representative respectively. Enclosure (4) is a Notice to detainees regarding the CSRT process. Enclosure (5) is a Sample Detainee Election Form. Enclosure (6) is a Sample Nominee Questionnaire for approval of Tribunal members, Recorders, and Personal Representatives. Enclosure (7) is an Appointment Letter that will be signed by the Director of CSRT as the convening authority. Enclosure (8) is a CSRT Hearing Guide. Tribunal decisions will be reported to the convening authority by means of enclosure (9). This implementing directive is subject to revision at any time.

CC:
Secretary of State
Secretary of Defense
Attorney General
Secretary of Homeland Security
Director, Central Intelligence Agency
Assistant to the President for National Security Affairs
Counsel to the President

Deputy Secretary of Defense
Secretary of the Army
Secretary of the Navy
Secretary of the Air Force
Chairman of the Joint Chiefs of Staff
Director, Federal Bureau of Investigation
Director of Defense Agencies
Director, DOD Office of Detainee Affairs

Combatant Status Review Tribunal Process

A. Organization

Combatant Status Review Tribunals (CSRT) will be administered by the Director, Combatant Status Review Tribunals. The Director will staff and structure the Tribunal organization to facilitate its operation. The CSRT staff will schedule Tribunal proceedings, provide for interpreter services, provide legal advice to the Director and to Tribunal panels, provide clerical assistance and other administrative support, ensure information security, and coordinate with other agencies as appropriate.

B. Purpose and Function

This process will provide a non-adversarial proceeding to determine whether each detainee in the control of the Department of Defense at the Guantanamo Bay Naval Base, Cuba, meets the criteria to be designated as an enemy combatant, defined in reference (a) as follows:

> An "enemy combatant" for purposes of this order shall mean an individual who was part of or supporting Taliban or al Qaida 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.

Each detainee whose status will be reviewed by a Tribunal has previously been determined, since capture, to be an enemy combatant through multiple levels of review by military officers and officials of the Department of Defense.

The Director, CSRT, shall convene Tribunals pursuant to this implementing directive to conduct such proceedings as necessary to make a written assessment as to each detainee's status as an enemy combatant. Each Tribunal shall determine whether the preponderance of the evidence supports the conclusion that each detainee meets the criteria to be designated as an enemy combatant.

Adoption of the procedures outlined in this directive is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, instrumentalities or entities, its officers, employees or agents, or any other person.

C. Combatant Status Review Tribunal Structure

(1) Each Tribunal shall be composed of a panel of three neutral commissioned officers of the U.S. Armed Forces convened to make determinations of enemy combatant status pursuant to this implementing directive. Each of the officers shall possess the appropriate security clearance and none of the officers appointed shall have been involved in the apprehension, detention, interrogation, or previous determination of status of the detainees other than the CSRT process. The senior member of each Tribunal shall be an officer serving in the grade of O-6 and shall be its President. The other members of the Tribunal shall be officers in the grade of O-4 and above. One of

the officers appointed to the Tribunal shall be a judge advocate. All Tribunal members have an equal vote as to a detainee's enemy combatant status.

(2) **Recorder.** Each Tribunal shall have a commissioned officer serving in the grade of O-3 or above, preferably a judge advocate, appointed by the Director, CSRT, to obtain and present all relevant evidence to the Tribunal and to cause a record to be made of the proceedings. The Recorder shall have an appropriate security clearance and shall have no vote. The Recorder shall not have been involved in the apprehension, detention, interrogation, or previous determination of status of the detainees other than the CSRT process. The role and responsibilities of the Recorder are set forth in enclosure (2).

(3) **Personal Representative.** Each Tribunal shall have a commissioned officer appointed by the Director, CSRT, to assist the detainee in reviewing all relevant unclassified information, in preparing and presenting information, and in questioning witnesses at the CSRT. The Personal Representative shall be an officer in the grade of O-4 or above, shall have the appropriate security clearance, shall not be a judge advocate, and shall have no vote. The Personal Representative shall not have been involved in the apprehension, detention, interrogation, or previous determination of status of the detainees other than the CSRT process. The role and responsibilities of the Personal Representative are set forth in enclosure (3).

(4) **Legal Advisor.** The Director, CSRT, shall appoint a judge advocate officer as the Legal Advisor to the Tribunal process. The Legal Advisor shall be available in person, telephonically, or by other means, to each Tribunal as an advisor on legal, evidentiary, procedural or other matters. In addition, the Legal Advisor shall be responsible for reviewing each Tribunal decision for legal sufficiency. The Legal Advisor shall have an appropriate security clearance and shall have no vote. The Legal Advisor shall also not have been involved in the apprehension, detention, interrogation, or previous determination of status of the detainees other than the CSRT process.

(5) **Interpreter.** If needed, each Tribunal will have an interpreter appointed by the President of the Tribunal who shall be competent in English and a language understood by the detainee. The interpreter shall have no vote and will have an appropriate security clearance.

D. Handling of Classified Material

(1) All parties shall have due regard for classified information and safeguard it in accordance with all applicable instructions and regulations. The Tribunal, Recorder and Personal Representative shall coordinate with an Information Security Officer in the handling and safeguarding of classified material before, during and after the Tribunal proceeding.

(2) The Director, CSRT, and the Tribunal President have the authority and duty to ensure that all proceedings of, or in relation to, a Tribunal under this Order shall comply with Executive Order 12958 regarding national security information in all respects. Classified information may be used in the CSRT process with the concurrence of the

originating agency. Classified information for which the originating agency declines to authorize for use in the CSRT process is not reasonably available. For any information not reasonably available, a substitute or certification will be requested from the originating agency as cited in paragraph E (3)(a) below.

(3) The Director, CSRT, the CSRT staff, and the participants in the CSRT process do not have the authority to declassify or change the classification of any classified information.

E. Combatant Status Review Tribunal Authority

The Tribunal is authorized to:

(1) Determine the mental and physical capacity of the detainee to participate in the hearing. This determination is intended to be the perception of a layperson, not a medical or mental health professional. The Tribunal may direct a medical or mental health evaluation of a detainee, if deemed appropriate. If a detainee is deemed physically or mentally unable to participate in the CSRT process, that detainee's case will be held as a Tribunal in which the detainee elected not to participate. The Tribunal President shall ensure that the circumstances of the detainee's absence are noted in the record.

(2) Order U.S. military witnesses to appear and to request the appearance of civilian witnesses if, in the judgment of the Tribunal President those witnesses are reasonably available as defined in paragraph G (9) of this enclosure.

(3) Request the production of such reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant, including information generated in connection with the initial determination to hold the detainee as an enemy combatant and in any subsequent reviews of that determination, as well as any records, determinations, or reports generated in connection with such proceedings (cumulatively called hereinafter the "Government Information").

(a) For any relevant information not provided in response to a Tribunal's request, the agency holding the information shall provide either an acceptable substitute for the information requested or a certification to the Tribunal that none of the withheld information would support a determination that the detainee is not an enemy combatant. Acceptable substitutes may include an unclassified or, if not possible, a lesser classified, summary of the information; or a statement as to the relevant facts the information would tend to prove.

(4) Require each witness (other than the detainee) to testify under oath. The detainee has the option of testifying under oath or unsworn. Forms of the oath for Muslim and non-Muslim witnesses are in the Tribunal Hearing Guide (enclosure (8)). The Tribunal Recorder will administer the oath.

F. The Detainee's Participation in the CSRT Process

(1) The detainee may elect to participate in a Combatant Status Review Tribunal or may waive participation in the process. Such waiver shall be submitted to the Tribunal in writing by the detainee's Personal Representative and must be made after the Personal Representative has explained the Tribunal process and the opportunity of the detainee to contest this enemy combatant status. The waiver can be either an affirmative statement that the detainee declines to participate or can be inferred by the Personal Representative from the detainee's silence or actions when the Personal Representative explains the CSRT process to the detainee. The detainee's election shall be noted by the Personal Representative on enclosure (5).

(2) If a detainee waives participation in the Tribunal process, the Tribunal shall still review the detainee's status without requiring the presence of the detainee.

(3) A detainee who desires to participate in the Tribunal process shall be allowed to attend all Tribunal proceedings except for proceedings involving deliberation and voting by the members and testimony or other matters that would compromise national security if held in the presence of the detainee.

(4) The detainee may not be compelled to testify or answer questions before the Tribunal other than to confirm his identity.

(5) The detainee shall not be represented by legal counsel but will be aided by a Personal Representative who may, upon the detainee's election, assist the detainee at the Tribunal. He shall be provided with an interpreter during the Tribunal hearing if necessary.

(6) The detainee may present evidence to the Tribunal, including the testimony of witnesses who are reasonably available and whose testimony is considered by the Tribunal to be relevant. Evidence on the detainee's behalf (other than his own testimony, if offered) may be presented in documentary form and through written statements, preferably sworn.

(7) The detainee may present oral testimony to the Tribunal and may elect to do so under oath or affirmation or as unsworn testimony. If the detainee testifies, either under oath or unsworn, he may be questioned by the Recorder, Personal Representative, or Tribunal members, but may not be compelled to answer questions before the Tribunal.

(8) The detainee's Personal Representative shall be afforded the opportunity to review the Government Information, and to consult with the detainee concerning his status as an enemy combatant and any challenge thereto. The Personal Representative may share the unclassified portion of the Government Information with the detainee.

(9) The detainee shall be advised of the foregoing by his Personal Representative before the Tribunal is convened, and by the Tribunal President at the beginning of the hearing.

G. **Tribunal Procedures**

(1) By July 17, 2004, the convening authority was required to notify each detainee of the opportunity to contest his status as an enemy combatant in the Combatant Status Review Tribunal process, the opportunity to consult with and be assisted by a Personal Representative, and of the jurisdiction of the courts of the United States to entertain a habeas corpus petition filed on the detainee's behalf. The English language version of this Notice to Detainees is at enclosure (4). All detainees were so notified July 12-14, 2004.

(2) An officer appointed as a Personal Representative will meet with the detainee and, through an interpreter if necessary, explain the nature of the CSRT process to the detainee, explain his opportunity to personally appear before the Tribunal and present evidence, and assist the detainee in collecting relevant and reasonably available information and in preparing for and presenting information to the CSRT.

(3) The Personal Representative will have the detainee make an election as to whether he wants to participate in the Tribunal process. Enclosure (5) is a Detainee Election Form. If the detainee elects not to participate, or by his silence or actions indicates that he does not want to participate, the Personal Representative will note this on the election form and this detainee will not be required to appear at his Tribunal hearing. The Director, CSRT, as convening authority, shall appoint a Tribunal as described in paragraph C (1) of this enclosure for all detainees after reviewing Nomination Questionnaires (enclosure (6)) and approving Tribunal panel members. Enclosure (7) is a sample Appointment Letter.

(4) The Director, CSRT, will schedule a Tribunal hearing for a detainee within 30 days after the detainee's Personal Representative has reviewed the Government Information, had an opportunity to consult with the detainee, and notified the detainee of his opportunity to contest his status, even if the detainee declines to participate as set forth above. The Personal Representative will submit a completed Detainee Election Form to the Director, CSRT, or his designee when the Personal Representative has completed the actions above. The 30-day period to schedule a Tribunal will commence upon receipt of this form.

(5) Once the Director, CSRT, has scheduled a Tribunal, the President of the assigned Tribunal panel may postpone the Tribunal for good cause shown to provide the detainee or his Personal Representative a reasonable time to acquire evidence deemed relevant and necessary to the Tribunal's decision, or to accommodate military exigencies as presented by the Recorder.

(6) All Tribunal sessions except those relating to deliberation or voting shall be recorded on audiotape. Tribunal sessions where classified information is discussed shall be recorded on separate and properly marked audiotapes.

(7) **Admissibility of Evidence.** The Tribunal is not bound by the rules of evidence such as would apply in a court of law. Instead, the Tribunal shall be free to consider any information it deems relevant and helpful to a resolution of the issues before it. At the discretion of the Tribunal, for example, it may consider hearsay evidence, taking into account the reliability of such evidence in the circumstances.

(8) **Control of Case.** The President of the Tribunal is authorized to order the removal of any person from the hearing if that person is disruptive, uncooperative, or otherwise interferes with the Tribunal proceedings following a warning. In the case of the removal of the detainee from the Tribunal hearing, the detainee's Personal Representative shall continue in his role of assisting the detainee in the hearing.

(9) **Availability of Witnesses.** The President of the Tribunal is the decision authority on reasonable availability of witnesses.

(a) If such witnesses are from within the U.S. Armed Forces, they shall not be considered reasonably available if, as determined by their commanders, their presence at a hearing would adversely affect combat or support operations.

(b) If such witnesses are not from within the U.S. Armed Forces, they shall not be considered reasonably available if they decline properly made requests to appear at a hearing, if they cannot be contacted following reasonable efforts by the CSRT staff, or if security considerations preclude their presence at a hearing. Non-U.S. Government witnesses will appear before the Tribunal at their own expense. Payment of expenses for U.S. Government witnesses will be coordinated by the CSRT staff and the witness's organization.

(c) For any witnesses who do not appear at the hearing, the President of the Tribunal may allow introduction of evidence by other means such as e-mail, fax copies, and telephonic or video-telephonic testimony. Since either video-telephonic or telephonic testimony is equivalent to in-person testimony, the witness shall be placed under oath and is subject to questioning by the Tribunal.

(10) **CSRT Determinations on Availability of Evidence.** If the detainee requests witnesses or evidence deemed not reasonably available, the President of the Tribunal shall document the basis for that decision; to include, for witnesses, efforts undertaken to procure the presence of the witness and alternatives considered or used in place of that witness's in-person testimony.

(11) **Burden of Proof.** Tribunals shall determine whether the preponderance of the evidence supports the conclusion that each detainee meets the criteria to be designated as an enemy combatant. There is a rebuttable presumption that the Government Evidence, as defined in paragraph H (4) herein, submitted by the Recorder to support a determination that the detainee is an enemy combatant, is genuine and accurate.

(12) **Voting.** The decisions of the Tribunal shall be determined by a majority of the voting members of the Tribunal. A dissenting member shall prepare a brief summary of the basis for his/her opinion, which shall be attached to the record forwarded for legal review. Only the Tribunal members shall be present during deliberation and voting.

H. Conduct Of Hearing

A CSRT Hearing Guide is attached at enclosure (8) and provides guidance on the conduct of the Tribunal hearing. The Tribunal's hearing shall be substantially as follows:

(1) The President shall call the Tribunal to order, and announce the order appointing the Tribunal (see enclosure (7)). The President shall also ensure that all participants are properly sworn to faithfully perform their duties.

(2) The Recorder shall cause a record to be made of the time, date, and place of the hearing, and the identity and qualifications of all participants. All proceedings shall be recorded on audiotape except those portions relating to deliberations and voting. Tribunal sessions where classified information is discussed shall be recorded on separate and properly marked audiotapes.

(3) The President shall advise the detainee of the purpose of the hearing, the detainee's opportunity to present evidence, and of the consequences of the Tribunal's decision. In cases requiring an interpreter, the President shall ensure the detainee understands these matters through the interpreter.

(4) The Recorder shall present to the Tribunal such evidence in the Government Information as may be sufficient to support the detainee's classification as an enemy combatant, including the circumstances of how the detainee was taken into the custody of U.S. or allied forces (the evidence so presented shall constitute the "Government Evidence"). In the event the Government Information contains evidence to suggest that the detainee should not be designated as an enemy combatant, the Recorder shall also separately provide such evidence to the Tribunal.

(5) The Recorder shall present to the Tribunal an unclassified report summarizing the Government Evidence and any evidence to suggest that the detainee should not be designated as an enemy combatant. This report shall have been provided to the detainee's Personal Representative in advance of the Tribunal hearing.

(6) The Recorder shall call the witnesses, if any. Witnesses shall be excluded from the hearing except while testifying. An oath or affirmation shall be administered to each witness by the Recorder. When deemed necessary or appropriate, the Tribunal members can call witnesses who are reasonably available to testify or request the production of reasonably available documentary or other evidence.

(7) The detainee shall be permitted to present evidence and question any witnesses. The Personal Representative shall assist the detainee in obtaining unclassified documents and in arranging the presence of witnesses reasonably available and, if the detainee elects, the Personal Representative shall assist the detainee in the presentation of

information to the Tribunal. The Personal Representative may, outside the presence of the detainee, present or comment upon classified information that bears upon the detainee's status if it would aid the Tribunal's deliberations.

(8) When deemed necessary and appropriate by any member of the Tribunal, the Tribunal may recess the Tribunal hearing to consult with the Legal Advisor as to any issues relating to evidence, procedure, or other matters. The President of the Tribunal shall summarize on the record the discussion with the Legal Advisor when the Tribunal reconvenes.

(9) The Tribunal shall deliberate in closed session with only voting members present. The Tribunal shall make its determination of status by a majority vote. The President shall direct a Tribunal member to document the Tribunal's decision on the Combatant Status Review Tribunal Decision Report cover sheet (enclosure (9)), which will serve as the basis for the Recorder's preparation of the Tribunal record. The unclassified reasons for the Tribunal's decision shall be noted on the Tribunal Decision Report cover sheet, and should include, as appropriate, the detainee's organizational membership or affiliation with a governmental, military, or terrorist organization (*e.g.*, Taliban, al Qaida, etc.). A dissenting member shall prepare a brief summary of the basis for his/her opinion.

(10) Both documents shall be provided to the Recorder as soon as practicable after the Tribunal concludes.

I. Post-Hearing Procedures

(1) The Recorder shall prepare the record of the hearing and ensure that the audiotape is preserved and properly classified in conformance with security regulations.

(2) The detainee's Personal Representative shall be provided the opportunity to review the record prior to the Recorder forwarding it to the President of the Tribunal. The Personal Representative may submit, as appropriate, observations or information that he/she believes was presented to the Tribunal and is not included or accurately reflected on the record.

(3) The Recorder shall provide the completed record to the President of the Tribunal for signature and forwarding for legal review.

(4) In all cases the following items will be attached to the decision which, when complete and signed by the Tribunal President, shall constitute the record:

(a) A statement of the time and place of the hearing, persons present, and their qualifications;

(b) The Tribunal Decision Report cover sheet;

(c) The classified and unclassified reports detailing the findings of fact upon which the Tribunal decision was based;

(d) Copies of all documentary evidence presented to the Tribunal and summaries of all witness testimony. If classified material is part of the evidence submitted or considered by the Tribunal, the report will be properly marked and handled in accordance with all applicable security regulations; and

(e) A dissenting member's summary report, if any.

(5) The President of the Tribunal shall forward the Tribunal's decision and all supporting documents as set forth above to the Director, CSRT, acting as Convening Authority, via the CSRT Legal Advisor, within three working days of the date of the Tribunal decision. If additional time is needed, the President of the Tribunal shall request an extension from the Director, CSRT.

(6) The Recorder shall ensure that all audiotapes of the Tribunal hearing are properly marked with identifying information and classification markings, and stored in accordance with all applicable security regulations. These tapes may be reviewed and transcribed as necessary for the legal sufficiency and Convening Authority reviews.

(7) The CSRT Legal Advisor shall conduct a legal sufficiency review of all cases. The Legal Advisor shall render an opinion on the legal sufficiency of the Tribunal proceedings and forward the record with a recommendation to the Director, CSRT. The legal review shall specifically address Tribunal decisions regarding reasonable availability of witnesses and other evidence.

(8) The Director, CSRT, shall review the Tribunal's decision and may approve the decision and take appropriate action, or return the record to the Tribunal for further proceedings. In cases where the Tribunal decision is approved and the case is considered final, the Director, CSRT, shall so advise the DoD Office of Detainee Affairs, the Secretary of State, and any other relevant U.S. Government agencies.

(9) If the Tribunal determines that the detainee shall no longer be classified as an enemy combatant, and the Director, CSRT, approves the Tribunal's decision, the Director, CSRT, shall forward the written report of the Tribunal's decision directly to the Secretary of the Navy. The Secretary of the Navy shall so advise the DoD Office of Detainee Affairs, the Secretary of State, and any other relevant U.S. Government agencies, in order to permit the Secretary of State to coordinate the transfer of the detainee with representatives of the detainee's country of nationality for release or other disposition consistent with applicable laws. In these cases the Director, CSRT, will ensure coordination with the Joint Staff with respect to detainee transportation issues.

(10) The detainee shall be notified of the Tribunal decision by the Director, CSRT. If the detainee has been determined to no longer be designated as an enemy combatant, he shall be notified of the Tribunal decision upon finalization of transportation arrangements or at such earlier time as deemed appropriate by the Commander, JTF-GTMO.

Recorder Qualifications, Roles and Responsibilities

A. Qualifications of the Recorder

(1) For each case, the Director, CSRT, shall select a commissioned officer in the grade of O-3 or higher, preferably a judge advocate, to serve as a Recorder.

(2) Recorders must have at least a TOP SECRET security clearance. The Director shall ensure that only properly cleared officers are assigned as Recorders.

B. Roles of the Recorder

(1) Subject to section C (1), below, the Recorder has a duty to present to the CSRT such evidence in the Government Information as may be sufficient to support the detainee's classification as an enemy combatant, including the circumstances of how the detainee was taken into the custody of U.S. or allied forces (the "Government Evidence"). In the event the Government Information contains evidence to suggest that the detainee should not be designated as an enemy combatant, the Recorder shall also provide such evidence to the Tribunal.

(2) The Recorder shall have due regard for classified information and safeguard it in accordance with all applicable instructions and regulations. The Recorder shall coordinate with an Information Security Officer (ISO) in the handling and safeguarding of classified material before, during, and following the Tribunal process.

C. Responsibilities of the Recorder

(1) For each assigned detainee case under review, the Recorder shall obtain and examine the Government Information as defined in paragraph E (3) of enclosure (1).

(2) The Recorder shall draft a proposed unclassified summary of the relevant evidence derived from the Government Information.

(3) The Recorder shall ensure appropriate coordination with original classification authorities for any classified information presented that was used in the preparation of the proposed unclassified summary.

(4) The Recorder shall permit the assigned Personal Representative access to the Government Information and will provide the unclassified summary to the Personal Representative in advance of the Tribunal hearing.

(5) The Recorder shall ensure that coordination is maintained with Joint Task Force-Guantanamo Bay and the Criminal Investigative Task Force to deconflict any other ongoing activities and arrange for detainee movements and security.

(6) The Recorder shall present the Government Evidence orally or in documentary form to the Tribunal. The Recorder shall also answer questions, if any, asked by the Tribunal.

(7) The Recorder shall administer an appropriate oath to the Tribunal members, the Personal Representative, the paralegal/reporter, the interpreter, and all witnesses (including the detainee if he elects to testify under oath).

(8) The Recorder shall prepare a Record of Proceedings, and, if applicable, a record of the dissenting member's report. The Record of Proceedings should include:

(a) A statement of the time and place of the hearing, persons present, and their qualifications;

(b) The Tribunal Decision Report cover sheet;

(c) The classified and unclassified reports detailing the findings of fact upon which the Tribunal decision was based;

(d) Copies of all documentary evidence presented to the Tribunal and summaries of all witness testimony. If classified material is part of the evidence submitted or considered by the Tribunal, the report will be properly marked and handled in accordance with applicable security regulations; and

(e) A dissenting member's summary report, if any.

(9) The Recorder shall provide the detainee's Personal Representative the opportunity to review the record prior to the Recorder forwarding it to the President of the Tribunal. The Personal Representative may submit, as appropriate, observations or information that he/she believes was presented to the Tribunal and is not included or accurately reflected on the record.

(10) The Recorder shall submit the completed Record of Proceedings to the President of the Tribunal who shall sign and forward it to the Director, CSRT via the CSRT Legal Advisor. Once signed by the Tribunal President, the completed record is considered the official record of the Tribunal's decision.

(11) The Recorder shall ensure that all audiotapes of the Tribunal hearing are properly marked with identifying information and classification markings, and stored in accordance with applicable security regulations. These tapes are considered part of the case record and may be reviewed and transcribed as necessary for the legal sufficiency and convening authority reviews.

Personal Representative Qualifications, Roles and Responsibilities

A. Qualifications of Personal Representative

(1) For each case, the Director, CSRT, shall select a commissioned officer serving in the grade of O-4 or higher to serve as a Personal Representative. The Personal Representative shall not be a judge advocate.

(2) Personal Representatives must have at least a TOP SECRET security clearance. The Director shall ensure that only properly cleared officers are assigned as Personal Representatives.

B. Roles of the Personal Representative

(1) The detainees were notified of the Tribunal process per reference (a). When detailed to a detainee's case the Personal Representative shall further explain the nature of the CSRT process to the detainee, explain his opportunity to present evidence and assist the detainee in collecting relevant and reasonably available information and in preparing and presenting information to the Tribunal.

(2) The Personal Representative shall have due regard for classified information and safeguard it in accordance with all applicable instructions and regulations. The Personal Representative shall coordinate with an Information Security Officer (ISO) in the handling and safeguarding of classified material before, during, and after the Tribunal process.

C. Responsibilities of the Personal Representative

(1) The Personal Representative is responsible for explaining the nature of the CSRT process to the detainee. Upon first contact with the detainee, the Personal Representative shall explain to the detainee that no confidential relationship exists or may be formed between the detainee and the Personal Representative. The Personal Representative shall explain the detainee's opportunity to make a personal appearance before the Tribunal. The Personal Representative shall request an interpreter, if needed, to aid the detainee in making such appearance and in preparing his presentation. The Personal Representative shall explain to the detainee that he may be subject to questioning by the Tribunal members, but he cannot be compelled to make any statement or answer any questions. Paragraph D, below, provides guidelines for the Personal Representative meeting with the enemy combatant prior to his appearance before the Tribunal.

(2) After the Personal Representative has reviewed the Government Information, had an opportunity to consult with the detainee, and notified the detainee of his opportunity to contest his status, even if the detainee declines to participate as set forth above, the Personal Representative shall complete a Detainee Election Form (enclosure (5)) and provide this form to the Director, CSRT.

(3) The Personal Representative shall review the Government Evidence that the Recorder plans to present to the CSRT and shall permit the Recorder to review documentary evidence that will be presented to the CSRT on the detainee's behalf.

(4) Using the guidelines set forth in paragraph D, the Personal Representative shall meet with the detainee, using an interpreter if necessary, in advance of the CSRT. In no circumstance shall the Personal Representative disclose classified information to the detainee.

(5) If the detainee elects to participate in the Tribunal process, the Personal Representative shall present information to the Tribunal if the detainee so requests. The Personal Representative may, outside the presence of the detainee, comment upon classified information submitted by the Recorder that bears upon the presentation made on the detainee's behalf, if it would aid the Tribunal's deliberations.

(6) If the detainee elects not to participate in the Tribunal process, the Personal Representative shall assist the detainee by presenting information to the Tribunal in either open or closed sessions and may, in closed sessions, comment upon classified information submitted by the Recorder that bears upon the detainee's presentation, if it would aid the Tribunal's deliberations.

(7) The Personal Representative shall answer questions, if any, asked by the Tribunal.

(8) The Personal Representative shall be provided the opportunity to review the record prior to the Recorder forwarding it to the President of the Tribunal. The Personal Representative may submit, as appropriate, observations or information that he/she believes was presented to the Tribunal and is not included or accurately reflected on the record.

D. Personal Representative Guidelines for Assisting the Enemy Combatant

In discussing the CSRT process with the detainee and completing the Detainee Election Form, the Personal Representative shall use the guidelines provided below to assist the detainee in preparing for the CSRT:

> You have already been advised that a Combatant Status Review Tribunal has been established by the United States government to review your classification as an enemy combatant.
>
> A Tribunal of military officers shall review your case in "x" number of days [or other time frame as known], and I have been assigned to ensure you understand this process. The Tribunal shall review your case file, offer you an opportunity to speak on your own behalf if you desire, and ask questions. You also can choose not to appear at the Tribunal hearing. In that case I will be at the hearing and will assist you if you want me to do so.
>
> You will be provided with an opportunity to review unclassified information that relates to your classification as an enemy combatant. I will be able to review additional information that is classified. I can discuss the unclassified information with you.

You will be allowed to attend all Tribunal proceedings, except for proceedings involving deliberation and voting by the members, and testimony or other matters that would compromise U.S. national security if you attended. You will not be forced to attend, but if you choose not to attend, the Tribunal will be held in your absence and I will attend.

You will have the opportunity to question witnesses testifying at the Tribunal.

You will have the opportunity to present evidence to the Tribunal, including calling witnesses to testify on your behalf if those witnesses are reasonably available. If a witness is not considered by the Tribunal as reasonably available to testify in person, the Tribunal can consider evidence submitted by telephone, written statements, or other means rather than having a witness testify in person. I am available to assist you in gathering and presenting these materials, should you desire to do so. After the hearing, the Tribunal shall determine whether you should continue to be designated as an enemy combatant.

I am neither a lawyer nor your advocate, but have been given the responsibility of assisting your preparation for the hearing. None of the information you provide me shall be held in confidence and I may be obligated to divulge it at the hearing.
I am available to assist you in preparing an oral or written presentation to the Tribunal should you desire to do so. I am also available to speak for you at the hearing if you wish that kind of assistance.

Do you understand the process or have any questions about it?

The Tribunal is examining one issue: whether you are an enemy combatant against the United States or its coalition partners. Any information you can provide to the Tribunal relating to your activities prior to your capture is very important in answering this question. However, you may not be compelled to testify or answer questions at the Tribunal hearing.

Do you want to participate in the Tribunal process and appear before the Tribunal?

Do you wish to present information to the Tribunal or have me present information for you?

Is there anyone here in the camp or elsewhere who can testify on your behalf regarding your capture or status?

Do you want to have anyone else submit any information to the Tribunal regarding your status? [If so,] how do I contact them? If feasible and you can show the Tribunal how the information is relevant to your case, the Tribunal will endeavor to arrange for evidence to be provided by other means such as mail, e-mail, faxed copies, or telephonic or video-telephonic testimony.

Do you have any questions?

Combatant Status Review Tribunal Notice to Detainees*

You are being held as an enemy combatant by the United States Armed Forces. An enemy combatant is an individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. The definition includes any person who has committed a belligerent act or has directly supported such hostilities.

The U.S. Government will give you an opportunity to contest your status as an enemy combatant. Your case will go before a Combatant Status Review Tribunal, composed of military officers. This is not a criminal trial and the Tribunal will not punish you, but will determine whether you are properly held. The Tribunal will provide you with the following process:

1. You will be assigned a military officer to assist you with the presentation of your case to the Tribunal. This officer will be known as your Personal Representative. Your Personal Representative will review information that may be relevant to a determination of your status. Your Personal Representative will be able to discuss that information with you, except for classified information.

2. Before the Tribunal proceeding, you will be given a written statement of the unclassified factual basis for your classification as an enemy combatant.

3. You will be allowed to attend all Tribunal proceedings, except for proceedings involving deliberation and voting by the members, and testimony or other matters that would compromise U.S. national security if you attended. You will not be forced to attend, but if you choose not to attend, the Tribunal will be held in your absence. Your Personal Representative will attend in either case.

4. You will be provided with an interpreter during the Tribunal hearing if necessary.

5. You will be able to present evidence to the Tribunal, including the testimony of witnesses. If those witnesses you propose are not reasonably available, their written testimony may be sought. You may also present written statements and other documents. You may testify before the Tribunal but will not be compelled to testify or answer questions.

As a matter separate from these Tribunals, United States courts have jurisdiction to consider petitions brought by enemy combatants held at this facility that challenge the legality of their detention. You will be notified in the near future what procedures are available should you seek to challenge your detention in U.S. courts. Whether or not you decide to do so, the Combatant Status Review Tribunal will still review your status as an enemy combatant.

If you have any questions about this notice, your Personal Representative will be able to answer them.

[*Text of Notice translated, and delivered to detainees 12-14 July 2004]

Enclosure (4)

Sample Detainee Election Form

Date/Time: _____

ISN#: _____

Personal Representative: _____
[Name/Rank]

Translator Required? _____ Language? _____

CSRT Procedures Read to Detainee or Written Copy Read by Detainee?_____

Detainee Election:

☐ Wants to Participate in Tribunal

☐ Wants Assistance of Personal Representative

☐ Affirmatively Declines to Participate in Tribunal

☐ Uncooperative or Unresponsive

Personal Representative Comments:

_____

_____

_____

_____

_____

_____

_____
Personal Representative

Enclosure (5)

Sample Nomination Questionnaire

Department of Defense
Director, Combatant Status Review Tribunals

As a candidate to become a Combatant Status Review Tribunal member, Recorder, or Personal Representative, please complete the following questionnaire and provide it to the Director, Combatant Status Review Tribunal (CSRT). Because of the sensitive personal information requested, no copy will be retained on file outside of the CSRT.

1. Name (Last, First MI)_____ 2. Rank/Grade_____

3. Date of Rank_____ 4. Service _____ 5. Active Duty Service Date _____

6. Desig/MOS _____ 7. Date Current Tour Began: _____

8. Security Clearance Level _____ 9. Date of clearance: _____

10. Military Awards / Decorations:_____

_____

11. Current Duty Position_____ 12. Unit: _____

13. Date of Birth _____ 14. Gender ____ 15. Race or Ethnic Origin _____

16. Civilian Education. College/Vocational/Civilian Professional School: _____

17. Date graduated or dates attended (and number of years), school, location, degree/major:_____

_____

_____

18. Military Education. Dates attended, school/course title._____

_____

_____

19. Duty Assignments. Last four assignments, units, and dates of assignments. _____

_____

_____

_____

20. Have you had any relative or friend killed or wounded in Afghanistan or Iraq? _____ Explain.

_____

_____

_____

Enclosure (6)

21. Have you had any close relative or friend killed, wounded, or impacted by the events of September 11, 2001? ____ Explain._____

_____

_____

_____

22. Have you ever been in an assignment related to enemy prisoners of war or enemy combatants, to include the apprehension, detention, interrogation, or previous determination of status of a detainee at Guantanamo Bay? _____ Explain._____

_____

_____

_____

23. Do you believe you may be disqualified to serve as a Tribunal member, Recorder, or Personal Representative for any reason? Explain. _____

_____

_____

_____

24. Your name or image as well as information related to the enemy combatant may be released to the public in conjunction with the Combatant Status Review Tribunal process. Could this potential public affairs release affect your ability to objectively serve in any capacity in the Tribunal process?
Y/N_____Explain._____

_____

_____

_____

SIGNATURE OF OFFICER:_____DATE: _____

Approved____ Disapproved_____ Director, CSRT

Sample Appointment Letter for Combatant Status Review Tribunal Panel

Department of Defense
Director, Combatant Status Review Tribunals

Ser

From: Director, Combatant Status Review Tribunals

Subj: APPOINTMENT OF COMBATANT STATUS REVIEW TRIBUNAL

Ref: (a) Convening Authority Appointment Letter of 7 July 2004

By the authority given to me in reference (a), a Combatant Status Review Tribunal established by DCN XXX "Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba" is hereby convened. It shall hear such cases as shall be brought before it without further action of referral or otherwise.

The following commissioned officers shall serve as members of the Tribunal:

MEMBERS:

XXX, 999-99-9999; President*

YYY, 999-99-9999; Member*

ZZZ, 999-99-9999; Member*

J.M. MCGARRAH
RADM, CEC, USNR

[* The Order should note which member is the Judge Advocate required to be on the Tribunal.]

Enclosure (7)

Combatant Status Review Tribunal Hearing Guide

RECORDER: All rise. (The Tribunal enters)

[In Tribunal sessions where the detainee has waived participation, the Tribunal can generally omit the *italicized* portions.]

PRESIDENT: This hearing shall come to order.

RECORDER: This Tribunal is being conducted at [Time/Date] on board Naval Base Guantanamo Bay, Cuba. The following personnel are present:

_____, President

_____, Member

_____, Member

_____, Personal Representative

_____, Interpreter,

_____, Reporter/Paralegal, and

_____, Recorder

[Rank/Name] is the Judge Advocate member of the Tribunal.

PRESIDENT: The Recorder will be sworn. Do you, (name and rank of the Recorder) swear (or affirm) that you will faithfully perform the duties assigned in this Tribunal (so help you God)?

RECORDER: I do.

PRESIDENT: The reporter/paralegal will now be sworn.

RECORDER: Do you (name and rank of reporter/paralegal) swear or affirm that you will faithfully discharge your duties as assigned in this tribunal?

REPORTER/PARALEGAL: I do.

PRESIDENT: *The interpreter will be sworn. [If needed for witness testimony when detainee not present]*

RECORDER: Do you swear (or affirm) that you will faithfully perform the duties of interpreter in the case now hearing (so help you God)?

INTERPRETER: I do.

Enclosure (8)

PRESIDENT: *We will take a brief recess while the detainee is brought into the room.*

RECORDER: *All Rise.*

[Tribunal members depart, followed by the Recorder, Personal Representative, Interpreter, and Court Reporter. The detainee is brought into the room. All participants except the Tribunal members return to the Tribunal room.]

RECORDER: *All Rise. [The Tribunal members enter the room.]*

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: This hearing will come to order. You may be seated.

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: *(NAME OF DETAINEE),* this Tribunal is convened by order of the Director, Combatant Status Review Tribunals under the provisions of his Order of XX July 2004. It will determine whether *you [or Name of Detainee]* meet the criteria to be designated as an enemy combatant against the United States or its allies or otherwise meet the criteria to be designated as an enemy combatant.

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: This Tribunal shall now be sworn. All rise.

INTERPRETER: *(TRANSLATION OF ABOVE).*

[All persons in the room stand while Recorder administers the oath. Each voting member raises his or her right hand as the Recorder administers the following oath:]

RECORDER: Do you swear (affirm) that you will faithfully perform your duties as a member of this Tribunal; that you will impartially examine and inquire into the matter now before you according to your conscience, and the laws and regulations provided; that you will make such findings of fact and conclusions as are supported by the evidence presented; that in determining those facts, you will use your professional knowledge, best judgment, and common sense; and that you will make such findings as are appropriate according to the best of your understanding of the rules, regulations, and laws governing this proceeding, and guided by your concept of justice (so help you God)?

MEMBERS OF TRIBUNAL: I do.

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: The Recorder will now administer the oath to the Personal

Representative.

INTERPRETER: *(TRANSLATION OF ABOVE).*

[The Tribunal members lower their hands but remain standing while the following oath is administered to the Personal Representative:]

RECORDER: Do you swear (or affirm) that you will faithfully perform the duties of Personal Representative in this Tribunal (so help you God)?

PERSONAL REPRESENTATIVE: I do.

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: Please be seated. The Reporter, Recorder, and Interpreter have previously been sworn. This Tribunal hearing shall come to order.

[All personnel resume their seats.]

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: *(NAME OF DETAINEE), you are hereby advised that the following applies during this hearing:*

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: You may be present at all open sessions of the Tribunal. However, if you become disorderly, you will be removed from the hearing, and the Tribunal will continue to hear evidence.

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: You may not be compelled to testify at this Tribunal. However, you may testify if you wish to do so. Your testimony can be under oath or unsworn.

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: You may have the assistance of a Personal Representative at the hearing. Your assigned Personal Representative is present.

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: You may present evidence to this Tribunal, including the testimony of witnesses who are reasonably available. You may question witnesses testifying at the Tribunal.

INTERPRETER: *(TRANSLATION OF ABOVE).*
PRESIDENT: *You may examine documents or statements offered into evidence other than classified information. However, certain documents may be partially masked for security reasons.*

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: *Do you understand this process?*

INTERPRETER: *(TRANSLATION OF ABOVE)*

PRESIDENT: *Do you have any questions concerning the Tribunal process?*

INTERPRETER: *(TRANSLATION OF ABOVE)*

[In Tribunal sessions where the detainee has waived participation substitute:

PRESIDENT: [Rank/Name of Personal Representative] you have advised the Tribunal that [Name of Detainee] has elected to not participate in this Tribunal proceeding. Is that still the situation?

PERSONAL REPRESENTATIVE: Yes/No. [Explain].

PRESIDENT: Please provide the Tribunal with the Detainee Election Form marked as Exhibit D-a.]

[Presentation of Unclassified Information by Recorder and Detainee or his Personal Representative. Recorder evidence shall be marked in sequence R-1, R-2, etc. while evidence presented for the detainee shall be marked in sequence D-a, D-b, etc.]

[The Interpreter shall translate as necessary during this portion of the Tribunal.]

PRESIDENT: Recorder, please provide the Tribunal with the unclassified evidence.

RECORDER: I am handing the Tribunal what has previously been marked as Exhibit R-1, the unclassified summary of the evidence that relates to this detainee's status as an enemy combatant. A translated copy of this exhibit was provided to the Personal Representative in advance of this hearing for presentation to the detainee. In addition, I am handing to the Tribunal the following unclassified exhibits, marked as Exhibit R-2 through R-x. Copies of these Exhibits have previously been provided to the Personal Representative.

PRESIDENT: Does the Recorder have any witnesses to present?

RECORDER: Yes/no.

If witnesses appear before the Tribunal, the Recorder shall administer an appropriate oath:

Form of Oath for a Muslim

Do you [Name], in the Name of Allah, the Most Compassionate, the Most Merciful, swear that your testimony before this Tribunal will be the truth?

Form of Oath or Affirmation for Others

Do you (swear) (affirm) that the statements you are about to make shall be the truth, the whole truth, and nothing but the truth (so help you God)?

INTERPRETER: (TRANSLATION AS NECESSARY)

[Witnesses may be questioned by the Tribunal members, the Recorder, the Personal Representative, or the detainee.]

RECORDER: Mr./Madam President, I have no further unclassified information for the Tribunal but request a closed Tribunal session at an appropriate time to present classified information relevant to this detainee's status as an enemy combatant.

PRESIDENT: *[Name of detainee]* (or Personal Representative), *do you* (or does the detainee) want to present information to this Tribunal?

[If detainee not present, Personal Representative may present information to the Tribunal.]

INTERPRETER: (TRANSLATION OF ABOVE).

[If the detainee elects to make an oral statement:]

PRESIDENT: [Name of detainee] would you like to make your statement under oath?

INTERPRETER: (TRANSLATION OF ABOVE).

[After statement is completed:]

PRESIDENT: [Name of detainee] does that conclude your statement?

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: [Determines whether Tribunal members, Recorder, or Personal Representative have any questions for detainee.]

PRESIDENT: *[Name of detainee] do you have any other evidence to present to this Tribunal?*

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: All unclassified evidence having been provided to the Tribunal, this concludes this Tribunal session.

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: *(Name of detainee), you shall be notified of the Tribunal decision upon completion of the review of these proceedings by the convening authority in Washington, D.C.*

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: *If the Tribunal determines that you should not be classified as an enemy combatant, you will be released to your home country as soon as arrangements can be made.*

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: *If the Tribunal confirms your classification as an enemy combatant you shall be eligible for an Administrative Review Board hearing at a future date.*

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: *That Board will make an assessment of whether there is continued reason to believe that you pose a threat to the United States or its allies in the ongoing armed conflict against terrorist organizations such as al Qaida and its affiliates and supporters or whether there are other factors bearing upon the need for continued detention.*

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: *You will have the opportunity to be heard and to present information to the Administrative Review Board. You can present information from your family that might help you at the Board. You are encouraged to contact your family as soon as possible to begin to gather information that may help you.*

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: *A military officer will be assigned at a later date to assist you in the Administrative Review Board process.*

INTERPRETER: *(TRANSLATION OF ABOVE)*

PRESIDENT: This Tribunal hearing is adjourned.

RECORDER: All Rise. [If moving into Tribunal session in which classified material will be discussed add:] This Tribunal is commencing a closed session. Will everyone but the Tribunal members, Personal Representative, and Reporter/Paralegal please leave the Tribunal room.

PRESIDENT: [When Tribunal room is ready for closed session.] You may be seated. The Tribunal for [Name of detainee] is now reconvened without the detainee being present to prevent a potential compromise of national security due to the classified nature of the evidence to be considered. The Recorder will note the date and time of this session for the record.

[Closed Tribunal Session Commences, as necessary, with only properly cleared personnel present. Presentation of classified information by Recorder and, when appropriate, Personal Representative. Recorder evidence shall be marked in sequence R-1, R-2, etc. while evidence presented for the detainee shall be marked in sequence D-a, D-b, etc. All evidence will be properly marked with the security classification.]

PRESIDENT: This Tribunal session is adjourned and the Tribunal is closed for deliberation and voting.

RECORDER: Notes time and date when Tribunal closed.

[CLASSIFICATION]

Combatant Status Review Tribunal Decision Report Cover Sheet

[CLASSIFICATION]: UNCLASSIFIED Upon Removal of Enclosure(s) (2) [and (3)]

TRIBUNAL PANEL: _____

ISN #: _____ DATE: _____

Ref: (a) Convening Order of XX YYY 2004
(b) CSRT Implementation Directive of XX July 2004
(c) DEPSECDEF Memo of 7 July 2004

Encl: (1) Unclassified Summary of Basis for Tribunal Decision (U)
(2) Classified Summary of Basis for Tribunal Decision (U)
(3) Copies of Documentary Evidence Presented (U)

This Tribunal was convened by references (a) and (b) to make a determination as to whether the detainee meets the criteria to be designated as an enemy combatant as defined in reference (c).

The Tribunal has determined that he (is) (is not) designated as an enemy combatant as defined in reference (c).

[If yes] In particular the Tribunal finds that this detainee is a member of, or affiliated with, _____ (al Qaida, Taliban, other), as more fully discussed below and in the enclosures.

Enclosure (1) provides an unclassified account of the basis for the Tribunal's decision, as summarized below. A detailed account of the evidence considered by the Tribunal and its findings of fact are contained in enclosure (2).

_____
_____
_____
_____
_____
_____
_____

_____
(Rank, Name) President

Enclosure (9)

Exhibit C to Respondents' Motion to Dismiss or for Judgment

Army Regulation 190–8
OPNAVINST 3461.6
AFJI 31-304
MCO 3461.1

Military Police

Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees

Headquarters
Departments of the Army,
the Navy, the Air Force,
and the Marine Corps
Washington, DC
1 October 1997

UNCLASSIFIED

SUMMARY of CHANGE

AR 190-8/OPNAVINST 3461.6/AFJI 31-304/MCO 3461.1
Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees

This revision--

- Establishes a multi-service regulation for all services (para 1-4a).
- Ensures compliance with DOD Directive 2310.1 dated August 1994 (para 1-4g).
- Establishes HQDA, Deputy Chief of Staff for Operations as the primary Army Staff responsibility for the Enemy Prisoner of War, Civilian Internee and Retained Persons Program (para 1-4c).
- Establishes a DD FORM 2745, Enemy Prisoner of War(EPW) Capture Tag (para 2-1b).
- Highlights Combatant Commanders, Task Force Commanders and Joint Task Force Commanders responsibilities (para 1-4g).
- Establishes procedures for conducting tribunals (para 1-6).
- Establishes Public Affairs policy (para 1-9).
- Establishes policy for EPW held aboard ship (para 2-1b).
- Updates OCONUS evacuation policy (para 2-3).
- Establishes the use of Health and Comfort Packs as a temporary substitution for Advance of Pay for short term operations (para 3-4h).
- Updates procedures for contracting EPW (para 4-22).
- Combines AR 190-8 and AR 190-57 (para 6-1).

Headquarters
Departments of the Army,
the Navy, the Air Force,
and the Marine Corps
Washington, DC
1 October 1997

*Army Regulation 190–8
*OPNAVINST 3461.6
*AFJI 31–304
*MCO 3461.1
Effective 1 November 1997

Military Police

Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees

By Order of the Secretary of the Navy:

TOGO D WEST,JR.
Secretary of the Army

J.L. JOHNSON
Admiral, United States Navy
Chief of Naval Operations
Acting

J.S. Mobley
Rear Admiral, United States Navy
Director, Navy Staff

By Order of the Secretary of the Air Force:

RICHARD A. COLEMAN
Colonel, USAF
Chief of Security Police

By Order of the Secretary of the Navy:

LT GENERAL J.L. JONES, USMC
Marine Corps Deputy Chief of Staff
for Plans, Policies and Operations

History. This printing publishes a revision of this publication. Because the publication has been extensively revised the changed portions have not been highlighted.

Summary. This regulation implements Department Of Defense Directive 2310.1 and establishes policies and planning guidance for the treatment, care, accountability, legal status, and administrative procedures for Enemy Prisoners of War, Civilian Internees, Retained Persons, and Other Detainees. This regulation is a consolidation of Army Regulation 190-8 and Army Regulation 190-57 and incorporates SECNAV Instruction 3461. 3 and Air Force Joint Instruction 31-304. Policy and procedures established herein apply to the services and their capabilities to the extent that they are resourced and organized for enemy prisoner of war operations.

Applicability. This is a multi-service regulation. It applies to the Army, Navy, Air Force and Marine Corps and to their Reserve components when lawfully ordered to active duty under the provisions of Title 10 United States Code.

Proponent and exception authority. The proponent of this regulation is the Deputy Chief of Staff for Operations and Plans. The proponent has the authority to approve exceptions to this regulation that are consistent with controlling law and regulation. Proponents may delegate the approval authority, in writing, to a division chief within the proponent agency in the grade of colonel or the civilian equivalent.

Army management control process. The Regulation contains management control provisions in accordance with AR 11-2, but does not contain checklists for conducting management control. Reviews are used to accomplish assessment of management controls.

Supplementation. Army supplementation of this regulation and establishment of command or local forms is prohibited without prior approval from HQDA (DAMO-ODL), WASH DC 20310. Navy, Marine Corps and Air Force supplementation of this regulation is authorized, but is not required. If supplements are issued, major or second echelon commands will furnish one copy of each supplement to their headquarters, as follows: Navy, to the Chief of Naval Operations (N511), 2000 Navy Pentagon, Washington DC 20350-2000, Marine Corps, to the Commandant of the Marine Corps, HQ USMC (POS-10) 2 Navy Annex, Washington DC, 20380-1775 11), and Air Force, to HQ USAF/SPO, 1340 Air Force Pentagon, Washington, DC 20330-1340.

Suggested Improvements. Users are invited to send comments and suggested improvements through channels as follows: HQDA (DAMO-ODL), WASH DC 20310-0440.

Distribution. *Army:* Distribution of this regulation is made in accordance with initial distribution number (IDN) 092120, intended for command levels A, B, C, D, and E for Active Army, Army National Guard, U. S. Army Reserve.
Navy: SNDL A (Navy Department); B5 (Coast Guard); (COMDTCOGARD, only) 21A (Fleet Commanders in Chief); 22A (Fleet Commanders); 23 (Force Commanders); 24 (Type Commanders); 26A (Amphibious Groups); 28 (Squadron, Division, and Group Commanders—Ships); 41A (COMSC); SECNAV/OPNAV Directives Control Office,Washington Navy Yard Bldg 200, 901 M Street SE, Washington DC 20374-5074
Air Force: F
Marine Corps: PCN 10203324000

*This regulation supersedes AR 190-8, 1 June 1982, and rescinds AR 190-57, 4 March 1987. This regulation also rescinds DA Form 5451-R, August 1985; DA Form 5452-R, August 1985; and DA Form 5976, January 1991.

UNCLASSIFIED

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Glossary

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Chapter 1
Introduction

1–1. Purpose

a. This regulation provides policy, procedures, and responsibilities for the administration, treatment, employment, and compensation of enemy prisoners of war (EPW), retained personnel (RP), civilian internees (CI) and other detainees (OD) in the custody of U.S. Armed Forces. This regulation also establishes procedures for transfer of custody from the United States to another detaining power.

b. This regulation implements international law, both customary and codified, relating to EPW, RP, CI, and ODs which includes those persons held during military operations other than war. The principal treaties relevant to this regulation are:

(1) The 1949 Geneva Convention Relative to the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GWS).

(2) The 1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GWS SEA).

(3) The 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GPW).

(4) The 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC), and In the event of conflicts or discrepancies between this regulation and the Geneva Conventions, the provisions of the Geneva Conventions take precedence.

1–2. References

Required and related publications and prescribed and referenced forms are listed in appendix A.

1–3. Explanation of abbreviations and terms

Abbreviations and special terms used in this regulation are explained in the glossary.

1–4. Responsibilities

a. The Secretaries of the Military Departments. The Secretaries will—

(1) Develop internal policies and procedures consistent with this regulation in support of the Department of Defense (DOD), EPW/CI and other detainee programs.

(2) Ensure that appropriate training, as required, pursuant to DOD Directive 5100.77 is provided so that the principles of the Geneva Conventions, and the rights and obligations thereunder, are known by members of their service.

(3) Ensure that suspected or alleged violations of the international law of war are promptly reported and investigated per DOD Directive 5100.77.

(4) Conduct a periodic review of the EPW, CI and RP Program and training to ensure compliance with the law of war.

b. The Secretary of the Army (SA). The Secretary of the Army is the DOD Executive Agent (EA) for administering the DOD EPW, CI and RP Program. The SA, in coordination with the Assistant Secretary of Defense, International Security Affairs (ASD-ISA), will plan and develop the policy and coordinate the operation of the programs.

c. The Army Deputy Chief of Staff for Operations and Plans (DCSOPS). DCSOPS has primary Headquarters, Department of the Army (HQDA) staff responsibility for the EPW, CI and RP programs. The DCSOPS will-

(1) Develop and disseminate policy guidance for the treatment, care, accountability, legal status, and processing of EPW, CI, RP, and ODs.

(2) Report suspected or alleged violations of law committed by or against military personnel or civilians.

(3) Provide HQDA staff supervision for National Prisoner of War Information Center (NPWIC).

(4) Develop plans for the initial assignment and replacement of block internment serial numbers (ISNs) from the NPWIC to the Branch PWIC and for the assignment of the theater code section of the ISN.

(5) Provide necessary reports, coordination, technical advice, and staff assistance to:

(a) The Office of the Secretary of Defense (OSD).

(b) The Joint Chiefs of Staff (JCS).

(c) The military departments.

(d) Unified commands.

(e) Department of State and other Federal agencies.

(f) The International Committee of the Red Cross (ICRC).

(g) Protecting powers.

d. The Army Judge Advocate General (TJAG). The TJAG will provide HQDA guidance and advice to commanders on the legal aspects of the EPW, CI and RP program. TJAG will-

(1) Conduct liaison in coordination with the ASA-ISA, the Department of State, the Department of Justice, and other Federal agencies; the JCS; the Defense Intelligence Agency (DIA); the military departments; the ICRC; the Protecting Powers; and other detaining powers, as required.

(2) Provide advice and assistance to commanders on legal aspects of reported violations by EPW, CI, RP, and ODs.

(3) Provide theater guidelines for any EPW, CI and RP claims against the U.S. Government.

(4) Provide guidance regarding GPW Article 5 Tribunals.

e. Deputy Chief of Staff for Logistics (DCSLOG). The DCSLOG will ensure logistical resources are available to support EPW operations.

f. The Assistant Secretary of the Army Financial Management (ASA-FM&C). The ASA-FM&C will establish the policies and procedures governing entitlement, control, and accounting for pay, allowances, and personal funds for EPW, CI, RP, and ODs per the provisions of the GPW and GC.

g. Combatant Commanders, Task Force Commanders and Joint Task Force Commanders. Combatant Commanders, Task Force Commanders and Joint Task Force Commanders have the overall responsibility for the EPW, CI and RP program, operations, and contingency plans in the theater of operation involved to ensure compliance with international law of war. DOD Directive 2310.1 provides that persons captured or detained by the U.S. Military Services shall normally be handed over for safeguarding to U.S. Army Military Police, or to detainee collecting points or other holding facilities and installations operated by U.S. Army Military Police as soon as practical. U.S. Army Military Police have units specifically organized to perform the long-term functions associated with EPW/CI internment. Commanders must ensure the proper force structure is included in any joint operational plans. Commanders at all levels will ensure that all EPW, CI, RP, and ODs are accounted for and humanely treated, and that collection, evacuation, internment, transfers, release, and repatriation operations are conducted per this regulation. Combatant Commanders, Task Force Commanders and Joint Task Force Commanders will—

(1) Provide for an EPW, CI and RP camp liaison and assistance program to ensure the protection of U.S. interests per the Geneva Conventions upon the capture and transfer of EPW, CI, RP, and ODs to a host or other nation.

(2) Plan and procure logistical support to include: transportation, subsistence, personal, organizational and Nuclear, Biological & Chemical (NBC) clothing and equipment items, mail collection and distribution, laundry, and bath for EPW, CI and RP.

(3) Collect and dispose of captured enemy supplies and equipment through theater logistics and Explosive Ordnance Disposal (EOD) channels.

(4) Coordinate for acquisition of real estate, and as required, for planning, design, contracting, and construction of facilities for EPW, CI and RP with the Theater or JTF Engineer.

(5) Establish guidance for the use, transport, and evacuation of EPW, CI, RP, and ODs in logistical support operations.

(6) Identify requirements and allocations for Army Medical units in support of the EPW, CI and RP Program, and ensure that the

medical annex of OPLANs, OPORDs and contingency plans includes procedures for treatment of EPW, CI, RP, and ODs. Medical support will specifically include:

(a) First aid and all sanitary aspects of food service including provisions for potable water, pest management, and entomological support.

(b) Preventive medicine.

(c) Professional medical services and medical supply.

(d) Reviewing, recommending, and coordinating the use and assignment of medically trained EPW, CI, RP and OD personnel and medical material.

(e) Establishing policy for medical repatriation of EPW, CI and RP and monitoring the actions of the Mixed Medical Commission.

h. U. S. Army Criminal Investigation Command (USACIDC). USACIDC will provide criminal investigative support to EPW, CI and RP Camp Commanders per AR 195-2.

1–5. General protection policy

a. U.S. policy, relative to the treatment of EPW, CI and RP in the custody of the U.S. Armed Forces, is as follows:

(1) All persons captured, detained, interned, or otherwise held in U.S. Armed Forces custody during the course of conflict will be given humanitarian care and treatment from the moment they fall into the hands of U.S. forces until final release or repatriation.

(2) All persons taken into custody by U.S. forces will be provided with the protections of the GPW until some other legal status is determined by competent authority.

(3) The punishment of EPW, CI and RP known to have, or suspected of having, committed serious offenses will be administered IAW due process of law and under legally constituted authority per the GPW, GC, the Uniform Code of Military Justice and the Manual for Courts Martial.

(4) The inhumane treatment of EPW, CI, RP is prohibited and is not justified by the stress of combat or with deep provocation. Inhumane treatment is a serious and punishable violation under international law and the Uniform Code of Military Justice (UCMJ).

b. All prisoners will receive humane treatment without regard to race, nationality, religion, political opinion, sex, or other criteria. The following acts are prohibited: murder, torture, corporal punishment, mutilation, the taking of hostages, sensory deprivation, collective punishments, execution without trial by proper authority, and all cruel and degrading treatment.

c. All persons will be respected as human beings. They will be protected against all acts of violence to include rape, forced prostitution, assault and theft, insults, public curiosity, bodily injury, and reprisals of any kind. They will not be subjected to medical or scientific experiments. This list is not exclusive. EPW/RP are to be protected from all threats or acts of violence.

d. Photographing, filming, and video taping of individual EPW, CI and RP for other than internal Internment Facility administration or intelligence/counterintelligence purposes is strictly prohibited. No group, wide area or aerial photographs of EPW, CI and RP or facilities will be taken unless approved by the senior Military Police officer in the Internment Facility commander's chain of command.

e. A neutral state or an international humanitarian organization, such as the ICRC, may be designated by the U.S. Government as a Protecting Power (PP) to monitor whether protected persons are receiving humane treatment as required by the Geneva Conventions. The text of the Geneva Convention, its annexes, and any special agreements, will be posted in each camp in the language of the EPW, CI and RP.

f. Medical Personnel. Retained medical personnel shall receive as a minimum the benefits and protection given to EPW and shall also be granted all facilities necessary to provide for the medical care of EPW. They shall continue to exercise their medical functions for the benefit of EPW, preferably those belonging to the armed forces upon which they depend, within the scope of the military laws and regulations of the United States Armed Forces. They shall be provided with necessary transport and allowed to periodically visit EPW situated in working detachments or in hospitals outside the EPW camp. Although subject to the internal discipline of the camp in which they are retained such personnel may not be compelled to carry out any work other than that concerned with their medical duties. The senior medical officer shall be responsible to the camp military authorities for everything connected with the activities of retained medical personnel.

g. Religion.

(1) EPW, and RP will enjoy latitude in the exercise of their religious practices, including attendance at the service of their faith, on condition that they comply with the disciplinary routine prescribed by the military authorities. Adequate space will be provided where religious services may be held.

(2) Military chaplains who fall into the hands of the U.S. and who remain or are retained to assist EPW, and RP, will be allowed to minister to EPW, RP, of the same religion. Chaplains will be allocated among various camps and labor detachments containing EPW, RP, belonging to the same forces, speaking the same language, or practicing the same religion. They will enjoy the necessary facilities, including the means of transport provided in the Geneva Convention, for visiting the EPW, RP, outside their camp. They will be free to correspond, subject to censorship, on matters concerning their religious duties with the ecclesiastical authorities in the country of detention and with international religious organizations. Chaplains shall not be compelled to carry out any work other than their religious duties.

(3) Enemy Prisoners of War, who are ministers of religion, without having officiated as chaplains to their own forces, will be at liberty, whatever their denomination, to minister freely to the members of their faith in U.S. custody. For this purpose, they will receive the same treatment as the chaplains retained by the United States. They are not to be obligated to do any additional work.

(4) If EPW, RP, do not have the assistance of a chaplain or a minister of their faith. A minister belonging to the prisoner's denomination, or in a minister's absence, a qualified layman, will be appointed, at the request of the prisoners, to fill this office. This appointment, subject to approval of the camp commander, will take place with agreement from the religious community of prisoners concerned and, wherever necessary, with approval of the local religious authorities of the same faith. The appointed person will comply with all regulations established by the United States.

1–6. Tribunals

a. In accordance with Article 5, GPW, if any doubt arises as to whether a person, having committed a belligerent act and been taken into custody by the US Armed Forces, belongs to any of the categories enumerated in Article 4, GPW, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

b. A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces, and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists.

c. A competent tribunal shall be composed of three commissioned officers, one of whom must be of a field grade. The senior officer shall serve as President of the Tribunal. Another non-voting officer, preferably an officer in the Judge Advocate General Corps, shall serve as the recorder.

d. The convening authority shall be a commander exercising general courts-martial convening authority.

e. Procedures.

(1) Members of the Tribunal and the recorder shall be sworn. The recorder shall be sworn first by the President of the Tribunal. The recorder will then administer the oath to all voting members of the Tribunal to include the President.

(2) A written record shall be made of proceedings.

(3) Proceedings shall be open except for deliberation and voting by the members and testimony or other matters which would compromise security if held in the open.

(4) Persons whose status is to be determined shall be advised of their rights at the beginning of their hearings.

(5) Persons whose status is to be determined shall be allowed to attend all open sessions and will be provided with an interpreter if necessary.

(6) Persons whose status is to be determined shall be allowed to call witnesses if reasonably available, and to question those witnesses called by the Tribunal. Witnesses shall not be considered reasonably available if, as determined by their commanders, their presence at a hearing would affect combat or support operations. In these cases, written statements, preferably sworn, may be submitted and considered as evidence.

(7) Persons whose status is to be determined have a right to testify or otherwise address the Tribunal.

(8) Persons whose status is to be determined may not be compelled to testify before the Tribunal.

(9) Following the hearing of testimony and the review of documents and other evidence, the Tribunal shall determine the status of the subject of the proceeding in closed session by majority vote. Preponderance of evidence shall be the standard used in reaching this determination.

(10) A written report of the tribunal decision is completed in each case. Possible board determinations are:

(a) EPW.

(b) Recommended RP, entitled to EPW protections, who should be considered for certification as a medical, religious, or volunteer aid society RP.

(c) Innocent civilian who should be immediately returned to his home or released.

(d) Civilian Internee who for reasons of operational security, or probable cause incident to criminal investigation, should be detained.

f. The recorder shall prepare the record of the Tribunal within three work days of the announcement of the tribunal's decision. The record will then be forwarded to the first Staff Judge Advocate in the internment facility's chain of command.

g. Persons who have been determined by a competent tribunal not to be entitled to prisoner of war status may not be executed, imprisoned, or otherwise penalized without further proceedings to determine what acts they have committed and what penalty should be imposed. The record of every Tribunal proceeding resulting in a determination denying EPW status shall be reviewed for legal sufficiency when the record is received at the office of the Staff Judge Advocate for the convening authority.

1–7. The National Prisoner of War Information Center (NPWIC)

The NPWIC will—

a. Forward blocks of ISNs to designated Branch PWIC in Theater and CONUS, as required.

b. Obtain and store information concerning EPW, CI and RP, and their confiscated personal property. Information will be collected and stored on each EPW, CI, and RP captured and detained by U.S. Armed Forces. This includes those EPW, RP, who were captured by the United States but are in custody of other powers and those who have been released or repatriated. EPW, CI and RP cannot be forced to reveal any information however they are required to provide their name, rank, serial number and date of birth. The Geneva Convention requires the NPWIC to collect and store the following information for EPW, RP:

(1) Complete name.

(2) ISN.

(3) Rank.

(4) Serial number.

(5) Date of birth.

(6) City of birth.

(7) Country of birth.

(8) Name and address of next of kin.

(9) Date of capture.

(10) Place of capture.

(11) Capturing unit.

(12) Circumstances of capture.

(13) Location of confiscated personal property.

(14) Nationality.

(15) General statement of health.

(16) Nation in whose armed services the individual is serving.

(17) Name and address of a person to be notified of the individual's capture.

(18) Address to which correspondence may be sent.

(19) Certificates of death or duly authenticated lists of the dead.

(20) Information showing the exact location of war graves together with particulars of the dead.

(21) Notification of capture.

(22) List of personal articles of value not restored upon repatriation.

c. Obtain and store information concerning CI and ODs who are kept in the custody of U.S. Armed Forces who are subjected to assigned residence, or who were interned and then released. The following information will be collected:

(1) Any particulars that may assist in the individual's identification. This information shall include at least the person's surname, first names, place and date of birth, nationality, last residence and distinguishing characteristics, the first name of the father and the maiden name of the mother, the date, place and nature of the action taken with regard to the individual, the address at which correspondence may be sent and the name and address of the person to be informed.

(2) The individual's personal data for notification of his or her internment, state of health, and changes to this data.

(3) Certificates of death or authenticated lists of the dead and information showing the location of graves.

(4) Authenticated lists of personal valuables left by these protected persons.

(5) Information pertaining to children living in territories occupied by the United States. This will include all data necessary for identifying children whose identity is in doubt.

d. Process all inquiries concerning EPW and RP captured by U.S. Armed Forces.

e. Make reports to the ICRC, the State Department, and other Federal agencies as required.

f. Provide to the adverse party via the ICRC's Central Tracing Agency (CTA) all pertinent information pertaining to EPW, CI, and RP, in custody of the U.S. Armed Forces.

g. Transmit via the CTA/ICRC/PP, all official documents and information on judicial proceedings concerning EPW and RP captured, interned, retained or detained by U.S. Armed Forces.

h. Information and Property Transfers.

(1) In response to an inquiry, the NPWIC will forward all information and documents to the CTA or PP.

(2) Valuables and personal property which can be returned to a released or repatriated person will be forwarded through the CTA or PP.

(3) Valuables and personal property of deceased EPW/RP, which can be released, will be forwarded to the next of kin through the CTA or PP.

i. The ICRC/PP transmits information, documents, and personal effects to the State it represents as follows:

(1) If civilians are concerned, to their countries of origin and/or residence.

(2) If combatants or EPW, CI, and RP are concerned, to their country of origin or to the Power on which they depend.

1–8. The Branch PWIC

a. The Branch PWIC functions as the field operations agency for the NPWIC. It is the central agency responsible to maintain information on all EPW, CI and RP and their personal property within an assigned theater of operations or in CONUS.

b. The Branch PWIC serves as the theater repository for information pertaining to:

(1) Accountability of EPW, CI, and RP and implementation of DOD policy.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BENJAMIN MOHAMMED AL HABASHI, *et al.*,	)	
Petitioners,	)	
v.	)	Civil Action No. 05-CV-0765 (EGS)
GEORGE W. BUSH, President of the United States, *et al.*,	)	
Respondents.	)	

NOTICE OF SUBMISSION OF CERTAIN PORTIONS OF RESPONDENTS' RESPONSE TO ORDER TO SHOW CAUSE UNDER SEAL

Respondents hereby submit, as explained herein, the final record of proceedings before the Combatant Status Review Tribunal pertaining to petitioner Binyam Ahmed Mohammad (listed in the petition as Benjamin Mohammed Al Habashi) in response to the April 21, 2005 docket entry in this matter, entitled "Order to Show Cause," directing the government to "show cause why this Writ of Habeas Corpus should not be granted." This factual submission demonstrates, in light of the applicable legal standards, that no writ of habeas corpus should issue in this case. See Respondents' Response to Order to Show Cause, filed concurrently herewith.

Consistent with practice in the coordinated Guantanamo Bay detainee cases and the applicable protective order in this case ("Protective Order"), see Order dated April 21, 2005 (applying Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba, and related orders, to this case), the portion of this submission suitable for public release is attached as Exhibit 1 to Respondents' Response to Order to Show Cause, filed concurrently herewith. The remaining portions of this submission,

including information that is classified or not suitable for public release, are being submitted under seal. One copy of the submission is being submitted to the Court for *in camera* review. Another copy of the submission, containing classified information suitable for disclosure to counsel under seal, is being made available to petitioner's counsel who have been issued security clearances and have otherwise complied with the Protective Order. Any redactions made in the submission are explained in the declaration(s)/certification(s) submitted therewith. Both copies of the submission contain highlighting, explained therein, consistent with the Court's Order for Specific Disclosures Relating to Respondents' Motion to Designate as "Protected Information" Unclassified Information and Petitioners' Motion for Access to Unredacted Factual Returns, entered on December 8, 2004 by Judge Green in the coordinated cases. Respondents have designated certain highlighted, unclassified information in the submission as "protected information" under the Protective Order. Pursuant to the Protective Order, once counsel for petitioner has reviewed the submission and counsel for the parties have conferred, respondents will file a motion requesting that the Court designate the information in the submission as "protected" pursuant to the Protective Order.[1]

Dated: April 26, 2005

Respectfully submitted,

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KENNETH L. WAINSTEIN
United States Attorney

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Assistant to the Solicitor General

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[1] Pursuant to the Court's Order dated April 21, 2005, respondents are disclosing this information to petitioner's counsel, who shall treat such information as "protected information" pursuant to the Protective Order pending further order of the Court.

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IN THE UNITED STATES DISTRICT COURT
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Petitioners,	)	
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GEORGE W. BUSH, President of the United States, *et al.*,	)	
Respondents.	)	

ATTORNEY APPEARANCE

Undersigned counsel, Terry M. Henry, hereby enters his appearance as one of the counsel for respondents in the above-named case.

Dated: April 26, 2005

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMIL EL-BANNA, *et al.*, Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 04-1144 (RWR)
OMAR DEGHAYES, *et al.*, Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 04-2215 (RMC)
HISHAM SLITI, *et al.*, Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 05-429 (RJL)

USAMA HASAN ABU KABIR, *et al.*, Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 05-431 (RJL)
AHAMED ABDUL AZIZ, *et al.*, Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 05-492 (JR)
ADEL HAMLILY, *et al.*, Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 05-763 (JDB)

AHMED ABU IMRAN, *et al.*, Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 05-764 (CKK)
BENJAMIN MOHAMMED AL HABASHI, *et al.*, Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 05-765 (EGS)
ABDUL HADI IBN EL HATHILY AL HAMAMY, *et al.*, Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 05-766 (RJL)

RESPONDENTS' MEMORANDUM IN OPPOSITION TO PETITIONERS' MOTION FOR A PRELIMINARY INJUNCTION CONCERNING CONDITIONS OF CONFINEMENT

Petitioners have filed a Motion for a Preliminary Injunction Concerning Conditions of Confinement ("Motion for Preliminary Injunction")[1] based upon unsupported and inaccurate allegations pertaining to hunger strike protests of some of the detainees currently held at the United States Naval Base at Guantanamo Bay, Cuba ("Guantanamo"). Petitioners' counsel points to an ongoing hunger strike by some of the Guantanamo detainees and resorts to sensational accounts of the general effects of a hunger strike on the human body. See Motion for Preliminary Injunction at 5-6, 43. Contrary to petitioners' spurious allegations, however, the medical personnel at Guantanamo have long-standing procedures in place for responding appropriately to hunger strikes that include protocols to intervene to take medically appropriate measures to preserve detainees' lives and health. As noted in the sworn declaration of Major General Jay W. Hood, the Commander of Joint Task Force-Guantanamo ("JTF-GTMO"), security forces at Guantanamo monitor each detainee's daily intake of food and water. Declaration of MG Jay W. Hood ("Hood Decl.") ¶ 5 (attached as Exhibit A). If medical personnel have reason to believe that the continuation of a hunger strike might endanger the health of a detainee, the detainee is admitted to the detention hospital. Id. ¶ 6. The detainee is then encouraged to eat food and drink liquids and is counseled on the health risks associated with refusing to do so. Id. If a detainee continues to refuse to eat or drink and a medical officer determines that the detainee's health or life might be seriously threatened if treatment is not promptly administered, feeding by intravenous means or through a feeding tube will be authorized by Major General Hood. Id. ¶ 8. No detainee at Guantanamo has ever died, from a

[1] Counsel for petitioners has filed the same Motion for Preliminary Injunction in each of the above-captioned cases. See Motion for Preliminary Injunction at 1 n.1. For the convenience of the Court and the parties, respondents hereby consolidate their responses to each of those motions in this memorandum.

hunger strike or otherwise, since the detentions at issue in these cases began.

Petitioners' counsel presumes, without any legitimate basis, that the military would not and will not intervene to provide medically appropriate measures to preserve the lives and health of hunger-striking detainees,[2] leading counsel to the baseless conclusion that "people are likely to die." See Motion for Preliminary Injunction at 3, 8-9, 43. Petitioner then relies upon that erroneous premise to justify emergency intervention by the Court. Tellingly, however, petitioners' motion fails to specifically request any direct intervention by the Court directing medical intervention in order to preserve the lives or health of detainees participating in the hunger strike; rather, counsel requests that general conditions of confinement at Guantanamo be improved. See, e.g., id. at 46 (Prayer for Relief). In other words, petitioners' counsel improperly seeks to employ the processes of this Court, along with shocking, vituperative, and trumped up rhetoric, merely to further the demands of various hunger-striking detainees. See, e.g., id. at 9-13 (castigating Military for allegedly negotiating with hunger-striking detainees in bad faith); id. at 43 (same); id. at 45 (same; also accusing respondents of being "paralyzed by their arrogance, blinded by their misguided quest for vengeance" and "prepared to sit back and have prisoners starve themselves to death"). Court processes, however, should only be used for legitimate, case-specific dispute resolution. Cf. Pigford v. Veneman, 225 F.R.D. 54, 59 (D.D.C. 2005) (Friedman, J.) (striking various notices filed in the case and explaining that "the purpose

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[2] The only support that counsel for petitioners offers to substantiate his allegation that the military would not intervene to save the life and protect the health of a detainee is an unsworn statement, that counsel has not provided (see infra note 3), from a detainee which, by its own terms, merely indicates that a doctor noted verbal statements from detainees indicating that they did not wish to be resuscitated if they lapsed into a coma. See Motion for Preliminary Injunction at 11.

of such a filing is not to carry on a conversation with the world at large. The Court is a forum for dispute resolution, not a means of disseminating press releases, [or] letters to the two political branches of government (the Congress and the Executive Branch) . . . .").[3]

Thus, stripped of its purported urgency and baseless alleged dire outcomes (outcomes contradicted by the sworn declaration of Major General Hood), and disregarding its improper invective, petitioners' motion is merely a repeat of similar motions filed by petitioners' counsel in other related cases challenging the general conditions of confinement at Guantanamo. The motion should be denied for multiple reasons, including the fact that these cases are stayed.[4] In the motion, petitioners seek, among other things, an order requiring respondents to allegedly

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[3] In addition to its baseless and inaccurate premises and approach, petitioners' motion is riddled with assertions based often on nothing more than layer upon layer of hearsay contained in unsworn or incompetent evidence – such as press reports and other apparently unsworn memos not provided to the Court – and for this reason also, it should be stricken from the record. See, e.g., Motion for Preliminary Injunction at 7 (alleging that "the military simply cannot be trusted to provide the Court and the public with accurate and reliable information about the prisoners' health and welfare" and attributing the statement "'[w]e care nothing if one of you dies'" to unnamed military personnel); id. at 9-10 (string of allegations based on "Memo on Conditions in Guantanamo Bay," which is not otherwise described); id. at 45 (accusing respondents of being "paralyzed by their arrogance, blinded by their misguided quest for vengeance" and "prepared to sit back and have prisoners starve themselves to death"); see also infra Section II. Rule 11 of the Federal Rules of Civil Procedure provides, in relevant part, that by presenting to the court any "pleading, written motion, or other paper," an attorney "is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances," the pleading "is not being filed for an improper purpose, such as to harass . . . and [that] the allegations and other factual contentions have evidentiary support . . . ." Fed. R. Civ. P. 11(b). And Rule 12(f) of the Federal Rules of Civil Procedure provides that a court may strike any matter that is "redundant, immaterial, impertinent, or scandalous." Fed. R. Civ. P. 12(f). Although striking filings is generally disfavored as an extreme remedy, a court has "liberal discretion" to strike such filings as it deems appropriate under Rule 12(f). Stanbury Law Firm v. IRS, 221 F.3d 1059, 1063 (8th Cir. 2000); see also 2 Moore's Federal Practice § 12.37[1] at 12-93 to 12-94 (3d ed. 2002).

[4] In Habashi v. Bush, Case No. 05-765 (EGS), respondents' Motion to Stay, (dkt. no. 5) (Apr. 20, 2005), remains pending.

"cease all acts of torture and cruel, inhuman and degrading treatment of Petitioners" and "mandating that Respondents treat Petitioners at least according to minimum acceptable standards." Motion for Preliminary Injunction at 46. Petitioners' motion should be denied in its entirety because petitioners have failed to provide a sufficient factual or legal basis to justify departure from the stays in these cases for purposes of the requested relief. A preliminary injunction is not warranted while the stays are in place and while issues underlying the purported legal bases for petitioners' challenges to their general conditions of confinement are being reviewed on appeal by the D.C. Circuit in related cases involving other detainees or will likely be impacted by such appeals. Further, as mentioned, the asserted factual basis for petitioners' complaints about the alleged hunger strike and other conditions at Guantanamo is insufficient to justify the Court's intrusion into the decisions of military authorities regarding the appropriate manner in which to detain and treat petitioners. Accordingly, petitioners' Motion for Preliminary Injunction should be denied.

BACKGROUND

Petitioners are non-resident aliens who are currently detained at Guantanamo. They initiated the above-captioned cases by filing petitions for writs of habeas corpus challenging their confinement. Prior to the filing of many of the petitions in these cases, on January 19, 2005, Judge Richard Leon of this Court issued a Memorandum Opinion and Order granting respondents' motion to dismiss in two other Guantanamo detainee cases. See Khalid v. Bush, Boumediene v. Bush, Case Nos. 04-CV-1142 (RJL), 04-CV-1166 (RJL), 355 F. Supp. 2d 311 (D.D.C. 2005). Judge Leon held that "no viable legal theory exists" by which the Court "could issue a writ of habeas corpus" in favor of the Guantanamo detainees. Id. at 314. In reaching this

decision, Judge Leon concluded that aliens held at Guantanamo, that is, outside the sovereign territory of the United States, are not possessed of any constitutional rights. Furthermore, Judge Leon determined that "the Court's role in reviewing the military's decision to capture and detain a non-resident alien is, and must be, highly circumscribed," and that the Court would "not probe into the factual basis for the petitioners' detention." Id. at 329. According to Judge Leon, the Constitution allocates exercise of war powers "among Congress and the Executive, not the Judiciary," and such separation of powers concerns necessarily limit any role of the Court in reviewing challenges of non-resident aliens to their detention in the midst of ongoing armed conflict. Id. Judge Leon also noted that petitioners' challenges to the conditions of their confinement did not support the issuance of a writ of habeas corpus because such claims, even if true, would not render the custody itself unlawful. Id. at 324-25. Judge Leon explained that separation of powers principles prevent the judiciary from scrutinizing the conditions of the aliens' detention because such matters are the province of the Executive and Legislative branches. Id. at 328. Petitioners in Khalid and Boumediene then appealed.

On January 31, 2005, Judge Joyce Hens Green entered a Memorandum Opinion and Order in eleven of the pending Guantanamo habeas cases, denying in part and granting in part respondents' motion to dismiss or for judgment as a matter of law. See Memorandum Opinion Denying in Part and Granting in Part Respondents' Motion to Dismiss or for Judgment as a Matter of Law, No. 02-CV-0299, et al., In re Guantanamo Detainee Casês, 355 F. Supp. 2d 443 (D.D.C. 2005). In contrast to Judge Leon's decision, Judge Green held that "the detainees at Guantanamo Bay have the fundamental right to due process of law under the Fifth Amendment" to challenge the legality of their detention through petitions for writs of habeas corpus. Id. at

463. Based on this decision, Judge Green concluded that the Combatant Status Review Tribunal ("CSRT") proceedings the military has used in assessing detainees' enemy combatant status do not satisfy procedural due process requirements. Id. at 465-78. Judge Green also adopted the reasoning of Judge Robertson in Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 165 (D.D.C. 2004), rev'd, 415 F.3d 33 (D.C. Cir. 2005), to conclude that Articles 4 and 5 of the Third Geneva Convention are "self-executing" and can provide some petitioners – those held because of their relationship with the Taliban – with a judicially enforceable claim in a habeas action to a hearing consistent with Article 5 of the Geneva Convention to determine whether the detainee qualifies for "prisoner of war" protections, as defined by Article 4 of the Convention. Id. at 478-80.[5] Finally, Judge Green dismissed petitioners' remaining claims under the Sixth, Eighth, and Fourteenth Amendments, the Suspension Clause, other international treaties, and under Army Regulation 190-8, the Alien Tort Statute and the Administrative Procedure Act. Id. at 480-81.

On February 3, 2005, in response to a motion filed by respondents, Judge Green certified for interlocutory appeal her January 31, 2005 opinion and stayed proceedings in the eleven cases coordinated in In re Guantanamo Detainee Cases for all purposes pending the resolution of all appeals. Various petitioners in the eleven cases sought reconsideration of Judge Green's stay order, arguing that the Court should permit discovery and proceedings regarding complaints about detainee living conditions, similar to the charges asserted by petitioners in the present cases, to go forward, but Judge Green denied the motion for reconsideration

[5] On July 15, 2005, the D.C. Circuit reversed the lower court's decision in Hamdan, and squarely held that "the 1949 Geneva Convention does not confer . . . a right to enforce its provisions in court." Hamdan v. Rumsfeld, 415 F.3d 33, 40 (D.C. Cir. 2005), petition for cert. filed.

> in light of the substantial resources that would be expended and the significant burdens that would be incurred should this litigation go forward, and . . . [in] recognition that a reversal of the Court's January 31, 2005 rulings would avoid the expenditure of such resources and incurrence of such burdens . . . .

See In re Guantanamo Detainee Cases, Order Denying Motion for Reconsideration of Order Granting Stay Pending Appeal (Feb. 7, 2005).

On February 9, 2005, pursuant to Judge Green's certification, respondents filed a petition for interlocutory appeal of the January 31, 2005 decision with the D.C. Circuit, see 28 U.S.C. § 1292(b), and requested that the appeal proceed on an expedited basis. Petitioners, in the coordinated cases, in responding to the petition for interlocutory appeal, filed their own cross-petition for interlocutory appeal. Oral argument on the merits of the appeal, along with appeals by petitioners in Khalid and Boumediene, was heard on September 8, 2005.

During the course of this litigation, Judges in the above-captioned cases have generally granted respondents' motions to stay and have stayed these cases pending resolution of all appeals of Judge Green's January 31, 2005 decision in In re Guantanamo Detainee Cases and of Judge Leon's January 19, 2005 decision in Khalid v. Bush. See Kabir v. Bush, Case No. 05-431 (RJL), Order (dkt. no. 10) (Apr. 7, 2005); Imran v. Bush, Case No. 05-764 (CKK), Order (dkt. no. 6) (Apr. 25, 2005); El-Banna v. Bush, Case No. 04-1144 (RWR), Order Granting in Part and Denying in Part Respondents' Motion for Certification of January 31, 2005 Orders and for Stay (dkt. no. 122) (Feb. 3, 2005); Hamamy v. Bush, Case No. 05-766 (RJL), Order (dkt. no. 6) (May 4, 2005); Hamlily v. Bush, Case No. 05-763 (JDB), Order (dkt. no. 10) (June 7, 2005); Aziz v. Bush, Case No. 05-492 (JR), Order (dkt. no. 16) (Apr. 20, 2005); Sliti v. Bush, Case No. 05-429 (RJL), Order (dkt. no. 8) (Apr. 7, 2005); Deghayes v. Bush, Case No. 04-2215 (RMC), Minute

Order (dkt. no. 7) (Feb. 22, 2005).[6]

On September 1, 2005, petitioners filed their current Motion For Preliminary Injunction with the Court Security Officers, as required by the governing protective orders in these cases. As mentioned above, in this motion petitioners reference an ongoing hunger strike by some detainees at Guantanamo allegedly done in protest of legal issues related to their continued detention and the conditions under which they are confined. See Motion for Preliminary Injunction at 11-13. The motion lists numerous allegations concerning the overall conditions of confinement at Guantanamo, including complaints about noisy fans, bright lights, lack of socialization, religious intolerance, medical neglect, and bad food. See id. at 14-28. Petitioners request preliminary injunctive relief requiring respondents to allegedly "cease all acts of torture and cruel, inhuman and degrading treatment of Petitioners" and "mandating that Respondents treat Petitioners at least according to minimum acceptable standards" which are not stated or described. Id. at 46.

ARGUMENT

I. The Court Should Not Address Petitioners' Complaints About the General Conditions of Confinement at Guantanamo While the Case is Stayed and the Asserted Legal Bases for Their Claims Could be Resolved or Determined by the Appeals to the D.C. Circuit.

As an initial matter, as explained supra, the existence of any hunger strike among certain Guantanamo detainees provides no basis for emergency relief of any kind here. The Military has protocols in place to preserve the lives and health of hunger-striking detainees. In any case, to

[6] As noted, in Habashi v. Bush, Case No. 05-765 (EGS), respondents' Motion to Stay, (dkt. no. 5) (Apr. 20, 2005), remains pending.

the extent that conditions of confinement claims are even cognizable in habeas proceedings,[7] the Court should not entertain petitioners' challenges to the overall conditions of confinement at Guantanamo when the legal bases for any such claims at all are involved in the appeal to the D.C. Circuit. Petitioners rely on the First, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution, as well as various other statutes and the Third Geneva Convention, to support their Motion for Preliminary Injunction. See Motion for Preliminary Injunction at 28-38. They ignore, however, the fact that the D.C. Circuit has already resolved their Geneva Convention claim in respondents' favor and that other appeals are presently pending in the D.C. Circuit that will address the existence and scope of constitutional and other core rights as applied to aliens detained at Guantanamo.

As to petitioners' claims under the Third Geneva Convention, the D.C. Circuit recently held that the Third Geneva Convention is not privately enforceable in court. Hamdan v. Rumsfeld, 415 F.3d 33, 40 (D.C. Cir. 2005), petition for cert. filed.[8]

Furthermore, as noted above, in Khalid v. Bush and Boumediene v. Bush, Case Nos. 04-

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[7] The Supreme Court has never squarely resolved whether challenges to conditions of confinement may be brought under habeas proceedings. See Bell v. Wolfish, 441 U.S. 520, 526 n.6 (1979) ("Thus, we leave for another day the question of the propriety of using a writ of habeas corpus to obtain review of the conditions of confinement, as distinct from the fact or length of confinement itself.").

[8] Additionally, petitioners' attempt to assert a breach of contract claim and their request for specific performance of the alleged oral promise of a military official to apply the Geneva Conventions at Guantanamo are entirely without merit. No statute provides authorization for or federal court jurisdiction over suits for the specific performance of a pure contract against the government. Richardson v. Morris, 409 U.S. 464, 465-66 (1973). Indeed, as a general matter, "[f]ederal courts do not have the power to order specific performance by the United States of its alleged contractual obligations." Coggeshall Dev. Corp. v. Diamond, 884 F.2d 1, 3 (1st Cir. 1989). Accordingly, petitioners' contract claim to enforce an alleged oral promise in this Court is barred by sovereign immunity, and the Court lacks jurisdiction over the claim.

CV-1142 (RJL), 04-CV-1166 (RJL), 355 F. Supp. 2d 311 (D.D.C. 2005), Judge Leon held that "no viable legal theory exists" by which the Court "could issue a writ of habeas corpus" in favor of the Guantanamo detainees. Id. at 314. In reaching this decision, the Court concluded that aliens held at Guantanamo "possess no cognizable constitutional rights" including rights under the Fifth, Sixth, and Eighth Amendments. Id. at 321. Thus, Judge Leon concluded that petitioners "lack any viable theory under the United States Constitution to challenge the lawfulness of their continued detention at Guantanamo." Id. at 323. Judge Leon also found that petitioners failed to identify any United States law or international treaty that could serve as a basis for the issuance of a writ of habeas corpus. Id. at 324-27.

Conversely, with respect to the issue of constitutional rights, Judge Green, in In re Guantanamo Detainee Cases, 355 F. Supp.2d 443 (D.D.C. 2005), found only that "the detainees at Guantanamo Bay have the fundamental right to due process of law under the Fifth Amendment" to challenge the legality of their detention through petitions for writs of habeas corpus. Id. at 463.[9] Judge Green, however, dismissed the detainees' remaining claims under the Sixth, Eighth, and Fourteenth Amendments, the Suspension Clause, other international treaties, and under Army Regulation 190-8, the Alien Tort Statute and the Administrative Procedure Act.[10] Id. at 480-81.

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[9] Because Judge Green held that the Guantanamo detainees have a Fifth Amendment right merely to challenge the fact of their confinement, her decision does not directly authorize detainees to contest the conditions of their confinement.

[10] To the extent petitioners assert that their treatment and the manner in which they are confined violate provisions of the Constitution other than the Fifth Amendment, such claims lack any merit. As mentioned, in Khalid, Judge Leon determined that the non-resident aliens detained at Guantanamo have no cognizable constitutional rights whatsoever. Khalid, 355 F. Supp. 2d at 321. And Judge Green rejected petitioners' non-Fifth Amendment claims. See In re

The D.C. Circuit granted interlocutory appeal in Judge Green's case and will determine in that case and in the appeal of Judge Leon's decisions in Khalid and Boumediene, on an expedited basis, whether and to what extent detainees at Guantanamo have any rights under the United States Constitution – the core legal basis, other than the Third Geneva Convention claim already resolved by the D.C. Circuit, asserted by petitioners in their present motion.[11] In light of

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Guantanamo Detainee Cases, 355 F. Supp. 2d at 480-81. In any event, whether Guantanamo detainees have any rights under the Constitution is an issue currently on appeal before the D.C. Circuit.

[11] Petitioners throw out an assortment of additional novel legal theories as bases for the injunctive relief they seek. See Motion for Preliminary Injunction at 28-38. Each of these legal theories, however, will not likely be successful and, in any event, may be substantially impacted by the D.C. Circuit's decision in the appeals of Judge Green's decision in In re Guantanamo Detainee Cases and of Judge Leon's decision in Khalid v. Bush.

Petitioners' claim under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb, see Motion for Preliminary Injunction at 28-30, presumes that detainees at Guantanamo are entitled to free exercise rights under the First Amendment. RFRA is based on the First Amendment's protection of free exercise of religion, 42 U.S.C. § 2000bb(a)(1), but the issue of whether non-resident alien detainees with no voluntary connections to the United States, such as petitioners, can avail themselves of constitutional rights at all is the subject of the pending D.C. Circuit appeals in Khalid and In re Guantanamo Detainee Cases, which were argued on September 8, 2005. Accordingly, this Court should abstain from reviewing petitioners' passing invocation of RFRA and not consider it a legitimate basis to grant injunctive relief while the appeals are pending.

Moreover, under current Supreme Court and D.C. Circuit law RFRA may not apply to individuals at Guantanamo Bay. In City of Boerne v. Flores, 521 U.S. 507, 532-36 (1997), the Supreme Court invalidated RFRA as applied to States and their subdivisions, holding that the Act exceeded Congress' remedial powers under the Fourteenth Amendment. The Supreme Court "has not had occasion to rule on the matter" of whether RFRA "remains operative as to the Federal Government." Cutter v. Wilkinson, 125 S. Ct. 2113, 2118 n.2 (2005). Further, while the D.C. Circuit has found RFRA applicable to the federal government, Henderson v. Kennedy, 265 F.3d 1072, 1073 (D.C. Cir. 2001), neither the Supreme Court nor the D.C. Circuit has ruled on whether RFRA is operative outside the United States. See Cutter, 125 S. Ct. at 2118 n.2 ("This Court . . . has not had occasion to rule on the matter" of whether RFRA is operative as to "federal territories and possessions."). It is a "longstanding principle of American law" that congressional legislation is presumed not to have extraterritorial application unless such intent is clearly manifested, EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991), and such intent is in no way evidenced in RFRA. (While the Ninth Circuit found that RFRA applies to

the potential for the D.C. Circuit's ruling to moot or at least significantly impact the legal bases for the present motion,[12] the likelihood that any decision by this Court regarding petitioners' right to challenge the nature of the general confinement conditions at Guantanamo would have to be re-litigated or revisited once the Court of Appeals provides guidance on these legal issues, and for the other reasons discussed infra, the Court should not consider petitioners' current challenges to the confinement conditions at Guantanamo until the appeals are resolved.[13]

Guam, a federal instrumentality, Guam v. Guerrero, 290 F.3d 1210, 1221-22 (2002), that case is inapposite. RFRA in "its original form" expressly applied to Guam but not to Guantanamo Bay. See id. at 1221. Moreover, the Ninth Circuit found that RFRA applied to Guam because it was a federal territory, and Guantanamo Bay is not a federal territory. Although the Supreme Court in Rasul v. Bush, 124 S. Ct. 2686, 2696 (2004), held that jurisdiction for the purposes of the habeas corpus statute extended to Guantanamo Bay, the Court did not find that Guantanamo is itself a federal territory. Also, while the Court specifically discussed the historical reach of the writ of habeas corpus to "so-called 'exempt jurisdictions,' where ordinary writs do not run, and all other dominions under the sovereign's control," id. at 2697 (citation omitted), RFRA does not have a similarly long, historical jurisdictional reach.)

Petitioners' "Right to Life" claim also fails to entitle them to injunctive relief. See Motion for Preliminary Injunction at 33. Petitioners rely on statements from the Supreme Court's decisions in Roe v. Wade, 410 U.S. 113 (1973), and Cruzan v. Missouri, 497 U.S. 261 (1990), to support their request that their conditions of confinement be improved. See id. These cases, however, involve the entirely separate subjects of abortion and the right to reject life-sustaining medical treatment. And although these cases do support the principle that the government has an interest in protecting human life, as demonstrated above, the military authorities and medical staff at Guantanamo will intervene to take appropriate medical measures before a detainee's life is in jeopardy as a result of a hunger strike. In any event, the extent to which petitioners may enjoy the Fifth Amendment's protection against the deprivation of life without due process of law will be addressed by the D.C. Circuit, and the Court should not order relief on that basis while the issue is on appeal.

[12] Petitioners' general complaints about the process they have received through the Combatant Status Review Tribunals (CSRTs) are also on appeal to the D.C. Circuit. See Motion for Preliminary Injunction at 2, 14. As mentioned, Judge Green found the CSRT proceedings to be inadequate to satisfy procedural due process requirements. In re Guantanamo Detainee Cases, 355 F. Supp. 2d at 465-78. Accordingly, the D.C. Circuit has been presented with this issue.

[13] Other Judges of this Court have rejected similar challenges by Guantanamo detainees to their treatment and conditions of confinement in light of the D.C. Circuit appeals. In Al Odah

Accordingly, the Court should deny petitioners' Motion for Preliminary Injunction.

II. The Factual Record Does Not Warrant the Court's Involvement in the General Conditions In Which Detainees at Guantanamo are Confined.

Regardless of the pendency of the appeals involving the core legal bases for petitioners' motion, the record here does not warrant the Court's involvement in petitioners' and other detainees' conditions of confinement; that is, petitioners have not made a sufficient showing of irreparable harm. Even if petitioners were possessed of constitutional rights, the showing required of them would be demanding. See infra Section III. B. (indicating that petitioners likely would have to demonstrate, at a minimum, that military personnel were deliberately indifferent to their health or safety). Petitioners, however, rely on incompetent and unpersuasive evidence that often does not pertain specifically to them and their particular conditions and, in any event, is refuted by sworn and compelling declarations from military authorities with firsthand knowledge of the general conditions, medical care, and other treatment provided to detainees at Guantanamo.

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v. United States, Case No. 02-0828 (CKK), Judge Green, acting as coordinating judge, twice rejected petitioners' requests to assert claims objecting to their confinement conditions in light of the appeals pending in the D.C. Circuit and the fact that the case was stayed. See Al Odah, Order Granting in Part and Denying in Part Respondents' Motion for Certification of Jan. 31, 2005 Orders and for Stay (Feb. 3, 2005); Order Denying Motion for Reconsideration of Order Granting Stay Pending Appeal (Feb. 7, 2005) (refusing to allow claims regarding conditions of confinement to proceed "in light of the substantial resources that would be expended and the significant burdens that would be incurred should this litigation go forward"). The Al Odah petitioners' third attempt to litigate their conditions of confinement claims is currently pending. See Plaintiffs-Petitioners' Motion For a Preliminary Injunction and Provisional Motion to Modify Stay Pending Appeals, filed Mar. 11, 2005, in Al Odah. And most recently, Judge Leon denied a detainee's motion for a preliminary injunction challenging his medical treatment at Guantanamo in light of the fact that the case is stayed pending the appeals in the D.C. Circuit. See Sliti v. Bush, Case No. 05-429 (RJL), Memorandum Opinion and Order at 4-5 (dkt. no. 18) (August 30, 2005). See also infra at Section II (discussing denial of conditions claims in O.K. v. Bush and Paracha v. Bush).

Respondents have already refuted petitioners' false and inaccurate assertions regarding respondents' treatment of detainees engaging in hunger strikes by demonstrating that respondents have detailed protocols in place for dealing humanely with such behavior, including, if necessary, intervening to take medically appropriate measures to preserve the lives and health of detainees. See supra at 1-2. Accordingly, despite petitioners' inflammatory assertions, the detainees' health is being closely monitored by the Guantanamo medical staff, which will step in as necessary and follow medically appropriate measures to protect the lives and the health of the detainees. Based on uncontroverted sworn evidence of record, therefore, petitioners will not suffer irreparable injury as a result of a hunger strike.

The remainder of petitioners' various allegations regarding poor conditions and abusive treatment are supported only by unreliable and unpersuasive evidence. Petitioners' assorted complaints – including, for example, assertions that the Koran is being mistreated, that detainees are denied showers and being physically abused, and that scorpions are in the food – are almost entirely supported merely with citations to either unsworn hearsay statements of a few detainees or to unidentified "memos" containing unsworn hearsay statements of detainees, all of which were presumably drafted by petitioner's counsel and none of which have been provided to opposing counsel or the Court.[14] See, e.g., Motion for Preliminary Injunction at 16 n.65, 17 n.68, 23 n.82; see also id. at notes 30-99 (repeatedly citing to "Deghayes Memo" and "Memo on Conditions in Guantanamo Bay" to support various factual allegations). Respondents dispute

[14] Petitioners also allege that juveniles have been mistreated. See Motion for Preliminary Injunction at 18-20. Petitioners' assertion, however, that detainee O.K. is a juvenile is incorrect. See O.K. v. Bush, 344 F. Supp. 2d 44, 62 n.25 (D.D.C. 2004) (indicating that O.K. is no longer a juvenile but is now an adult).

these conclusory statements, which generally lack specificity in details, dates, and times, and do not in any event amount to sufficiently compelling evidence on which to afford petitioners the injunctive relief they seek.[15]

Moreover, much of the evidence set forth in petitioners' motion describes the alleged treatment of only a few of the petitioners in these cases, as well as at least one other detainee who is not a petitioner. For many of the petitioners, there is no evidence whatsoever pertaining to them specifically. For example, petitioners Adel Hamlily and Abdul Hadi Ibn El Hathily Al Hamamy are not even mentioned in the motion. Accordingly, many of the petitioners have not demonstrated a sufficient injury in fact to provide them standing to seek the sweeping relief requested in the motion. See Lewis v. Casey, 518 U.S. 343, 350-51 (1996) (explaining that "[i]f . . . a healthy inmate who had suffered no deprivation of needed medical treatment were able to claim violation of his constitutional right to medical care . . . simply on the ground that the prison medical facilities were inadequate, the essential distinction between judge and executive would have disappeared: it would have become the function of the courts to assure adequate medical care in prisons" and concluding that "an inmate cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is subpar in some theoretical sense. That would be the precise analog of the healthy inmate claiming constitutional

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[15] Counsel's lament that various obstacles make it difficult to obtain competent and verified information from his clients, see Motion for Preliminary Injunction at 1 n.2, is unavailing. See O.K. v. Bush, 344 F. Supp. 2d 44, 59 (D.D.C. 2004) (finding that "[p]etitioners cannot blame their inability to supply evidence [to support their motion] entirely, or even largely, on the inaccessibility of petitioner at Guantanamo."). Counsel has made multiple, extended visits to Guantanamo in recent months, as many or more than any other counsel in the Guantanamo habeas cases, and has had ample opportunities to obtain sworn declarations, but has failed to do so.

violation because of the inadequacy of the prison infirmary.")

Additionally, many of petitioners' complaints, even if true, are relatively minor and do not warrant court intrusion into the daily operations of a military detention center. For example, petitioners allege that they have been subjected to noisy fans, prayers with erroneous words, cold pancakes, and undercooked rice. See Motion for Preliminary Injunction at 21, 26, 27, 28. Such complaints do not require the extraordinary relief of a preliminary injunction. In sum, the factual support for petitioners' allegations regarding their conditions of confinement and other treatment at Guantanamo amounts to mere fantastic storytelling based on incompetent evidence that does not warrant court intervention.[16]

Other competent sources of information, however, belie many of the assertions in petitioners' motion. Contrary to some of petitioners' allegations, detainees at Guantanamo receive extensive, high-level medical care, as noted in the sworn declaration of Dr. John S. Edmondson, the Commander of the U.S. Navy Hospital at Guantanamo. See Declaration of Dr. John S. Edmondson ("Edmondson Decl.") (attached hereto as Exhibit B; originally submitted in O.K. v. Bush, 04-CV-1136).[17] The Guantanamo detention center hospital is an 18-bed facility with a medical staff of seventy consisting of highly trained doctors, nurses, technicians, and

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[16] Respondents deny petitioners' various allegations of mistreatment but, given the absence of details and the varied scope of the assertions, an attempt to rebut each individual allegation here would be unduly burdensome and, in any event, is unwarranted as explained in the text. Respondents, however, reserve the right to respond to such allegations with greater specificity should the Court deem it necessary.

[17] The Edmondson Declaration is the version filed on the public record in O.K. v. Bush, which has health information specific to petitioner O.K. redacted. See O.K. v. Bush, 04-CV-1136 (JDB), Respondents' Motion to Designate as "Protected Information" Certain Information in Memorandum of Points and Authorities in Opposition to Petitioner's Application for Preliminary Injunction and Two Declarations in Support Thereof (dkt. no. 116) (Apr. 13, 2005).

administrative personnel. Id. ¶ 3. Detainees receive a comprehensive physical exam on their arrival and can request medical assistance at any time by telling a guard or by informing medical personnel who make rounds to the cellblocks every other day. Id. ¶ 5. From just January, 2004 to November, 2004, the hospital staff conducted over 17,000 outpatient visits and has treated the detainees for a wide variety of medical conditions including hepatitis, diabetes, and tuberculosis. Id. ¶¶ 5, 7. The staff has also provided prosthetic limbs to some detainees and has removed cancerous tumors from several of them. Kathleen T. Rhem, "Guantanamo Detainees Receiving 'First Rate' Medical Care," American Forces Information Service, February 18, 2005 (attached as Exhibit C). The detention center hospital is also supported by a twenty-one member Behavioral Health Service (BHS) staff, including a board-certified psychiatrist and a Ph.D. psychologist, to address any psychological issues presented by the detainees.[18] Edmondson Decl. ¶ 4. In sum, detainees, such as petitioners, receive high quality medical care that is comparable to the care provided to active duty members of the armed forces. Id. ¶ 8; see also O.K. v. Bush, 344 F. Supp. 2d 44, 62 (D.D.C. 2004) (finding that Dr. Edmondson's declaration describes "in substantial detail a high level of medical care" provided at the Guantanamo detention center medical facility and noting that newspaper reports corroborate that description).

Furthermore, compelling evidence indicates that the military's mission is to treat all Guantanamo detainees humanely. See Declaration of Col. John A. Hadjis ("Hadjis Decl.") ¶ 2

[18] Petitioners' allegation that medical care is made contingent on a detainee's cooperation with interrogations, see Motion for Preliminary Injunction at 24, is completely unfounded and inaccurate. Contrary to petitioners' assertion, medical care is not affected by a detainee's degree of cooperation in interrogations, and medical records of detainees are not available to interrogators. Edmondson Decl. ¶ 10.

(attached as Exhibit D) (originally submitted in O.K. v. Bush, Case No. 04-1136 (JDB)).[19] To that end, "[a]ll detainees receive adequate shelter, food and water, and medical care at all times."[20] Id. ¶ 3. Moreover, mistreatment of detainees is not permitted, and the military employs standard operating procedures and training programs to ensure that detainees are not abused and that any violations of those procedures are investigated. Id. ¶ 2.[21]

Courts have found the foregoing declarations to be more reliable and persuasive than various unsworn statements from detainees and other assorted press articles and, as a result, have denied similar requests for injunctive relief regarding conditions of confinement and other treatment of detainees at Guantanamo. In particular, in O.K. v. Bush, 344 F. Supp. 2d 44, 60-63 (D.D.C. 2004), Judge Bates rejected a detainee's request for an order requiring an independent medical examination and production of his medical records finding that petitioner had not offered sufficient competent evidence of medical neglect, especially in light of the sworn

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[19] Colonel Hadjis was the Chief of Staff of the Joint Task Force-Guantanamo Bay, Guantanamo Bay, Cuba and oversaw the Joint Detention Operations Group at Guantanamo at the time he executed his declaration. Hadjis Decl. ¶ 1.

[20] Detainees also receive accommodations for their religious beliefs and practices. See Donna Miles, "Joint Task Force Respects Detainees' Religious Practices," American Forces Information Service, June 29, 2005 (attached as Exhibit E) (indicating that, among other accommodations, the Muslim "call to prayer" is broadcast over the loudspeaker five times a day; prayer caps, beads, and oil are provided to detainees; each detainee is issued a personal copy of the Koran, detainees receive food that satisfies Islamic certification requirements, Islamic holy periods, such as Ramadan, are observed, and the Guantanamo staff receive religious and cultural sensitivity training before beginning their assignments).

[21] Petitioners' complaints about the handling of the mail, see Motion for Preliminary Injunction at 26, are also rebutted by competent evidence. Each detainee is given the opportunity to send and receive mail, and detainees cannot lose mail privileges for any reason. Declaration of 1LT Wade M. Brown ¶ 2, originally submitted in John Does 1-570 v. Bush, Case No. 05-313 (CKK) (attached as Exhibit F). Moreover, contrary to petitioners' allegations, both incoming and outgoing mail is typically processed within fourteen days. Id. ¶ 5.

declaration of Dr. Edmondson detailing the extensive medical care afforded to detainees at Guantanamo. Subsequently, Judge Bates also relied on the declarations of Dr. Edmondson and Colonel Hadjis, among others, in denying the detainee's request for a preliminary injunction against alleged torture or other cruel and degrading treatment. O.K. v. Bush, 377 F. Supp. 2d 102, 109 (D.D.C. 2005). See also Paracha v. Bush, Case No. 04-2022 (PLF), Memorandum Opinion and Order at 3 (dkt. no. 58) (June 16, 2005) (denying petitioner's motion for preliminary injunction challenging, in part, his conditions of confinement, due to lack of competent evidence of his alleged mistreatment).

As demonstrated, petitioners have failed to make a sufficient showing of irreparable harm or to offer any competent and compelling evidence that their physical or mental condition warrants departure from the stay in this case or compels the granting of their request for the extraordinary relief of a preliminary injunction. A request for preliminary injunctive relief "is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (emphasis in original). Petitioners have failed to make an appropriate showing here.

III. The Court Should Not Grant Petitioners' Requested Relief When They Cannot Demonstrate a Likelihood of Success and the Requested Relief Would Impose Significant Harms on the Military and the Public Interest.

Petitioners' request for a preliminary injunction regarding their treatment and other general conditions of confinement also should be denied because petitioners cannot demonstrate a likelihood of success on such claims generally and because the requested relief would impose significant harms on the government and the public interest by improperly interfering with the judgment of the military regarding the confinement of wartime detainees.

A. Whether Wartime Detainees of the Military Can Assert Claims Challenging Their Conditions of Confinement and What Standard Would Govern Such Claims, if Permitted, are Unsettled Questions.

Neither Judge Leon in Khalid nor Judge Green in In re Guantanamo Detainee Cases directly addressed conditions of confinement claims asserted by detainees or decided what legal standard should govern them. In fact, because no court has ever determined that detainees of the military can even bring conditions of confinement claims, no court has determined what legal standard should be applied to evaluate such claims brought by detainees in the custody of the military. See O.K. v. Bush, 377 F. Supp. 2d 102, 112 n.10 (D.D.C. 2005) ("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."). The Supreme Court has explained that constitutional challenges to conditions of confinement brought by convicted criminals are analyzed under the Eighth Amendment's "deliberate indifference" standard, which requires a prisoner to establish that prison officials "were knowingly and unreasonably disregarding an objectively intolerable risk of harm to the prisoners' health or safety."[22] Farmer v. Brennan, 511 U.S. 825, 834-35, 846 (1994); see also Ingram v. Wright, 430 U.S. 651, 664 (1977) (holding that the Eighth Amendment applies only to "those convicted of crimes"). In contrast, the constitutional standard

[22] This standard is applicable both to claims alleging inadequate medical care as well as challenges to general conditions of confinement, such as inadequate food, clothing, and cell temperature. See Wilson v. Seiter, 501 U.S. 294, 303 (1991) ("Whether one characterizes the treatment received by the prisoner as inhumane conditions of confinement, failure to attend to his medical needs, or a combination of both, it is appropriate to apply the 'deliberate indifference' standard articulated in Estelle [v. Gamble, 429 U.S. 97 (1976)]"). The two-prong deliberate indifference test requires the moving party to establish first that "the deprivation alleged must be, objectively, sufficiently serious, . . . a prison official's act or omission must result in the denial of the minimal civilized measure of life's necessities"; second, a prison official must have a "sufficiently culpable state of mind" – "one of deliberate indifference to inmate health or safety." Farmer, 511 U.S. at 834 (internal quotations omitted).

of care owed to "pretrial detainees" in the criminal justice context – defined by the Supreme Court as "those persons who have been charged with a crime but who have not yet been tried on that charge" – is governed by the Due Process Clause of the Fifth Amendment. Bell v. Wolfish, 441 U.S. 520, 523, 536 (1979). "[W]here it is alleged that a pretrial detainee has been deprived of liberty without due process, the dispositive inquiry is whether the challenged condition, practice, or policy constitutes punishment, for under the Due Process Clause, a detainee must not be punished prior to an adjudication of guilt in accordance with due process of law."[23] Block v. Rutherford, 468 U.S. 576, 583 (1984) (internal quotations omitted); see also Brogsdale v. Barry, 926 F.2d 1184, 1188 n.4 (D.C. Cir. 1991).

Neither of these two standards, however, clearly applies to the Guantanamo detainees and, in any event, would not provide petitioners with a likelihood of success on their claims. Petitioners have not been convicted of any crime, thus they cannot rely on the Eighth Amendment as a basis for their conditions of confinement claims. See In re Guantanamo Detainee Cases, 355 F. Supp. 2d at 465-78 (dismissing Eighth Amendment claims). Similarly, petitioners are not "pretrial detainees," as defined by the Supreme Court, because they have not been charged with a crime, nor are they being detained as part of the criminal justice system. Cf. Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2640 (2004) (plurality opinion) (detention of enemy combatants is not punishment or penal in nature). Furthermore, the criminal justice interests

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[23] Although the Supreme Court has never resolved the precise relationship between these two tests, see City of Canton v. Harris, 489 U.S. 378, 389 n.8 (1989) (reserving "whether something less than the Eighth Amendment's 'deliberate indifference' test may be applicable in claims by [pretrial] detainees asserting violations of their due process right to medical care while in custody"), the Court has explained that "the due process rights of a pretrial detainee are at least as great as the Eighth Amendment protections available to a convicted prisoner." County of Sacramento v. Lewis, 523 U.S. 833, 849-50 (1998).

served by confining "pretrial detainees" are completely distinct from the military and national security interests served by detaining individuals, such as petitioners, in conjunction with ongoing hostilities.[24] Compare Wolfish, 441 U.S. at 536-37 (criminal justice interest served by pretrial detention is to ensure detainees' presence at trial), with Hamdi, 124 S. Ct. at 2640 (2004) (plurality opinion) ("The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants is to prevent captured individuals from returning to the field of battle and taking up arms once again."). The uncertainty of the law in this area is illustrated by the fact that one Judge of this Court who has addressed the issue of a condition of confinement claim by a Guantanamo detainee reserved the question whether "the 'deliberate indifference' doctrine is the correct standard for any constitutional claims that petitioners might raise in this case." O.K. v. Bush, 344 F. Supp. 2d 44, 60-63 & n.23 (D.D.C. 2004) (Bates, J.) ("Without concluding that the 'deliberate indifference' doctrine applies" to challenges regarding inadequate medical care, "the Court will draw on this well-developed body of law to guide its analysis"). As explained below, petitioners cannot demonstrate a likelihood of success even under that standard in this context.

B. Petitioners' Motion Does Not Justify Displacement of the Judgment of the Military Authorities at Guantanamo Regarding the General Manner in which They are Detained.

Petitioners are asking the Court to second-guess the decisions of the military regarding their treatment and the general manner in which they are detained. Even in the penal context,

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[24] Even in the cases of detainees who have been found to no longer be enemy combatants, their continued detention is not for any criminal justice purpose, but rather is an incident of war that is conducted on an interim basis as part of the military's necessary authority to wind up their detention in an orderly fashion while arrangements can be made for the proper resettlement or repatriation of such detainees.

however, prison administrators are entitled to great deference regarding the ways in which they manage prisons and the means used to care for and detain prisoners. The Supreme Court has stated that the operation of even domestic "correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial," and has admonished lower courts to avoid becoming "enmeshed in the minutiae of prison operations." Bell v. Wolfish, 441 U.S. 520, 548, 562 (1979). Only upon a showing that prison conditions or care sink to the level of "deliberate indifference" to an inmate's health or well-being is a court justified in intervening in the treatment of inmates in the traditional penal prison setting. See Neitzke v. Williams, 490 U.S. 319, 321 (1989).[25] Accordingly, the Supreme Court has directed that prison administrators "should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." Wolfish, 441 U.S. at 547; see also

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[25] Petitioners' assertion that there is no legitimate penological interest to justify the conditions at Guantanamo employs an inapplicable standard. See Motion for Preliminary Injunction at 40-42. The Supreme Court has determined that when an actual prison regulation has been alleged to violate the constitutional rights of prisoners, the appropriate inquiry is whether the regulation that impinges on inmates' constitutional rights "is reasonably related to legitimate penological interests." Turner v. Safely, 482 U.S. 78, 89 (1987). That inquiry is applicable to actual regulations, not mere general conditions of confinement, and petitioners do not point to a specific regulation that they challenge. Additionally, this inquiry presumes that the challenger possesses constitutional rights, and, as discussed, whether petitioners are entitled to constitutional protections is an issue on appeal to the D.C. Circuit. Moreover, as explained above, petitioners are not being detained for criminal justice purposes, thus determining if there is a legitimate "penological" interest for the regulation in question is not specifically applicable to war-related detentions. In any event, the Court in Turner acknowledged that "[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint." 482 U.S. at 84-85.

Thornburgh v. Abbott, 490 U.S. 401, 408 (1989) ("Acknowledging the expertise of these officials and that the judiciary is 'ill equipped' to deal with the difficult and delicate problems of prison management, this Court has afforded considerable deference to the determinations of prison administrators who, in the interest of security, regulate the relations between prisoners and the outside world."). These same principles counsel the Court to decline petitioners' request to entangle itself in unspecified ways[26] in the particulars of their treatment and the manner in which they are confined at the Guantanamo detention center. Indeed, in light of the fact that

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[26] Petitioners' motion requests the vague relief of an order requiring respondents to allegedly "cease all acts of torture and cruel, inhuman and degrading treatment of Petitioners" and "mandating that Respondents treat Petitioners at least according to minimum acceptable standards." Motion for Preliminary Injunction at 46. These requests are far too general and amorphous to be an appropriate remedy and fail to satisfy the specificity requirements for injunctions. See Fed. R. Civ. P. 65(d) (indicating that "[e]very order granting an injunction . . . shall be specific in terms; [and] shall describe in reasonable detail . . . the act or acts sought to be restrained . . . ."). The Supreme Court has explained that Rule 65(d)'s specificity requirement "was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood." Schmidt v. Lessard, 414 U.S. 473, 476 (1974). Here, petitioners seek such a vague injunction. It would be difficult to determine, for example, if the detainees were being treated "according to minimum acceptable standards." The relief petitioners request would not provide respondents with sufficient notice as to what specific conduct is prohibited, leaving respondents to guess as to the meaning of the vague injunction. See Calvin Klein Cosmetics Corp. v. Parfums de Coeur, Ltd., 824 F.2d 665, 669 (8th Cir. 1985) ("Broad language in an injunction that essentially requires a party to obey the law in the future is not encouraged and may be struck from an order for injunctive relief, for it is basic to the intent of Rule 65(d) that those against whom an injunction is issued should receive fair and precisely drawn notice of what the injunction actually prohibits.").

Moreover, such a broad standard would require the Court to delve into the day-to-day workings of Guantanamo and regularly second-guess the military, which, as explained above, the Supreme Court has instructed the Judiciary generally not to do. See Inmates of Occoquan v. Barry, 844 F.2d 828, 841 (D.C. Cir. 1988) ("But in carrying out their remedial task, courts are not to be in the business of running prisons. The cases make it plain that questions of prison administration are to be left to the discretion of prison administrators."). Accordingly, the prospect of the Court being entangled, through an improper injunction, in the minutiae of the Guantanamo detention operations indicates that it would not be appropriate to modify the stay to address petitioners' conditions of confinement claims.

petitioners are challenging the practices of a military detention center during a time of war, separation of powers principles may require satisfaction of an even more stringent standard before judicial intervention is warranted than in the penal context. See, e.g., Hamdi, 124 S. Ct. at 2647 (2004) (plurality opinion) (stating that "[w]ithout doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them"); id. at 2640 (noting that capture and detention of suspected combatants is an "important incident of war"); Ludecke v. Watkins, 335 U.S. 160, 170 (1948) (finding that determination of state of war and status of individual as enemy alien are "matters of political judgment for which judges have neither technical competence nor official responsibility"); cf. Hirota v. MacArthur, 338 U.S. 197, 215 (1949) (Douglas, J., concurring) (stating that "the capture and control of those who were responsible for the Pearl Harbor incident was a political question on which the President as Commander-in-Chief, and as spokesman for the nation in foreign affairs, had the final say."); Khalid v. Bush, 355 F. Supp. 2d 311, 328 (D.D.C. 2005) (explaining that management of wartime detainees' confinement conditions is the province of the Executive and Legislative branches, thus precluding judicial scrutiny of such conditions).[27] Petitioners, however, have not satisfied even the "deliberate indifference" standard that would apply in the penal context. The record demonstrates that petitioners are detained in a manner in which they receive adequate food, shelter, water, hygiene opportunities, and medical care. See supra Section II.

Other Judges of this Court have rejected similar challenges by other Guantanamo

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[27] The court in Khalid also recognized that even if a detainee is the subject of mistreatment, the authority to remedy such mistreatment "should remain with the military and the military judicial process." Khalid, 355 F. Supp. 2d at 324 n.18.

detainees to their conditions of confinement. In O.K. v. Bush, 344 F. Supp. 2d 44, 60-63 (D.D.C. 2004), Judge Bates rejected a detainee's request for an order requiring an independent medical examination and production of medical records finding that petitioner had not alleged a substantive violation of a legal right and had not offered sufficient competent evidence of medical neglect. Subsequently, in the same case, Judge Bates denied the detainee's request for a preliminary injunction against the alleged torture and other mistreatment of the detainee concluding that the detainee failed to make a sufficient showing of his alleged abuse and noting that the Court was "not equipped or authorized to assume the broader roles of a congressional oversight committee or a superintendent of the operations of a military base." O.K. v. Bush, 377 F. Supp. 2d 102, 114 (D.D.C. 2005). Similarly, in Paracha v. Bush, Case No. 04-2022 (PLF), the Court denied petitioner's motion for a preliminary injunction which, in part, challenged his conditions of confinement. See Memorandum Opinion and Order (dkt. no. 58) (June 16, 2005). The Court determined that petitioner had not set forth sufficient competent evidence of his alleged mistreatment to establish that he would suffer irreparable harm without an injunction. See id. at 3. As discussed, petitioners in the present case have also failed to establish competent factual support for their complaints regarding their conditions of confinement. Accordingly, petitioners' request for a preliminary injunction should be denied.

CONCLUSION

For the reasons stated above, respondents respectfully request that petitioners' Motion for Preliminary Injunction be denied in all respects.

Dated: September 9, 2005

Respectfully submitted,

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Exhibit A

DECLARATION OF MG JAY W. HOOD

Pursuant to 28 U.S.C. § 1746, I, JAY W. HOOD, hereby declare under penalty of perjury under the laws of the United States that to the best of my knowledge, information, and belief, the following is true, accurate, and correct:

1. I am a Major General in the United States Army, with 30 years of active duty service. I currently serve as Commander, Joint Task Force-Guantanamo, Guantanamo Bay, Cuba (JTF-GTMO). I have served in that position since March 2004. JTF-GTMO conducts detention and interrogation operations in support of the Global War on Terrorism, coordinates and implements detainee screening operations and supports law enforcement and war crimes investigations. Our detention mission is conducted in a humane manner that protects the security of both detainees and JTF personnel at GTMO. In my capacity as Commander, I am responsible for all aspects of detainee operations at Guantanamo Bay, Cuba to include medical care and I oversee the operation of the detention hospital that provides medical care to the detainees being held at Guantanamo. Currently, there are in excess of 500 detainees being held at Guantanamo Bay, Cuba.

2. Consistent with Department of Defense policy the JTF will prevent unnecessary loss of life of detainees through standard medical intervention, including involuntary medical intervention when necessary to overcome a detainee's desire to commit suicide, using means that are clinically appropriate. Although the principles of autonomy and consent for medical treatment are well established in medical care and are applicable to detainees, there are also clearly recognized exceptions in areas such as communicable disease treatment, occupational health, and

prison medical care, especially to prevent unnecessary loss of life.

3. The U.S. Department of Justice regulations for the Bureau of Prisons (Title 28 of the Code of Federal Regulations, Section 549.65) establishes explicit procedures for involuntary feeding of prison inmates engaged in hunger strikes when necessary to prevent an imminent threat of death or permanent impairment. That program was used as the model for Department of Defense detainee program operations in this area discussed in this declaration.

4. In keeping with the above guidance, it is JTF-GTMO's standard operating procedure (as approved by the Deputy Assistant Secretary of Defense – Detainee Affairs and the Assistant Secretary of Defense – Health Affairs) to avert death from hunger strikes and failure to drink, as well as to monitor the health status of detainees who are fasting voluntarily. Every attempt will be made to allow detainees to remain autonomous up to the point where failure to eat or drink might threaten their life or health.

5. Security forces at JTF-GTMO monitor each detainee's daily intake of meals and water. If a detainee has missed nine consecutive meals or has declined food and water for more than two days, personnel at the detention hospital are notified and a medical evaluation of the detainee is conducted. This evaluation includes a complete medical records review, as well as physical and mental health examinations and testing. Medical personnel on a regular and frequent basis then monitor the detainee.

6. If medical personnel have reason to believe that the continuation of a voluntary fast or hunger strike could endanger a detainee's health or life, the detainee will be admitted to the detention hospital. His food and water intake are again monitored, and his medical condition is

continuously observed. Medical Staff counsel the detainee regarding the risks associated with not following our medical advice directing him to eat life-sustaining food and to drink fluids. We also explain the alternatives available to him, including oral food and fluid, oral rehydration solutions, oral nutritional supplements and intravenous hydration.

7. If the detainee elects to voluntarily begin eating/drinking, the detention hospital follows specific protocols designed to ensure the detainee's health and well being as he increases his caloric and liquid intake.

8. If the detainee continues to refuse to eat and/or drink and if a medical officer determines that the detainee's health or life might be threatened if treatment is not initiated immediately, consideration is given to involuntary medical treatment of the detainee. Interventions of an involuntary manner are deferred, however, until there is a clear medical determination by the attending physician that continued fasting would impair the health seriously or jeopardize the life of a detainee. When, after reasonable efforts, or in an emergency preventing such efforts, a medical necessity for immediate treatment of a life or health threatening situation is determined by the physician to exist, I will authorize doctors to administer treatment without the consent of the detainee. This can include the use of intravenous means or a feeding tube. No request for such authorization has been denied, and where sought, such authorizations have been provided in a timely manner without exacerbating the medical situation of a detainee.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: 9 September 2005

JAY W. HOOD
Major General, USA

Exhibit B

REDACTED VERSION
(ORIGINAL FILED WITH CSO)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DECLARATION OF JOHN S. EDMONDSON, M.D.

Pursuant to 28 U.S.C. § 1746, I, John S. Edmondson, M.D., hereby declare:

1. I am a Captain in the United States Navy with 25 years Active Federal Commissioned Service. I currently am the Commander, U.S. Navy Hospital, Guantanamo Bay, Cuba and also serve as the Task Force Surgeon for Joint Task Force-Guantanamo, Guantanamo Bay, Cuba (JTF-GTMO). I am directly responsible for the medical care provided to personnel living at Guantanamo Bay and oversee the operation of the detention hospital that provides medical care to the detainees being held at Guantanamo. I have held this position since August 2003. Currently, there are in excess of 500 detainees being held at the detainee camp at Guantanamo Bay, Cuba.

2. I received my medical degree from the Medical College of Georgia. I completed an Internship at Bethesda Naval Hospital and a Residency in Emergency Medicine at Naval Hospital San Diego. I am licensed to practice in California and Georgia. I have held teaching appointments at the University of California San Diego and the Uniformed Services University

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of the Health Sciences in Bethesda.

3. The detention hospital is an 18-bed facility that is staffed to provide medical care to the over 500 detainees held at Guantanamo. The hospital medical staff of seventy includes two medical doctors and a Physician's Assistant. In addition, the staff includes Medical/Surgical Nurses, corpsmen, technicians (lab, radiology, pharmacy, OR, respiratory, physical therapy, information technology and biomedical repair), and administrative staff.

4. In addition, a 21-member Behavioral Health Service (BHS) Staff supports the hospital. The BHS staff includes a Board Certified Psychiatrist and a Ph.D. Psychologist. The remainder of the staff includes psychiatric nurses and psychiatric technicians. The BHS staff provides long-term supportive care and short-term behavioral modification therapy as well as psychotropic medication therapy for acute management of self-injurious behaviors and intense mood swings associated with dangerousness to others. They also manage major mental disorders and maladaptive behaviors associated with personality disorders.

5. All detainees arriving at Guantanamo are given a complete physical examination. The medical staff follows any medical issues identified during that or any subsequent examinations. The detainee can request 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. In addition to following up on detainee requests, the medical staff will investigate any medical issues observed by guards or other staff. From January 2004 to November 2004, the hospital staff conducted over 17,324 outpatient visits.

6. For medical procedures beyond the capability of the detention hospital, the detainees are transferred to the Naval Base Hospital at Guantanamo Bay. We can and have

JSC 2

requested that specialists be flown in to provide care to detainees when the medical need exceeds the capabilities of the Naval Base Hospital.

7. Medical staff at the detention hospital and the Naval Base Hospital have treated detainees for a variety of medical conditions, including hepatitis, heart ailments, hypertension, combat wounds, diabetes, tuberculosis, appendicitis, inguinal hernia, leishmaniasis, malaria, and malnutrition. In addition to providing medical treatment and prescription drugs, our medical staff has provided detainees with prescription eyeglasses and prosthetic limbs.

8. For many of the detainees, it was the military medical staff that diagnosed conditions that had previously been unknown to the detainees themselves. Many of the detainees were suffering from significant undiagnosed and/or untreated medical conditions and we have consistently provided high quality medical care to these detainees, comparable to the medical care provided to active duty military members. As a result, the health of the detainee population has markedly improved since they arrived at Guantanamo.

9. We have performed over 181 surgical procedures since January 2002. The first surgeries were primarily related to wound care and infection control, as many of the detainees had suffered wounds on the battlefield. Recent surgeries ranged from common procedures such as removing an appendix to coronary artery stent placement.

10. The provision of medical care to detainees is based solely on the need of detainees for such care. Medical care is not provided, denied, or affected by a detainee's cooperation (or not) in interrogations. Further, medical records of detainees are not available to interrogators, and interrogations are not permitted to interfere with the medical needs of detainees.

11. **REDACTED**

JSE 3

REDACTED

12.

REDACTED

REDACTED

13.

14.

REDACTED

15.

REDACTED

9855

REDACTED

16.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: April 11, 2005

John S. Edmondson
JOHN S. EDMONDSON, M.D.
Captain, Medical Corps, U.S. Navy

Exhibit C

AMERICAN FORCES INFORMATION SERVICE
NEWS ARTICLES

Guantanamo Detainees Receiving 'First-Rate' Medical Care

By Kathleen T. Rhem
American Forces Press Service

NAVAL STATION GUANTANAMO BAY, Cuba, Feb. 18, 2005 -- In every case, enemy combatants held here receive medical care that is "as good as or better than anything we would offer our own soldiers, sailors, airmen or Marines," the general in charge of the U.S. detention facility here said.

Detainees at Navy Station Guantanamo Bay, Cuba, receive the same high-quality medical care available to U.S. servicemembers, the detention facility commander said, including surgery in this operating room at the detainee hospital. Photo by Staff Sgt. Stephen Lewald, USA
(Click photo for screen-resolution image); high-resolution image available.

Army Brig Gen. Jay Hood, commander of Joint task Force Guantanamo, said medical personnel at the detainee hospital here have helped detainees recover from "some very significant war wounds."

Active-duty U.S. Navy medical personnel care for detainees as both inpatients and outpatients from a dedicated facility at Camp Delta, the main detainee- holding facility here. Most routine medical care is administered by corpsmen who visit each cellblock every two days or whenever a detainee requests care.

More serious health concerns among detainees are treated at the small, state- of-the-art medical facility dedicated to their care. A senior administrator at the facility called it "equivalent to a community acute-care hospital."

The facility is equipped with 19 inpatient beds (and can expand to 28), a physical-therapy area, pharmacy, radiology department, central sterilization area, and a single-bed operating room. More complex surgeries can be performed at the base naval hospital, which also is equipped with an intensive-care wing.

The detainee hospital also features an isolation room to prevent infectious diseases from spreading. So far, however, this room has only been used when ruling out diseases. For

instance, an official explained, one detainee stayed in the isolation room when doctors thought he might have an active case of tuberculosis. The detainee was removed from the room when cell cultures disproved that preliminary diagnosis. To date, no detainees at Guantanamo Bay have been diagnosed with active tuberculosis or other infectious diseases, the official said.

As in every other part of Camp Delta, security is a constant concern. A dedicated force of Army military police officers is assigned to guard detainees receiving treatment in the hospital.

The Navy medical personnel who treat the detainees pride themselves on the quality of care they provide, said Capt. Barry Barendse, a Navy nurse and the deputy command surgeon for JTF Guantanamo. "The standard of care here is the best possible standard of care (the detainees) could get," he said.

Barendse said humane treatment is "second-nature" for medical personnel.

"It's not that we like hanging around the bad guys," he said. "The thing about it is that the job we do for a living is a very humane one, and we just keep that mindset."

And the detainees' actions or attitudes do nothing to deter the staff from their dedication to providing high-quality care. The captain explained that detainees have told staff members "they would kill them if they had the chance and go after the rest of their family if they could." And still, the standard of care never wavers, he said.

Today detainees held here form a generally healthy population. They've received immunizations most of them never would have had available to them in their home countries, Hood said.

Some detainees have been provided life-changing care, Barendse said. He cited prosthetic limbs and removal of cancerous tumors as examples of the level of care provided to detainees. "Some of them have even told us that they're very happy we're taking care of them," he said. "We've given them new life, some of them we really have."

Psychological care also is available here for detainees who need it or request it. Barendse noted that most Americans "have the luxury" of seeking psychiatric care if they need it; that's usually not an option in the countries most of these detainees come from.

Psychiatric care for the detainees, like any other medical care provided to them, is important because it's the right thing to do and "because of the possibility they may not be in this prison the rest of their lives," Barendse said. "If they were sick when they got here or they're sick while they're here, we still want to get them well, so wherever and whatever they're going to do can be done in a normal state."

Related Site:
U.S. Naval Station Guantanamo Bay, Cuba

News Archive

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Exhibit D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DECLARATION OF JOHN A. HADJIS

Pursuant to 28 U.S.C. § 1746, I , John A. Hadjis, hereby declare:

1. I am a Colonel in the United States Army, with almost 23 years of active duty service. I currently serve as the Chief Of Staff of Joint Task Force-Guantanamo, Guantanamo Bay, Cuba ("JTF-GTMO"), and have served in that position since 28 July 2004. The JTF-GTMO has several subordinate units, including the Joint Detention Operations Group (JDOG). The mission of the JDOG is to provide for the safe and humane custody and control of enemy combatants at Guantanamo Bay, Cuba in support of the Global War on Terrorism. In addition, the JDOG provides security for JTF detention facilities. The JDOG undertakes the detention of enemy combatant detainees at GTMO in a humane manner that protects the security of both detainees and personnel at GTMO. In my capacity as Chief Of Staff for the Commander, Joint Task Force - Guantanamo, I am familiar with all JTF-GTMO operations, including those performed by the JDOG.

2. The mission of JDOG involves humane detention of the detainees. Consistent with that mission, and with the President's directive to the Military to treat detainees humanely, we do not permit the mistreatment or abuse of detainees. We have detailed standard operating procedures and training programs to ensure that the detainees are treated appropriately and that any violations of our procedures are investigated. These procedures apply to all personnel having contact with detainees, whether security, intelligence, or law enforcement personnel.

3. Over 500 individuals are currently detained at GTMO. All detainees receive adequate shelter, food and water, and medical care at all times. Detainees are housed in areas providing adequate shelter from the elements and with adequate

ventilation. They have access to potable drinking water and receive at least three meals per day that meet cultural dietary requirements. Detainees are provided with means to maintain adequate hygiene, including opportunities for showers. Medical care is available 24 hours a day.

4. An important aspect of detention is the maintenance of discipline among the detainees. This is for the safety, and security of all personnel within the detention facility, including detainees. The JDOG uses a system of detainee discipline and positive behavior rewards programs tied to a detainee's compliance with camp rules. Detainee violations of camp rules are reported through the guard force chain of command to the appropriate officer or commander who has authority to take action based on the type of violation involved. This system provides for the fair and consistent delivery of consequences for negative behavior by detainees and rewards for positive behavior.

5. Detainees are not granted or denied privileges, disciplined, or otherwise discriminated against on account of their being involved in habeas corpus litigation or having met with legal counsel.

6. A forced cell extraction or forced cell movement is used when a detainee refuses to leave his cell or some other location, and efforts to obtain compliance or to stop the detainee from acting out without the use of physical force have not been successful. A team of guards, who have been trained to enter a confined space, such as a cell, and secure the detainee in a safe manner, conducts these movements. The guards wear protective clothing when conducting a cell extraction. We refer to the team of guards who perform this task as the Initial

Response Force. A forced cell extraction or forced cell movement is not used as an interrogation technique.

I declare under penalty of perjury pursuant to the laws of the United States that the foregoing is true and correct.

Dated: April 13, 2005

JOHN A. HADJIS
Colonel, US Army

Exhibit E

AMERICAN FORCES INFORMATION SERVICE
NEWS ARTICLES

Joint Task Force Respects Detainees' Religious Practices

By Donna Miles
American Forces Press Service

WASHINGTON, June 29, 2005 – Members of Joint Task Force Guantanamo, Cuba, go to great lengths to respect the religious practices and beliefs of an estimated 520 enemy combatants being detained there, senior task force leaders told Congress today.

Officials described a sweeping program that ranges from educating servicemembers about Muslim beliefs and sensitivities to incorporating those religious practices into nearly every aspect of camp life.

The procedures are so strict, one member of the House Armed Services Committee quipped during today's hearing that "Guantanamo may be the only place in Cuba where religious freedom is allowed."

Army Command Sgt. Maj. Anthony Mendez from the task force's Joint Detention Group explained to committee members the procedures in place to respect Islam practices.

A loudspeaker at the camp signals the Muslim "call to prayer" five times a day - generally at 5:30 in the morning, 1 and 2:30 in the afternoon, and 7:30 and 9:30 at night, Mendez said.

Once the prayer call sounds, detainees get 20 minutes of uninterrupted time to practice their faith, he said. Those who choose to can take advantage of the prayer caps, beads and oil given to them as part of their basic-issue items and pray toward the Muslim holy city of Mecca, in the direction designated by arrows painted in each detainee cell and all common areas. Detainees who display good behavior and abide by camp rules receive traditional Islam prayer rugs as well, Mendez said.

The Joint Task Force Guantanamo Bay staff strives to ensure detainees aren't interrupted during the 20 minutes following the prayer call, even if they're not involved in religious activity, Mendez said.

Staff members schedule detainee medical appointments, interrogations and other activities in accordance with the prayer call schedule. They also post traffic triangles throughout Camp Delta to remind task force members not to disrupt the 20-minute observation period, Mendez explained.

Strict measures in place throughout the facility ensure appropriate treatment of the Koran, the Muslim holy book.

Every detainee at the facility is issued a personal copy of the Koran, and it is displayed in detainee cells "in plain view and above eye level," Mendez said. This serves two purposes, he said, discouraging detainees from hiding contraband inside its pages and reducing the likelihood of a guard accidentally bumping it or touching it during a cell search.

"The rule of thumb for the guards is that you will not touch the Koran," Mendez said. "That's the bottom line."

In the rare event that guards must touch or move a Koran, they follow strict procedures, all carried out wearing cream-colored latex gloves, Mendez explained. In moving a Koran, they use two hands, place it on a white towel and wrap the towel to cover it, then carry it above waist level. Whenever possible, they do this movement with the assistance of a linguist or translator.

Army Brig. Gen. Jay Hood, commander of Joint Task Force Guantanamo, said the task force respects Muslim dietary practices, flying in food that meets strict Islamic certification requirements and serving only menu items permitted under Muslim law.

The task force also pays tribute to Islamic holy periods, like Ramadan, modifying meal schedules to meet the strict fasting requirements and even offering detainees figs and honey at appropriate times, he said.

To ensure members of Joint Task Force Guantanamo understand Islamic practices, all undergo a program of sensitivity training before their assignments, Hood said. They learn about cultural differences and how to observe them on the job, from how to use their hands to what to do with their feet to whether it's appropriate for a detainee to be required to look into the eyes of a woman guard when she's talking to him, he said.

Once they report to Guantanamo Bay for duty, new task force members get "walked through" these practices and procedures to ensure they understand them, he said.

Hood told the congressional panel he's convinced that Joint Task Force Guantanamo is doing everything possible to ensure religious freedom for detainees.

"I don't see how anybody can look to the efforts we have put into (ensuring detainees' freedom to practice their religion)" and believe otherwise, he said.

Related Site:
Joint Task Force Guantanamo

News Archive

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Exhibit F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN DOES 1-570, Unidentified Detainees Guantanamo Bay Naval Station Guantanamo Bay, Cuba, Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	)	Civil Action No. 05-CV-0313 (CKK)

DECLARATION OF 1LT WADE M. BROWN

I, Wade M. Brown, pursuant to 28 U.S.C. § 1746, hereby declare and say as follows:

1. I am a First Lieutenant in the New Jersey Army National Guard and am currently serving as the Officer in Charge (OIC) of the S-2 Section within the Joint Detention Operations Group at Guantanamo Bay, Cuba. I have held this position since October 2004. Prior to becoming OIC, I was the Assistant OIC from July 2004 through September 2004. In both of these positions, part of my responsibilities are to report directly to the JTF and JDOG Commanders on all issues related to Detainee Mail operations, to include the proper handling and processing of mail sent to and from detainees, processing times, force protection screening and redaction. I oversee the 15 individuals in the screening and processing units and work in the same building as such. The following statements provide a general overview of the mail privileges available to these detainees at Guantanamo Bay. I make these statements based upon

my personal knowledge and upon information made available to me in the performance of my official duties.

2. Each individual detained by the Department of Defense at Guantanamo Bay is given the opportunity to send and receive mail. Detainees cannot lose mail privileges for any reason, including as part of disciplinary action or interrogation. However, some detainees have affirmatively refused to send or receive any mail. Also, in rare cases, pens are temporarily removed from some detainees when appropriate members of the detainee medical care staff determine the detainee may use the pen to inflict self-harm.

3. In the six-month period from September 2004 through February 2005, the mail processing unit processed approximately 14,000 pieces of mail sent to or by detainees at Guantanamo Bay.

4. There are two methods for detainees to send and receive mail — through the mail delivery and collection system administered by the United States Military, or through the International Committee for the Red Cross ("ICRC"). Legal mail between habeas counsel and the detainees is not processed through either of these two methods, instead that mail is handled under the procedures set forth in the federal court order that covers the habeas cases.

5. The Military provides each detainee with two sheets of stationery, four postcards, and six envelopes per month. See Exhibit A. Each detainee is also provided with a soft pen, although certain detainees are not permitted to keep the pens in their cells for security reasons. These detainees are provided with pens only during the times when they are writing letters. Military officers collect and deliver mail from the detainees approximately six times per month. After mail is collected from the detainees, it is taken to a processing unit. At the processing unit,

each piece of mail is translated into English if necessary, screened for inappropriate materials and redacted accordingly, and placed in a U.S. Postal Service receptacle affixed with the required postage. This entire process takes approximately fourteen days on average. The processing unit clears approximately 75 pieces of mail each day. Mail that is sent to a detainee must also be cleared through the processing unit and stamped "Approved by U.S. Forces" before it can be delivered to the detainee to whom it is addressed. Incoming mail is also typically processed within fourteen days on average.

6. The ICRC also facilitates the delivery of detainee mail to and from Guantanamo Bay. The ICRC pays approximately four visits each year to the detainees for approximately 5-6 weeks per visit. The ICRC provides its own stationery and envelopes to the detainees (although detainees are still required to use Military-issued pens), collects the mail from the detainees, and delivers it to the processing unit. After the mail is cleared by the processing unit, it is returned to the ICRC, who delivers it to the intended recipients. The ICRC also collects mail from outside Guantanamo Bay and delivers the mail directly to the detainees after it is cleared through the processing unit.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 17, 2005.

WADE M. BROWN
First Lieutenant, NJARNG

EXHIBIT A

SENDER:

Name (Last, First MI) _____

Internment Serial Number _____

Date and Place of Birth _____

Name of Camp _____

Country where posted _____

(Fold on this line)

MAIL LETTER

Language _____

To _____

Street _____

City _____

Country _____

Province or Department _____

(Fold on this line)

DO NOT WRITE HERE

(Fold on this line)

DA FORM 2667-R, May 52 EDITION OF 1 JUL 63 IS OBSOLETE. For use of this form, see [illegible] the proponent agency is DCSPER.

DO NOT WRITE BEYOND HEAVY LINES

Reverse of DA FORM 2667-R, May 82

DETAINEE _____
CAMP DELTA
Washington, DC 20353
USA

SENDER	TO:
NAME *(Last, first, MI)*	
INTERNMENT SERAL NUMBER	STREET
DATE AND PLACE OF BIRTH	CITY
NAME OF CAMP	COUNTRY
COUNTRY WHERE POSTED	PROVINCE OR DEPARTMENT

DA FORM 2668, JAN 2004 Replaces DA Form 2668-R, May 1982, which is obsolete. APD V1.01

POST CARD For use of this form, see AR 190-8; the proponent agency is PMG.	DATE
LANGUAGE	POWER SERVED
WRITE BETWEEN LINES AND AS LEGIBLY AS POSSIBLE	

DA FORM 2668, JAN 2004 APD V1.01

DETAINEE _____
CAMP DELTA
Washington, DC 20353
USA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

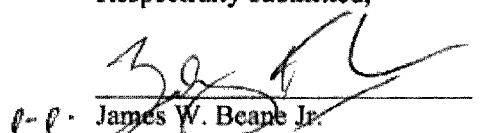
BENJAMIN MOHAMMED AL HABASHI,	)	
	)	
Petitioner/Plaintiff,	)	
	)	
v.	)	**Civ. No. 05-cv-765 (EGS)**
	)	
GEORGE W. BUSH, et al.,	)	
	)	
Respondents/Defendants.	)	

NOTICE OF FILING OF MOTION FOR A PRELIMINARY INJUNCTION CONCERNING CONDITIONS OF CONFINEMENT

Petitioner has filed a Motion for Preliminary Injunction concerning the conditions of confinement at Guantanamo Bay with the Court Security Officer (CSO), pursuant to Judge Joyce Hens Green's Order of December 13, 2004. The Motion requests an Order from the Court mandating that Respondents treat Petitioner at least according to minimum acceptable standards. Counsel also files the attached document outlining his submission to the CSO.

Dated: September 12, 2005

Respectfully submitted,



p-p. James W. Beane Jr.
U.S. District Court for the
District of Columbia, Bar No. 444920
803 Florida Avenue, N.W.
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(202) 257-3920 (tel)
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e-mail: beane.law@verizon.net

Clive A. Stafford Smith
Admitted *pro hac vice*
636 Baronne Street
New Orleans, La. 70113
(504) 558 9867
e-mail: clivess@mac.com

Counsel for Mr. Al Habashi

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BENJAMIN MOHAMMED AL HABASHI,	)	
	)	
Petitioner/Plaintiff,	)	
	)	
v.	)	**Civ. No. 05-cv-765 (EGS)**
	)	
GEORGE W. BUSH, et al.,	)	
	)	
Respondents/Defendants.	)	

Pursuant to Judge Joyce Hens Green's Order of December 13, 2004 (Case 1:02-cv-00299-CKK), Counsel files this submission to accompany the attached Notice of Filing of Motion for Preliminary Injunction.

On September 1, 2005 at approximately 2 PM, Counsel submitted to the Court Security Officer a Motion for Preliminary Injunction concerning the conditions of confinement at Guantanamo Bay. The Motion requests an Order from the Court mandating that Respondents treat Petitioner at least according to minimum acceptable standards.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

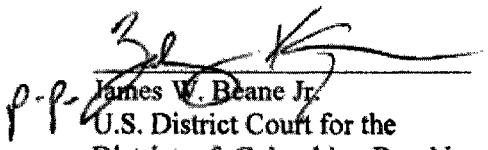
BENJAMIN MOHAMMED AL HABASHI,	)	
	)	
Petitioner/Plaintiff,	)	
	)	
v.	)	**Civ. No. 05-cv-765 (EGS)**
	)	
GEORGE W. BUSH, et al.,	)	
	)	
Respondents/Defendants.	)	

NOTICE OF FILING OF MOTION FOR A PRELIMINARY INJUNCTION CONCERNING CONDITIONS OF CONFINEMENT

On September 1, 2005 at approximately 2 PM, Counsel filed with the Court Security Officer a Motion for Preliminary Injunction concerning the conditions of confinement at Guantanamo Bay, pursuant to Judge Joyce Hens Green's Order of December 13, 2004. The Motion requests an Order from the Court mandating that Respondents treat Petitioner at least according to minimum acceptable standards.

Dated: September 14, 2005

Respectfully submitted,



p.p. James W. Beane Jr.
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803 Florida Avenue, N.W.
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e-mail: beane.law@verizon.net

Clive A. Stafford Smith
Admitted *pro hac vice*
636 Baronne Street
New Orleans, La. 70113
(504) 558 9867
e-mail: clivess@mac.com

Counsel for Petitioner

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

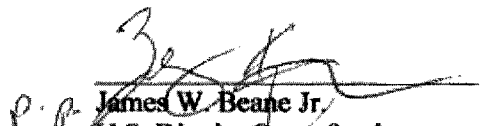
BENJAMIN MOHAMMED AL HABASHI,	)	
	)	
Petitioner/Plaintiff,	)	
	)	
v.	)	**Civ. No. 05-cv-765 (EGS)**
	)	
GEORGE W. BUSH, et al.,	)	
	)	
Respondents/Defendants.	)	

NOTICE OF FILING OF REPLY IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION CONCERNING CONDITIONS OF CONFINEMENT

On September 16, 2005 at 4:11 PM, Counsel filed with the Court Security Officer a Reply in Support of Motion for Preliminary Injunction concerning the conditions of confinement at Guantanamo Bay, pursuant to Judge Joyce Hens Green's Order of December 13, 2004. The Motion requests an Order from the Court mandating that Respondents treat Petitioner at least according to minimum acceptable standards.

Dated: September 16, 2005

Respectfully submitted,



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636 Baronne Street
New Orleans, La. 70113
(504) 558 9867
e-mail: clivess@mac.com

Counsel for Petitioner

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BENJAMIN MOHAMMED AL HABASHI, et al.	)	
Petitioners,	)	
v.	)	No. 1:05CV00765 (EGS)
GEORGE WALKER BUSH, et al.	)	
Respondents.	)	

ORDER

Petitioners' motion for preliminary injunction (Dkt. #12) is referred to the Calendar Committee for reassignment by consent to Judge Louis F. Oberdorfer, who will consider and decide it.

Signed: Emmet G. Sullivan
United States District Judge
September 23, 2005

**PREVIOUSLY FILED WITH THE CSO
AND CLEARED FOR PUBLIC FILING**

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

BENJAMIN MOHAMMED AL HABASHI,	)	
	)	
Petitioner/Plaintiff,	)	
	)	
v.	)	**Civ. No. 05-cv-765 (EGS)**
	)	
GEORGE W. BUSH, et al.,	)	
	)	
Respondents/Defendants.	)	

**MOTION FOR A PRELIMINARY INJUNCTION
CONCERNING CONDITIONS OF CONFINEMENT**

PREVIOUSLY FILED WITH THE CSO AND CLEARED FOR PUBLIC FILING

Petitioner[1] seeks a preliminary injunction against Respondents concerning the conditions of his confinement in Guantanamo Bay.[2]

As the Court reads this motion, prisoners at Guantanamo are already three weeks into a hunger strike. The reason: the constant debasement and deception of the prisoners by their custodians, and the lack of any prospect for the prisoners to receive a fair trial. This is the second major hunger strike since early July. Last time, various prisoners came close to death before the military agreed to make obviously necessary changes. Almost immediately, the military reneged, and it will be twice as difficult to resolve the issues this time.

Counsel for petitioner has repeatedly attempted to discuss this matter with officials in charge of Guantanamo Bay. However, these officials simply refused to meet with counsel to discuss the problems faced by his clients. The military will not negotiate issues of basic decency in good faith, the prisoners must seek injunctive relief from the Court.

I. THE FACTS CONCERNING THE UNTENABLE CONDITIONS OF PETITIONER'S CONFINEMENT

Petitioner urgently brings this motion to resolve the illegal, uncivilized and inhumane conditions of his confinement in Guantanamo Bay.

There is good reason why the people being held in Guantanamo Bay have become desperate. Most of the 500 men have been held for more than three years. Just four have been charged with some kind of an offense in a military commission, although none even among these four has actually had a commission – a tribunal which has, itself, been described as unfair and

[1] Counsel is filing a similar motion in the case of every prisoner he is representing as all face similar degradation and imminent danger to their lives. This is being done independently in each case, since the clients cannot afford the time that might be consumed certifying this as a class action, and there no longer exists the option of going to a designated judge (formerly Judge Green) to resolve all of the issues at one go. Obviously, such a system was more efficient, and Petitioners respectfully suggest that such a system should be invoked once again.

[2] Footnotes to sources are included for the convenience the classification assessment of this document rather than for any other reason. The obstacles placed in the way of counsel securing verified information about each element of the pleading below from the client are legion, but counsel verifies by his signature that each factual allegation is true and accurate to the best of the information counsel has received from the clients in Guantanamo and other legitimate sources of information.

rigged by the military prosecutors involved,[3] and "kangaroo courts" by respected international jurists.[4]

The rest of the 500 men have been offered only the military's other kangaroo tribunal, the Combatant Status Review Tribunal (CSRT). At a CSRT tribunal, there is no opportunity to see much of the evidence against you, there is no lawyer is allowed to represent you, and the 'judges' are all hand-picked members of the U.S. military. *See* In re Guantanamo Bay Cases, 355 F. Supp. 2d 443, 468 (D.D.C. 2005). The definition of "enemy combatant" is inherently vague, and the burden is on the prisoner to prove his own 'innocence'. Id. And whether the tribunal finds you are an enemy combatant or not,[5] you can be held indefinitely.[6] For the Guantanamo prisoner, then, there is no hope whatsoever of actually challenging his detention, let alone going home.

---

[3] See Neil Lewis, *Two Prosecutors Faulted Trials for Detainees*, N.Y. TIMES (August 1, 2005) ("Maj. Robert Preston, also of the Air Force, said in a March 11, 2004, message to another senior officer in the prosecutor's office that he could not in good conscience write a legal motion saying the proceedings would be "full and fair" when he knew they would not."); ABC News Online, *Leaked emails say Guantanamo trials rigged* (August 1, 2005) ("I lie awake worrying about this every night," [Military Prosecutor Major Robert Preston] wrote. "I find it almost impossible to focus on my part of mission. After all, writing a motion saying that the process will be full and fair when you don't really believe it is kind of hard, particularly when you want to call yourself an officer and lawyer."), available at http://www.abc.net.au/news/newsitems/200508/s1426797.htm.

[4] Lord Johan Steyn, *Guantanamo: The Legal Black Hole*, 27th F.A. Mann Lecture (25th November 2003) (Lord Steyn properly said that "the military commissions are not independent courts or tribunals. The term kangaroo court springs to mind. It derives from the jumps of the kangaroo, and conveys the idea of a pre-ordained arbitrary rush to judgement by an irregular tribunal which makes a mockery of justice."). Similar opinions have been expressed by some of the Bush Administration's closest allies. For example, as British Foreign Secretary Jack Straw has said, "in the Attorney General's view the Military Commissions, as presently constituted, would not provide the type of process which we would afford British nationals." *Foreign and Commonwealth Office, Statement by the Foreign Secretary on Return of British Detainees* (19th February, 2004).

[5] Respondents have recently taken the position with the Uigurs at Guantanamo Bay that even if they are found not to be enemy combatants at the CSRT they can still be held indefinitely while the government decides what to do with them. Associated Press, *Judge Asks Status of Gitmo Detainees* (August 25, 2005), available at http://www.nytimes.com/aponline/national/AP-Guantanamo-Detainees.html. With Sami Al Laithi, another person who was found not to be an enemy combatant several months ago at his CSRT, Respondents' position has been even more depressing for the prisoners. Respondents have argued that the CSRT finding was not a finding of 'innocence,' asserted the government's right to deport him to face persecution in Egypt, and denied the courts' role in any aspect of his predicament. See *Respondents' Memorandum in Opposition to Petitioner Sami Al Laithi's Motion for a Preliminary Injunction*, filed July 22, 2005, in Sliti et al. v. Bush, CIV No. 05-429 (RJL).

[6] Administrative Review Boards determine whether someone who was found to be an enemy combatant no longer poses a threat, but that review only occurs once a year. In the notice given to counsel for each prisoner earlier this year, Respondents represented: "The ARBs are an annual review process to make an assessment of whether there is continued reason to believe that an enemy combatant poses a continuing threat to the United States or its allies . . . . Information on the ARB procedures can be obtained through the Department of Defense website at http://www.defenselink.mil/releases/2004/nr20040915-1253.html."

The lack of any meaningful due process is itself a denial of the right to fair detention, and a source of intense frustration to the prisoners concerned. But the problem has been exacerbated exponentially because of the horrendous conditions under which the prisoners are being held. For example, prisoners "in Camp V are held in concrete isolation cells with 24-hour lighting and large, loud fans designed to prevent detainees talking with each other. ... [D]etainees [are] confined to these cells for up to 24 hours a day, only being allowed out to exercise once a week or every two weeks. When they are allowed out to exercise it is often in the middle of the night, so that detainees go for months without seeing the sun."[7]

There have been endless violations of the prisoners' religious rights. The Qur'an has been repeatedly desecrated by the military. Prisoners are isolated, cut off from family and friends – no visits whatsoever are allowed, no telephone calls, and even the mail system is manipulated as part of the interrogation process.

The prisoners have shown a surprising degree of patience in the face of this abuse. However, gradually, the prisoners have come to the end of their tether. It is this fact that makes the current petition so urgent.

A. THE URGENCY OF THE PROBLEM

The situation in Guantanamo Bay dire. There is a hunger strike going on there, and people are likely to die.[8] The history is briefly stated by Binyam Mohammed in his recently-unclassified statement:[9]

> I am Binyam Mohammed. I am 27 years old. I was seized by the Americans on April 10, 2002, and I have been held by them since. They took me forcibly to Morocco where I endured 18 months of

[7] Amnesty International, *Report of Hunger Strike at Guantanamo* (July 2005), available at http://web.amnesty.org/pages/stoptorture-hungerstrike-eng.

[8] Guantanamo inmates on hunger strike – Friday 22nd July 2005 1.44 Makka time 22:44 GMT, http://english.aljazeera.net/NR/exeres/1AFAF53F-2A54-43B5-A049-9B673AF6D241.htm ("The hunger strike is a "peaceful, nonviolent strike until demands are met" and calls for "starvation until death".").

[9] *Statement of Binyam Mohammed (August 11, 2005)*, provided to counsel as unclassified on August 23, 2005. This statement has been cleared as "Unclassified".

torture from July 21, 2002, to January 21, 2004. I was then taken by the Americans to Afghanistan and, on September 19, 2004, to Guantanamo Bay.

All this time the conditions of my confinement have been a nightmare. Along with other U.S. prisoners, I have been routinely humiliated and abused and constantly lied to.

We were very, very patient here in Guantanamo. But finally enough was enough, and in late June we organized a strike across the prison. People refused food and water, some for over 20 days, and became so weak they were hospitalized. They refused an I.V. drip and the doctor told them that he could not force them to take sustenance even if they were in a coma. He had the people in the hospital confirm twice, before witnesses, that they refused resuscitation if it came to that.

The administration eventually agreed, if we stopped the hunger strike, to negotiate on good faith. I had not eaten for just four days but I had been very weak and fallen down.

The administration promised that if we gave them ten days, they would bring the prison into compliance with the Geneva Conventions. They said this had been approved by Donald Rumsfeld himself in Washington, D.C.

As a result of these promises, we agreed to end the strike on July 28th, 2005.

It is now August 11th, 2005. They have betrayed our trust (again). Hisham from Tunisia was savagely beaten in his interrogation, and they publically (sic) desecrated the Qur'an (again). Saad from Kuwait was ERF'd for refusing to go (again) to interrogation because the female interrogator had sexually humiliated him (again) for 5 ½ hours. Omar the kid from Canada was ERF'd (again) for refusing to go to another illegal interrogation.

Therefore the strike must begin again. Some have already begun – 150 have begun in Camps I, II & III. 60 people in Camp V begin today.

I will begin tomorrow – Friday, August 12th, 2005. I do not plan to stop until I either die or we are respected. People will definitely die.

* * *

We ask only for justice: treat us, as promised, under the rules of the Geneva Conventions for Civilian Prisoners while we are held, and either try us fairly for a valid criminal charge or set us free.

Guantanamo presents a unique problem in the Western world, because of the military's insistence on secrecy even where such secrecy is patently unnecessary. How can the security of the nation be threatened by information about the physical well-being of our prisoners? Yet, as the prisoners starve to death hundreds of miles to the south of this Court, no public monitoring of their status is permitted.

1. THE PREDICTABLE AND FATAL COURSE OF A HUNGER STRIKE PROVIDES CAUSE OF URGENT CONCERN

Despite the lack of reliable information, we can predict the prisoners' plight by the known course of a hunger strike. Once a human being ceases to take in food, there are predictable limits for a normal, healthy adult (estimating approximately 24 pounds of fat on his body).[10] After a week, the hunger striker experiences dramatic weight loss.[11] Physiologists agree that no human being can survive losing 40 percent of his body mass,[12] which will generally happen within 40 to 60 days.

In the first few days of starvation the body uses stores of glycogen which is stored in the liver and muscles. This provides energy for the body to function. During these days, the person will experience substantial weight loss combined with salt excretion. After about two weeks, the stores of glycogen in the body are exhausted and the body turns to muscles and vital organs for energy.[13] Over the next several days, the liver and intestines atrophy, followed by the heart and kidneys. The pulse slows and blood pressure falls. Patients complain of fatigue,

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[10] See Brendan I. Koerner, *How Long Can You Go Without Food? Hunger strikes 101* (June 10, 2004), available at http://slate.msn.com/id/2102228.
[11] See Mary A Kenny, et. al., *Legal And Ethical Implications Of Medically Enforced Feeding Of Detained Asylum Seekers On Hunger Strike*, MJA 2004; 180 (5): 237-240, available at http://www.mja.com.au/public/issues/180_05_010304/ken10552_fm.html.
[12] See *Koerner*, supra.
[13] Id.

headache, faintness and dizziness. By about the 40th day, the striker becomes seriously ill and is bedridden.[14]

The body is generally able to survive for up to 40-60 days without food.[15] Although this is an estimate, there are tragic examples in history that provide some empirical evidence. In the Irish hunger strikes in 1981 – precipitated by the British internment of Irish suspects without trial, similar to Guantanamo Bay – ten people died. They began to expire after 46 days without food, and the longest lived survived 73 days.[16]

These predictions involve a gradual decline based on the lack of solid food, but assume the continued consumption of water. Refusing water radically changes the equation. It is unlikely that a human being will be able to last more than a week without water.[17]

Meanwhile, among the survivors, there are psychological implications that are inevitable when a hunger strike takes place. A study on anorexia nervosa and depression[18] indicates that 77% of individuals who lose significant body weight through means of starvation are clinically depressed at the time of admission to hospital. Hunger strikers also demonstrated features similar to those of the post-traumatic stress syndrome.

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[14] See *Kenny*, supra. While these stages may be 'predictable,' their consequences for each individual may not be. For example, the process described causes ketone bodies to be produced. Ketone bodies are toxic byproducts which are excreted through the urine. Some varieties of ketone bodies called acetones can be expelled through the lungs. Ketone bodies can be oxidized by the brain to create the energy that it needs. However, if the number of ketone bodies is too abundant in the blood stream, a lethal condition can arise which poisons the individual. See *Koerner*, supra.

[15] See *Koerner*, supra; *Kenny*, supra.

[16] See *1981 Irish Hunger Strike*, available at http://www.answers.com/topic/1981-irish-hunger-strike.

[17] Jill Irvin, Ohio State University, Nutrition in Perspective (Patricia Kreutler, 1980), http://www.madsci.org/posts/archives/sep99/937540022.Gb.r.html ("[a] person will die within 3-5 days without water."). The weight and size of the person is irrelevant in this matter. The human body is "made up of about 70 percent water. (That is about 15 gallons for an adult.) The body uses water in maintaining its temperature, breathing, digesting food, and lubricating moving joints." See Juyani, *Water*, available at http://www.endtimesreport.com/waterarticle.html. A person must consume "2.5 litres of water from all sources (i.e. water, food) per day to maintain health." http://www.epa.gov/safewater/kids/water_trivia_facts.html; see also http://www.ynhh.org/online/nutrition/advisor/water.html; http://www.nsf.org/consumer/drinking_water/ww_funfacts.asp?program=WaterTre; http://ct.water.usgs.gov/EDUCATION/trivia.htm.

[18] See Herpertz-Dahlmann B, Remschmidt H, *Anorexia nervosa and depression. On the relation of body weight and depressive symptoms*, Klinik und Poliklinik fur Kinder- und Jugendpsychiatrie, Philipps-Universitat Marburg, http://www.ncbi.nlm.nih.gov/entrez/query.fcgi?cmd=Retrieve&db=pubmed&dopt=Abstract&list_uids=2797333&query_hl=2.

This is the process that we know is now taking place in Guantanamo Bay.

2. AN EARLIER HUNGER STRIKE TOOK PLACE IN LATE JUNE AND IN JULY, PROVIDING THIS COURT WITH SOME IDEA OF WHAT IS HAPPENING NOW

In late June and most of July 2005, a hunger strike took place in Camp V.[19] A similar action took place in Camps I, II, III and IV.[20] The July hunger strike was a rolling one:

> They began on June 21, 2005, by rejecting one meal each day for a week. On June 28, they began to reject two meals. On July 2, 2005, they began rejecting all food. * * * A majority of Camp V are taking part in the hunger strike. Some are not able to because they have medical conditions.[21]

More details of this action follow below, as they become relevant.

3. THE PROBLEMS INHERENT IN THE CLOSED PRISON OF GUANTANAMO BAY CAST DOUBT ON ALL THE INFORMATION RELEASED BY THE U.S. MILITARY

Sad to say, the military simply cannot be trusted to provide the Court and the public with accurate and reliable information about the prisoners' health and welfare. The earlier hunger strike provides a good illustration of this. When a tree falls in the forest, nobody knows unless they are there to see or hear it. The same principle applies to Guantanamo Bay: when a prisoner suffers there, we only know if lawyers are allowed to see him, as otherwise it is highly unlikely that the military will provide a forthright report of what happened.

As one of the prisoners reports, the Military "showed indifference to the very fact of our deaths. 'Do you think the world will ever learn of your hunger strike? We will never let them know.' They said. 'We care nothing if one of you dies.'"[22]

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[19] Most of the details concerning Camp V come from an unclassified memo concerning discussions with Omar Deghayes (dated July 19, 2005) ("*Deghayes Memo*"). This memo has previously been filed in the public record in the case of Sami Al Laithi.

[20] Most of the details concerning Camps I-IV come from an unclassified memo concerning discussions with Usama Abu Kabir ("*Abu Kabir Memo*").

[21] *Deghayes Memo at 1.*

[22] *Shaker Aamer Statement* (August 11, 2005) (Note that the Shaker Aamer statement was submitted for classification review by counsel on August 14, 2005, and has been classified FOUO-Protected. This classification determination is indefensible, since all the facts in the memo concern the abuse of the Guantanamo prisoners.

The disregard for the true facts is apparent from the military's public statements during the July hunger strike. As of July 21, 2004, the Pentagon denied that a hunger strike was even taking place.[23] The Pentagon was then forced to admit it was happening,[24] but suggested that the prisoners had only refused meals for about three days,[25] when in truth it had been going on for three weeks. The U.S military then said that "52 prisoners are taking part in a hunger strike,"[26] when independent sources – now confirmed – suggested that it was three or four times that number.[27]

During the last hunger strike it was said that "[d]etainees are being monitored by medical professionals and their vital signs are being checked daily."[28] This much is true, but it is deceptive. Monitoring will not save the lives of the prisoners. The critical issue is whether the prisoners are going to be allowed to die from lack of food and water. "A military spokesman was unable to say whether any of the treatment was being administered by force."[29] The military may feel 'unable' to say this, but the truth is that last time the prisoners were not forcibly fed,

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However, counsel has attempted to pare down the facts cited in this pleading even more to head off any notion that the evidence should be censored.).

[23] See, e.g., Associated Press, *Afghans tell of hunger strike at Guantanamo* (July 22, 2004), TAIPEI TIMES ("Pentagon said it was unaware of a hunger strike"), available at http://www.taipeitimes.com/News/world/archives/2005/07/22/2003264520.

[24] Pravda, *Guantanamo prisoners engaged in hunger strike* (July 31, 2005) ("Pentagon had to admit a hunger strike in Guantanamo prison but declined to name the reason of it."), available at http://newsfromrussia.com/usa/2005/07/21/60646.html.

[25] ITV NEWS, *Guantanamo: prisoners on hunger strike* (July 22 2005) ("The Joint Task Force in charge of the facility said so far the men had refused nine meals over three days and are being monitored by medical professions."), available at http://www.itv.com/news/world_1782911.html. See also ABC News Online, *Guantanamo detainees give demands to end hunger strike* (July 23, 2005), available at http://www.abc.net.au/news/newsitems/200507/s1420814.htm.

[26] CBC News, *Hunger strike confirmed at Guantanamo Bay* (July 22, 2005), available at http://www.cbc.ca/story/world/national/2005/07/22/Guantanamo-Bay-protest-050722.html; Al Jazeera, *Guantanamo inmates on hunger strike* (July 22, 2005), available at http://english.aljazeera.net/NR/exeres/1AFAF53F-2A54-43B5-A049-9B673AF6D241.htm; Fox News, *Pentagon: Gitmo Prisoners on Hunger Strike* (July 21, 2005), available at http://www.foxnews.com/story/0,2933,163237,00.html;.

[27] ITV News, *Guantanamo: prisoners on hunger strike* (July 22, 2005) ("Two Afghan detainees released this week said some 180 terror suspects had been on hunger strike for around two weeks."), available at http://www.itv.com/news/world_1782911.html. It was later confirmed that the number of prisoners who joined the strike reached 250, *Shaker Aamer statement* (August 11, 2005), or half of all the prisoners being held in Guantanamo.

[28] BBC News, *Guantanamo detainees refuse food Fifty-two detainees at the US prison camp at Guantanamo Bay in Cuba are staging a hunger strike in protest at their detention and treatment* (July 22, 2005), available at http://news.bbc.co.uk/go/pr/fr/-/2/hi/americas/4704871.stm.

[29] Id.

and it seems likely that they cannot be forced to take food if they refuse. Thus, their lives are likely to be in jeopardy at any time.

4. THE BELLICOSE AND MANIPULATIVE MILITARY RESPONSE TO THE JULY HUNGER STRIKE ILLUSTRATES HOW DIFFICULT IT WILL BE TO AVERT FATALITIES THIS TIME

Beyond the military's focus on secrecy, there are other institutional reasons why the military is unlikely to be able to avert fatalities with the August hunger strike. The military is highly unlikely to take an honest approach to negotiations, in part because they are politically reticent to 'negotiate' with people they publicly brand as 'terrorists,' and in part because the last three years have seen the military engage in a consistent pattern of deception with respect to virtually every aspect of the prisoners' affairs. On the other side of the equation, it is highly unlikely that the prisoners will give the military the benefit of the doubt again when it comes to questions of the military's good faith. The prisoners have been deceived on so many levels, and believe that the military reneged on an agreement yet again after the July strike, that it is going to prove extremely difficult to persuade the prisoners that any promises made by the military are in good faith. This creates an unenviable impasse: if the two parties cannot reach agreement, the predictable outcome will be the deaths of the starving prisoners.

We can draw depressing lessons from the military's response to the first hunger strike, which was initially bellicose. They refused to make any concessions, and forcibly ERF'd the prisoners who refused food.[30] However, it gradually became evident that the military could not prevail by force alone. The first major embarrassment for the military during the first strike was a visit by some VIP's who were shown Camp 4 on July 19, 2005. The prisoners in Whiskey

[30] See *Memo on Conditions in Guantanamo Bay at* 1 (August 13, 2005). This memo was submitted for classification review and was classified as 'FOUO Protected,' apparently because it involved the ongoing investigation of the abuse of Hisham Sliti. Counsel has endeavored to remove from this pleading anything that could possibly cause concern to the military censors, but it must be noted that such a classification is patently inappropriate. Undersigned counsel is Mr. Sliti's lawyer, and the idea that evidence that he has been abused can be covered up is unsupportable.

Block shouted their grievances at the visitors, telling them that their tour was a farce, and that they should talk to the prisoners in Camp V. The military cracked down on the prisoners in Whiskey Block, and moved half of them to harsher conditions. This did not cause the anticipated result, as the other half of the prisoners insisted on the same punishment, and this attitude of solidarity gradually spread to other camps.[31]

The July hunger strike grew to the extent that the medics could not keep up, and elected to stop their regular medical calls.[32] Many of the prisoners were soon in varying states of physical peril. M.C., the juvenile prisoner who was just 14 years old when he was seized, became so weak that he collapsed. He suffered a serious blow to his forehead resulting in a scar.[33] Shaker Aamer lost 35 pounds during the strike.[34] The prisoners spent "twenty six days of no food" and when some of them also refused water; "the conditions of some prisoners became so critical that all the detainee hospital had no more beds and they had to take prisoners to the navy hospital."[35]

At this point, Colonel [XXXX][36] seemed to negotiate seriously with the prisoner representatives. However, there were real concerns from the prisoners as to whether the military could be trusted to abide by their oral promises, and some prisoners were loath to give up their strike without concrete assurances.[37] Indeed, it appeared that he could not deliver on his promises, and when the military first backed off from his proposals, those prisoners "in hospital, when told this news of betrayal, tore out their IV's and prepared for death within 48 hours."[38]

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[31] See *Memo on Conditions in Guantanamo Bay at* 1 (August 13, 2005).
[32] See *Memo on Conditions in Guantanamo Bay at* 2 (August 13, 2005).
[33] See *Memo on Conditions in Guantanamo Bay* at 4 (August 13, 2005).
[34] See *Memo on Conditions in Guantanamo Bay* at 4 (August 13, 2005).
[35] *Shaker Aamer statement* (August 11, 2005).
[36] The name is omitted since the military takes the position that the names of those involved in events at Guantanamo Bay should, for some reason, not be made public. While Petitioner begs to differ, and believes that all those who take actions in Guantanamo should be held personally responsible for their actions, this is not a debate that Petitioner seeks to hold at this point, as there are more urgent matters at stake.
[37] See *Memo on Conditions in Guantanamo Bay* at 2 (August 13, 2005).
[38] *Shaker Aamer statement* (August 11, 2005).

The prison doctor apparently sought and obtained legal advice, determining that he could not forcibly resuscitate prisoners who might die and – in front of witnesses – "the doctor in charge ... took verbal statements from dying prisoners refusing resuscitation efforts if they lapsed into coma."[39]

At this point, faced with the imminent deaths of several prisoners, the military chose to negotiate with the prisoners:

> The colonel held a third meeting and made various promises involving conditions. The US agreed with some claims 'consistent' with the Geneva Conventions, involving an organisational structure for the prisoners – with a central committee of six respected prisoners and leaders in each block.[40]

The Prisoners' Council includes Shaker Aamer (a British resident from Saudi Arabia) and Abdurrahman Fatur (from Egypt) -- the only ones who have been publicly named to date.[41] The Colonel in charge announced to the prisoners "that he had permission from Donald Rumsfeld himself to change the camp to be 'consistent with' the Geneva Conventions."[42] He agreed that everyone would be made Level One, and there would not be distinctions between prisoners.[43] He agreed that the prisoners could have input towards improving the food.[44] The prisoners were promised that they would have three bottles of proper water each day.[45] Various other issues were subject to negotiation, including the closure of Camp V. All of these agreements reflected the conceded problems with the state of the prison.

These promises resulted in the suspension of the hunger strike on July 28, 2005.[46]

5. THE CURRENT HUNGER STRIKE AROSE OUT OF THE MILITARY'S REFUSAL TO HONOR ITS AGREEMENT WITH THE PRISONERS

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[39] Id.
[40] Id.
[41] See *Memo on Conditions in Guantanamo Bay* at 1, 4 (August 13, 2005).
[42] See Id. at 2.
[43] Id.
[44] Id.
[45] Id.
[46] Id.

Unfortunately – no matter what the personal good faith of the colonel who conducted the negotiations – the military in general proved wholly unreliable. The Pentagon has not even been forthright about the agreement that it reached with the prisoners to end the hunger strike last time:

> Prison command staff responding to Globe questions in writing, said, "There is no new committee formed by the detainees. Camp leadership routinely receives and addresses concerns from detainees consistent with the spirit of the Geneva Conventions. ... [Prison staff are working] to increase the selection of books in our library" and "is always working to improve the manner in which we provide safe and human [sic] detention of enemy combatants."[47]

Again, this is simply not true. "As a result of the hunger strike, a colonel . . . set up a committee which has six prisoners on it that meets together. They are from different areas of the camp. They are allowed limited ability to speak to other prisoners. They are allowed to meet for a few hours a week, and occasionally should be meeting with the colonel."[48]

The urgent moment when prisoners might start dying having passed, the military then reneged on the deal.[49] On August 5, Hisham Sliti was ordered that he must go to interrogation. Mr. Sliti was taken from his cell in shackles, and questioned by a male interrogator[50] who has a reputation for violence. Although Mr. Sliti was in shackles, the interrogator became physically threatening towards him, and ultimately Mr. Sliti was assaulted in three different ways. First, there was a mini-refrigerator in the room, and the interrogator picked it up and literally threw it at Mr. Sliti. Second, he took a chair and struck Mr. Sliti about the head with it, resulting in a

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[47] Charlie Savage, *Lawyers cite Guantanamo concessions US said to be negotiating with prisoners*, BOSTON GLOBE (August 13, 2005), available at http://www.boston.com/news/nation/washington/articles/2005/08/13/lawyers_cite_guantanamo_concessions?mode=PF.

[48] Id.

[49] See *Memo on Conditions in Guantanamo Bay* at 3 (August 13, 2005).

[50] The name and description of this interrogator have been omitted from the memo and this pleading since the military takes the position that such identifying information should remain classified. Again, Petitioner complies with this under protest, since he believes that those responsible for violence in Guantanamo Bay should be identified, investigated and prosecuted.

serious injury about the eye. Third, the MP's who came in upon hearing this ruckus beat Mr. Sliti further.[51]

There were other events that immediately followed this. One of the Kuwaiti prisoners was sexually harassed at interrogation, and ERF'd. The Canadian juvenile prisoner was violently ERF'd.[52]

The hunger strike has started again.[53] Since that time, in another unfortunately provocative act, the military rounded up the Prisoners' Council and put them in isolation.[54]

As of August 11th, 2005, there were 150 prisoners who had joined the strike in Camps I, II & III, with additional prisoners set to join it from Camp IV and V. This means that many prisoners have been without food for at least two weeks, and some may have been going without water. Potentially fatal consequences may begin after two weeks of such a strike. Thus, the situation is very urgent.

The fact that these prisoners are serious is perhaps illustrated by the fact that Ahmed Abdulaziz, from Mauritania, asked counsel to draw up his last will and testament,[55] in case he does not survive.

B. THREE TIERS OF PROBLEMS FACED BY THE PRISONERS THAT MUST BE ADDRESSED BY THIS COURT

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[51] See *Memo on Conditions in Guantanamo Bay* at 3 (August 13, 2005).
[52] See *Memo on Conditions in Guantanamo Bay* at 3 (August 13, 2005).
[53] The immediate cause of the renewed hunger strike was is confirmed by Shaker Aamer, one of the members of the Prisoners' Council:

> Sliti suffered a terrible beating and his Qur'an was twice desecrated in one day. Saad was abused and humiliated for 5 1/2 hours by a female interrogator. * * * The final straw came when Saad was ERF'd on Sunday for another abusive interrogation, and Abdusalaam al-Hayla was taken for 'interrogation' for 5 hours and nobody questioned him. The military refused dinner to kilo Block D then ERF'd Saad very savagely, forcing his face in the toilet.

Shaker Aamer statement (August 11, 2005).
[54] *Shaker Aamer statement* (August 11, 2005).
[55] See *Memo on Conditions in Guantanamo Bay* at 4 (August 13, 2005).

There are three distinct tiers of problems faced by the prisoners in Guantanamo Bay, each of which falls within this Court's historical role as arbiter of illegal conditions of confinement.

1. THE OVERALL NEED FOR FAIR TREATMENT

The first tier of the complaints is simple: That more than 500 people have been held without any meaningful charges or trial for upwards of three years. The prisoners demand meaningful access to court – that they should be charged or released:[56]

> First and foremost among the issues, of course, it has been over three years and nothing has been decided. "We are dying a slow death in here. And you have to remember that we have not been charged with any crime. I do not understand what America is doing."[57]

In other words, the prisoners have been held for more than three years without official charges, and without a meaningful trial where they could prove their innocence before a fair tribunal. "The demands called for respect for . . . fair trials with proper legal representation."[58]

2. THE TREATMENT OF PRISONERS IN CAMP V, THE 'INNOCENT,' AND JUVENILES AS WELL AS CONTINUED ABUSE OF THE QUR'AN

The second tier of complaints involves conditions in Camp V, the juveniles held there, the CSRT-innocent prisoners, and on-going violations of the prisoners' religious rights:[59]

> In addition to seeking a fair resolution of their status, the prisoners' other main demands are as apparently follows:
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> 1. The immediate liberation of those determined to be 'innocent' through the CSRT's who continue to be held

[56] See *Memo on Conditions in Guantanamo Bay* at 1 (August 13, 2005).
[57] *Deghayes Memo* at *1*; see also Al Jazeera, *Guantanamo inmates on hunger strike* (July 22, 2005) (main complaint of the prisoners is "their indefinite detention and the inhuman conditions at Guantanamo"), available at http://english.aljazeera.net/NR/exeres/1AFAF53F-2A54-43B5-A049-9B673AF6D241.htm.
[58] ABC News Online, *Guantanamo detainees give demands to end hunger strike* (July 23, 2005), available at http://www.abc.net.au/news/newsitems/200507/s1420814.htm; Al Jazeera, *Guantanamo inmates on hunger strike* (July 22, 2005) ("The prisoners are demanding ... fair trials with proper legal representation;" strike to protest "their indefinite detention and the inhuman conditions at Guantanamo."), available at http://english.aljazeera.net/NR/exeres/1AFAF53F-2A54-43B5-A049-9B673AF6D241.htm; see also Associated Press, *Afghans tell of hunger strike at Guantanamo*, TAIPEI TIMES (July 22, 2005) ("To protest alleged mistreatment and to push for freedom"), available at http://www.taipeitimes.com/News/world/archives/2005/07/22/2003264520.
[59] See *Memo on Conditions in Guantanamo Bay* at 1 (August 13, 2005).

> months after this determination (without prejudice to the prisoners' claims that the CSRT's are wholly unfair, and that there are thus many more prisoners who are innocent than reflected in the CSRT results).
>
> 2. Removal of those who were seized as juveniles from Camp V, and their housing in an appropriate facility pending their release (such as the much-publicised Camp Iguana that the U.S. military originally said was for Juveniles), where they are not abused, and where they can receive education. Juveniles in Camp V are identified to include M.C, O.K, and H.B.A.
>
> 3. Cessation of the continued denigration of the prisoners' religious beliefs.[60]

a. THE HORRENDOUS CONDITIONS OF CAMP V

One of the main demands is to close "Camp V, a facility designed to destroy people both mentally and physically."[61] The terrible conditions of Camp V remain a major focus of this strike, because they are simply inhumane.

The prisoners there are held in solitary isolation, and noise-making fans have been introduced to try to ensure that there should be no meaningful communication among the prisoners:

> The cells in Camp V are concrete isolation cells. It is very difficult to hear or see anyone. The guards try to prevent meaningful communication. We would try to shout at each other, so they placed guards in the corridors. If he hears anyone trying to talk, he would come and bang loudly on the doors to stop this. But we were too many, and we talked all at the same time to frustrate their plans. They tried using noisy fans to drown out any conversation.[62]

Contrary to the occasional military statements to the contrary, the prisoners get very limited time outside their solitary isolation cells:

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[60] *Deghayes Memo* at 2.
[61] *Shaker Aamer statement* (August 11, 2005); see also ABC News Online, *Guantanamo detainees give demands to end hunger strike* (July 23, 2005) (the "prisoners [are] frustrated by their indefinite detention and what they described as the inhuman conditions at Guantanamo, specifically in a facility known as camp five."), available at http://www.abc.net.au/news/newsitems/200507/s1420814.htm.
[62] *Deghayes Memo* at 2.

> For one year, I have walked on the rec yard only once a week, and that is when I am lucky, as sometimes we do not go out at all and two weeks pass without leaving the cells. Sometimes the excuse is that someone else is on the yard. This could be the Red Cross, or anyone on the yard – then nobody can go out. Sometimes the Red Cross is here for many days, which makes our conditions even worse rather than the promise that they will be better. The "yard" itself is only twice as big as the cell. We are never under the sun, as the 'yard' is covered. Sometimes we are walked at night. Sometimes there are two people out in separate rec yards at the same time, and it is possible to talk. But there are some prisoners who are only ever taken out when there is nobody else there, so that they will never have another person to talk to. We are told that this is done on the instructions of the interrogators.[63]

Some of the prisoners suffer badly from this, both physically and mentally. For example, M.C., the juvenile prisoner, has suffered skin diseases because of his lack of exposure to sunlight. Despite his complaints to the medical officers, this persisted for many months.[64]

Reflecting the limited recreation, the prisoners in Camp V are also denied reasonable sanitary facilities including showers: "We only go to the shower when we go to rec, so that means that if you don't get outside, you don't get to clean yourself."[65]

Despite the military's public assurances that any use of light as a coercive interrogation tool was limited to Afghanistan and the early days of Guantanamo, this technique is still in use in Camp V:

> The lights are some of the worst tools used against us. They are neon, two and a half metres long, glaring 24 hours a day. They are fitted directly above the concrete tomb that is meant to be our bed. They are never dimmed. Have you ever lived in bright lights for 24 hours a day, every day? It is a constant struggle to get any sleep at all. Many in the camp suffer mentally from sleep deprivation.[66]

Likewise, although the military insists that any physical mistreatment of prisoners is a thing of the past, the experience of Camp V prisoners shows this to be false:

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[63] *Deghayes Memo* at 2.
[64] Source: unclassified memo concerning M.C.
[65] *Deghayes Memo* at 2.
[66] *Deghayes Memo* at 3.

The Physical abuse is very bad. On May 25, at 06.35, one of the MP's slammed the *beenhole* [what we call the grate] on M.C.'s hand. M.C as you know is one of the juveniles. The MP was the one who abused the Qur'an. He is Hispanic, heavyset, tall and middle-aged. He later did the same thing to two other prisoners, Awaisha and Ahmad, apparently causing them broken bones.

They continue to use the ERF [Emergency Reaction Team] for abusing prisoners in Camp V. Indeed, the verb 'to be ERF'd' has long since entered our language. A prisoner called Farid was beaten by the ERF team and left naked for three weeks. Farid is already lame because the guards in Kandahar broke his knee.

Saud Jihani, Issa Murbati and Hisham Sliti have also been particular victims of the ERF team. All three were beaten and left naked. When Sliti returned from a lawyer visit in Camp Echo in May, four of the ERF team 'mules' came into his cell, beat him, held him to the floor, and then rifled through his Qur'an solely to offend him.

At the end on 2004, O[67] was in my block, and he refused to give back his paper plate as a minor protest over something. Five members of the ERF team came in on him and three kneed him in the stomach until they had knocked him to the floor. This ruptured his stomach and he suffered constant and increasing pain. He asked for medical care for several months. Finally, on May 7, 2005, he saw a doctor, who said his situation was very dangerous. He has to undergo an operation as a result of this. He was kept at the hospital for only two days, and then returned to Camp V. We have heard his screams of pain whenever he uses the toilet. One day he collapsed in his cell, and so we felt forced to conduct joint protest on his behalf. Part of his problem is that he does not speak English, so that when he needs help, and when the MP's finally respond to his cries, they say that there is no translator. It is cruel. Finally, we were able to pressure the military into taking him back to the clinic. As they took him to the clinic, he was crying out in pain, and the guards – sad to say – were laughing at him. When he came back, he was put in the cell across from me, so I would hear each time he called for help from the MP's. The MP's often refuse to respond to him, walking directly by his cell. Last week [June 2005], he collapsed in his cell again and they took him back to the clinic. As of this writing, he has not returned. Beating him so badly was, in the first place, a vicious act for so minor a rule violation – a rule violation committed by someone who is being held without being proven guilty of any crime. He has received permanent injury from this.[68]

[67] Name omitted for reasons of medical privacy. (Note that according to Mr.Deghayes the prisoner has specifically authorized that his name be used to bring attention to his plight, but counsel has been informed that the government takes the position that this may violate his right to privacy, and is therefore omitting the name.)
[68] *Deghayes Memo* at 3-4.

These abuses leave the prisoners with permanent damage. Omar Deghayes, the British refugee from Libya, has been blinded by the U.S. military: "I have previously described to you the abuse I suffered from the ERF team when they gouged by eyes and left me permanently blind in my right eye. While I can see nothing out of it, my eye is very sensitive to light. It is particularly painful because they leave the bright neon lights on all the time."[69]

The treatment of prisoners in Guantanamo Bay – and particularly in Camp V – therefore go well beyond anything that might be deemed reckless abuse. It remains brutal, intentional and systematic.

b. THE MISTREATMENT OF THE 'INNOCENT'

A second element of the prisoners' complaints involves those who have been found 'innocent' in the CSRT process. Sami Al Laithi is one such person:

> They have prisoners here who are treated shamefully. One would be [Sami Al Laithi]. He has been found 'innocent' by the CSRT process. He was brutally abused and had his back broken by the guards at the hospital, which means that he is confined to a wheelchair. The treatment here is particularly harsh on him as he cannot get any help with therapy when he is being held in solitary confinement. He cannot stand unless he has other prisoners (or someone) to help him. He is very afraid that he will become totally paralysed if he is not allowed to do physical therapy.[70]

Mr. Al Laithi was – when counsel last saw him on August 8, 2005 – still being held in Camp V, under the shocking conditions previously described, three months after being found innocent by the CSRT process.

c. THE ABUSE OF JUVENILES, PARTICULARLY IN CAMP V

[69] *Deghayes Memo* at 4.
[70] *Deghayes Memo* at 6.

Extraordinarily, Respondents have also held juveniles[71] in Camp V, under conditions that are unacceptable for anyone, let alone someone who was a child when seized. The unclassified evidence reveals that at least three juveniles – MC, OK and HBA – have been held routinely in Camp V.[72]

This mistreatment is particularly harmful for the juveniles, as illustrated by the following description:

> With MC[73] (a juvenile) he has suffered continuous skin rashes from the absence of sunlight. The doctors said it was caused because he was not exposed to fresh air and sunlight, and because his clothes and blankets were changed so rarely. After the doctor's diagnosis, MC was still only allowed one hour outside in two weeks – despite the promise of the regulations that we would get three hours a week. When he was taken outside, he therefore refused to some in until the issue was addressed. The guards called the ERF team hooligans, and they beat him (and another prisoner) up and forced them back into their cells. Both were left naked but for boxer shorts for three weeks. They had their bedclothes confiscated, and had to sleep on bare concrete. Nothing has been done to redress the problem of his skin condition.
>
> Indeed, they came to MC and told him that he has to submit an injection. He refused because he did not know what it was. They entered his cell again, and one guard called [NAME OMITTED] knocked him down to the ground. The others held him down to the ground. The others held him down and they forcibly injected him,

[71] Respondents take an extraordinary view of the definition of 'juvenile':

> At the outset, this discussion requires a definition of "juvenile." The United States military applies this only to persons under the age of 16. * * * Clearly, this position is unacceptable.

Melissa Jamison, *Detention of Juvenile Enemy Combatants at Guantanamo Bay: The Special Concerns of the Children*, 9 U.C. Davis J. Juv. L. & Pol'y 127, 150 (2005) (footnotes omitted). Every legal body defines a 'juvenile' or 'child' prisoner as one who was detained for offences committed prior to his eighteenth birthday. This is the case according to the Convention on the Rights of the Child, Feb. 16, 1995, arts. 1, 38, 1577 U.N.T.S. 3 (CRC Article 1 defines "child," for the purposes of its protection, to mean "every human being below the age of 18 years"); Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, July 5, 2000, arts. 1-4, 6, 7, GA Res. 263, UN GAOR, 54th Sess., Supp. 49, UN Doc. A/RES/54/263; United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) (the Beijing Rules state, "[a] juvenile is every person under the age of 18."). Furthermore, the military seems now to justify treating juvenile prisoners as badly as they treat adults on the grounds that they have now reached the age of 18. It is very hard to believe that holding a juvenile illegally for several years can be used to justify mistreating him now.

[72] Petitioner does not mean to suggest that these are the only juveniles who have been held in Camp V, only that the evidence reveals that these prisoners have been.

[73] Name omitted because MC is a juvenile.

> while his blood was flowing on the floor. The rest of us were banging on the doors and loudly objecting, as it is shameful that they treat a kid this way. The injection was a sedative of some sort, and MC was comatose for three full days after the injection. We were very concerned about him, as we could not wake him, and he did not even wake for prayer. He did not know anything, and afterwards he could not remember anything about what had happened to him.
>
> For more than a year now, MC has constantly been coming in for this mistreatment. It began just before he came to Camp V, when he was in Camp Delta. MC had just move cell when, at roughly 3 a.m, the ERF team burst into his cell, pulled him off his bed, and beat him. They broke two of his teeth, and he was bleeding. They shackled him and took him onto the rec yard where they hosed him down before throwing him back on the floor of his cell. MC had no idea what this was about, although he thought this beating had been ordered by his interrogator, [NAME OMITTED], who had been angry because MC would not say what he wanted to hear. But the next day a translator came in and told him it had been a mistake, and the ERF team had not realized that he had moved cell. The previous occupant had committed some offence, apparently spitting on the General or a senior officer, and was meant to be punished for this.[74]

MC is not the only juvenile to have suffered. Indeed, one of the precipitants to the August hunger strike has been the violent physical abuse of the juvenile OK by the ERF team, after the military's purported agreement not to mistreat the prisoners in the way that has unfortunately been commonplace.

Another factor that particularly affects the juveniles in Camp V, but which had an impact on all others -- is the total lack of education available for the prisoners

> Education is most important for the young who are here. But it makes no sense not to allow meaningful access to books. We do not even ask them to pay for books. Although even convicted criminals in jail can receive books from their families, we cannot.[75]

The treatment of juveniles has been a source of great frustration for the more mature prisoners, as well as for the juveniles themselves. As well as being a precipitant of the hunger strike, it is also a violation of the law.

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[74] *Deghayes Memo* at 4.
[75] *Deghayes Memo* at 8.

d. VARIOUS ISSUES OF RELIGIOUS INTOLERANCE, AND THE CONTINUING DESECRATION OF THE QUR'AN

"The demands called for respect for their religion, including an end to what they described as desecration of the Qu'ran and religious discrimination. . . ."[76] There are several issues involved here that violate the law.

The first issue is the attempt by the military to manipulate the hours when the prisoners pray. This is a strange strategy indeed, as if somehow having a person pray at the wrong time were a legitimate governmental goal:

> The authorities manipulate religious issues for very cheap reasons. For example, one time I was in Camp Echo they had the wrong prayer times. It was for this reason that Shaker Aamer asked counsel to process a proper time schedule through to the prisoners, so that we could pray at the right times. It seems absurd that they would try to make us pray at the wrong times, as what does that achieve? They have now replaced this with the proper schedule.[77]

The military has also been playing the prayer call over the public address system at the wrong time and the personnel have tried to disrupt prayer:

> They play the call to prayer over the public address system at the wrong times and sometimes they do not play it at all. The guards have recently increased their efforts to disrupt prayer, by raising their voices as if they were kids playing with a new toy. They also make other noises at time of prayer, like increasing the volume of the fans, talking louder, or running races in the corridor. It is childish. At other times in the day it is totally quiet, and it is often very difficult to find a guard when we need help.[78]

Indeed, the call to prayer also included erroneous words in it.[79]

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[76] ABC News Online, *Guantanamo detainees give demands to end hunger strike* (July 23, 2005), available at http://www.abc.net.au/news/newsitems/200507/s1420814.htm; see also Al Jazeera, *Guantanamo inmates on hunger strike* (July 22, 2005) ("The prisoners are demanding ... greater respect for their religion - including an end to desecration of the Qu'ran"), available at http://english.aljazeera.net/NR/exeres/1AFAF53F-2A54-43B5-A049-9B673AF6D241.htm.
[77] *Deghayes Memo* at 5.
[78] *Deghayes Memo* at 5.
[79] Source: unclassified memo of Usama Abu Kabir.

The prisoners have also demanded the return of religious books that had been taken away. For example, the prison had instituted a rule that each prisoner could only have a Qur'an in Arabic or another language, which is detrimental to the many prisoners who do not read Arabic well. It is very important to have a copy in the original (Arabic) but also in an edition that the prisoners can understand.[80] At the same time, the prisoners have not been allowed copies of other religious books.

There have been many other ways in which the military have sought to insult the integrity of the prisoners' religious beliefs, including exploiting the Muslim's proscription against partial nakedness:

> In other Camps there are similar problems. Camp Romeo is the most notorious of course. I was held there, and the prisoners continue to be held in only their shorts, because the authorities know that this is inappropriate and humiliating for a Muslim. It is strange that they chose the name Camp Romeo for this treatment, too. They have been using this form of mistreatment in Camp V recently too. The prisoners who have been treated this way include MC (who is one of the juveniles) and four others.[81]

Again, it is hard to see a penological purpose for such humiliation of prisoners, particularly if the military now concedes that it should be acting in accordance with the Geneva Conventions, without coercive interrogation of the prisoners.

Perhaps most significant, however, in light of the history of abuse of the Muslim holy book, is the continued problems with the desecration of the Qur'an. This had caused immense discord in the prison before, as well as around the world. Unfortunately, the issue has not been resolved. As repeatedly reported, the Qur'an has been mistreated for the entire history of the Guantanamo experiment:

> I know that the U.S. First Amendment protects the right to freedom of religious practice. I have heard of a law called the Religious Freedom Restoration Act in the U.S., which protected prisoner's rights to

[80] Source: unclassified memo of Usama Abu Kabir.
[81] *Deghayes Memo* at 5.

> religious liberty, and sounded like a very appropriate thing though I also heard there were challenges to its constitutionality. Unfortunately, the authorities in Guantanamo Bay do not live up to this promise.
>
> * * *
>
> Abuse of our religion and the Qur'an still continues. In all the time I have been here, I have never been visited by a Muslim 'chaplain' or Imam. I have been asking for such help for over a year now. When I returned to Camp V form my counsel meeting in May, the Qur'an that I had to leave in my cell had been searched in my absence. As everyone knows, this is very offensive to Muslims as a non-Muslim did this. We had hoped that we had made this point by prior non-violent protests, but the abuse of the Qur'an continues in far worse ways than this as well. When the prisoners read the newspaper reports where the military denied abusing the Qur'an it was very sad – the acts taken against the Qur'an have been so offensive that they do not bear to mention here.[82]

Unfortunately, this abuse continues to this day. While the military has promised that the Qur'an would not be subject to desecration again, this has not been the case. Indeed, in the abuse of Hisham Sliti that was the precipitating misconduct leading to the new hunger strike, the Qur'an has reportedly been desecrated twice more.[83]

3. GENERAL ISSUES OF CONFINEMENT

The third tier of complaints involved general conditions at the prison, with the prisoners demanding that they be held consistent with the Geneva Conventions, as promised by the authorities.[84] These issues concern medical mistreatment of the prisoners, and the general conditions of confinement that must be addressed.[85]

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[82] *Deghayes Memo* at 5.

[83] *Mohammed Statement* ("Hisham from Tunisia was savagely beaten in his interrogation, and they public[ly] desecrated the Qur'an (again).").

[84] See *Memo on Conditions in Guantanamo Bay* at 1 (August 13, 2005).

[85] For example, "[t]hey also said they needed adequate supplies of food and clean water, and needed direct sunlight and not to be forced to go for months without seeing daylight." ABC News Online, *Guantanamo detainees give demands to end hunger strike* (July 23, 2005), available at http://www.abc.net.au/news/newsitems/200507/s1420814.htm; see also Al Jazeera, *Guantanamo inmates on hunger strike* (July 22, 2005) ("The prisoners are demanding clean food and water, better medical care, more access to sunlight, contact with relatives"), available at http://english.aljazeera.net/NR/exeres/1AFAF53F-2A54-43B5-A049-9B673AF6D241.htm; Associated Press, *Afghans tell of hunger strike at Guantanamo*, TAIPEI TIMES (July 22, 2005),

a. ISSUES OF MEDICAL MALPRACTICE

The medical malpractice that has been commonplace in the Guantanamo camps has been detailed in a recent pleading filed in the case of the Egyptian prisoner, Sami Al Laithi, and is encorporated herein by reference in its totality.[86]

Sad to say, in addition to providing wholly inadequate medical care to the prisoners, the military has made the right to necessary medical care contingent on the prisoners' cooperation with interrogation, a policy that shocks the conscience:

> The plight of the people who have had limbs amputated is among the saddest of the conditions of this ugly camp. I have twice been housed next to prisoners with prosthetic limbs. It was one of the most depressing experiences I have endured. The prisoners were effectively blackmailed by their interrogators who said that they had to cooperate in order to get their prosthetic devices back. They are denied the toilet chairs, the sticks they need to walk and even the cream they need to ensure that the wound will not become infected and inflamed. The pain is apparently particularly great when they are denied the necessary prosthetic socks, so that the wounds are exposed to the extreme cold of the cells.[87]

This medical abuse of prisoners is employed throughout the camps.

b. ISSUES OF SANITATION

There are various issues of basic sanitation that continue to plague the prisoners. For example, scorpions are present in the camps, and even make it into the prisoners' food:

> Scorpions just walk around in Camp V. In June 2004, Juma was bitten by one in the cell in front of me. The incident should be registered with the medical staff, who treated him for it. As related below, Hisham Sliti found one in his food.[88]

("A 'widespread' hunger strike over the amount and quality of their drinking water.") available at http://www.taipeitimes.com/News/world/archives/2005/07/22/2003264520.

[86] See *Motion for a Preliminary Injunction Requiring that Respondents provide his Counsel with a Complete Copy of his own Medical Records and Cease their Practice of Intentional Medical Malpractice against Him*, filed July 21, 2005, in Sliti v. Bush, Civ. No. 05-0429 (RJL).

[87] *Deghayes Memo* at 6.

[88] *Deghayes Memo* at 6.

The toilets often do not function properly, overflowing and resulting in other unsanitary conditions:

> There are frequent overflows, and occasional blockages of the toilets. Apart from other disgusting consequences, this seems to dramatically increase the number of mosquitoes. When I see you next, I will show you my hands and feet so that you can see the bites everywhere. This suffering is continuous.[89]

The prisoners asked that they be permitted to have drinkable water available. The water is a yellow-brown color and has a very bad odor.[90]

c. GENERAL QUESTIONS OF ABUSIVE TREATMENT

There have been various hold-overs from the more overt policies of coercion used to break the prisoners down in Guantanamo. One issue was sleep deprivation. The prisoners requested that no movement or interrogation of prisoners would take place between 10 p.m. and 6 a.m., as this caused a great disturbance on the blocks and made it impossible for the prisoners to sleep. They also asked that there be no cleaning of the blocks at night with the extremely pungent pine oil cleaner that was sloshed around causing breathing problems for asthmatics and others. The military agreed to this, but did not respect it. For example, the military tried to move prisoners for legal visits in the middle of the night – as late as 03.00 a.m. – and then when the prisoners objected to the timing, represented that they "refused" to see counsel.[91]

A second such hold-over is the continued use of excessive cold and noise to break down the prisoners:

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[89] *Deghayes Memo* at 6.

[90] See Associated Press, *Afghans tell of hunger strike at Guantanamo*, TAIPEI TIMES (July 22, 2005) (describing a "'widespread' hunger strike over the amount and quality of their drinking water."), available at http://www.taipeitimes.com/News/world/archives/2005/07/22/2003264520.

[91] This fact has not yet cleared classification review, but was reported by both Jamil El Banna and Bisher Al Rawi to their counsel on August 6-7, 2005.

> The strong A/C is fitted to blow directly on the concrete bed. If you lie down the stream blows directly in your face, unless you turn around in which case you have to put your face directly into the stainless steel toilet. You have your Hobson's choice, between illness and odour. The A/C is particularly strong in Wing D, where it is used as a particular abuse. Thankfully, I have not had to deal with this lately, as it is generally reserved for the new arrivals from Bagram. But if you anger the interrogators, you can end up there. Three people were sent there recently. Indeed, recently there has been a new tool for our torture. They put very large noisy fans in every corridor, even though there is nobody in the corridors, so they do nobody any good. They make very disturbing noises and they are left on all day and night, even the time for prayer. They are there just to make a noise to make communications between prisoners even more difficult.
>
> * * *
>
> Yet the fans are only minor in the pantheon of abuses that we suffer in Camp V. But if the central command is unhappy at us in Camp V they raise the level of the fans to make life more intolerable. If an interrogator is angry at a particular prisoner, he moves the fan in front of the prisoner's door. Only when an important visitor comes do they turn the fans off. Does anyone really believe that the U.S. could spend all the millions they have spent on Camp V and not get fans that do not do this? I was in a Pakistani prison and they had fans that were silent there. Does Pakistan have better technology than the U.S?[92]

The prisoners also request that the sexual humiliation of prisoners in Camp Romeo cease at once. This, as discussed above, has been an on-going sore in the conditions of the prison.

d. MAIL PRIVILEGES ARE CONSTANTLY ABUSED

Another significant complaint that precipitated the July hunger strike was the intentional interference with the prisoners' mail. The prisoners requested that family letters no longer be delayed. The 'normal' delay in delivery was two months, and sometimes it would take as long as one year for the letters to be delivered – if they were at all.

e. THE DIET IS UNACCEPTABLE

Various comments have been made publicly by Respondents and their Congressional allies about the supposedly high quality of the food in Guantanamo Bay, including statements to the effect that prisoners enjoy such delights as lemon chicken and rice pilaf. This is apparently

[92] *Deghayes Memo* at 7.

the fruit of false information provided to important visitors in an effort to use them to relay misinformation back to the public:

> Mr. Deghayes noted that there are a series of prisoners who are working with the military who are used to meet with important visitors to make the Camp look good. One such person was in Camp Romeo with Mr. Deghayes and he eventually confessed that he was working with the military. He had been picked because he spoke various languages. * * * There are at least seven people who have either confessed to this, or been exposed as having done it.[93]

In truth,

> The food is terrible. In June 2005, one evening at about 6pm, Hisham Sliti found a dead scorpion cooked in his dinner. He had already eaten some of it, and he began to get a bad pain in his stomach, and then vomited. He showed the scorpion to the MP, and the sergeant.[94]

It is not simply a matter of finding poisonous insects in the food. The general level of food quality is abysmal. A representative selection of assessment by the prisoners is as follows:

"The food is very, very terrible. I would prefer to eat grass."[95]

"The last time we had Lemon Chicken in Guantanamo Bay was never. I have never even seen a lemon in this place."[96]

The main meal at breakfast, served every second day for the past two years, consists of two pancakes (often cold), with a piece of fruit. This is alternated with two other breakfasts, served on the second and fourth day in each rotation. On the second day, the meal is eggs with oatmeal – the oatmeal is the dish that most often comes with undesirable items in it such as worms. On the fourth day, it is cornflakes with a vegetarian burger.[97] This is a very strange mix, and the vegetarian burger is very unappetizing.

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[93] Source: *"Misleading Visiting VIP's" memo* (July 19, 2005), unclassified July 21, 2005. (Names of the informants were omitted for security purposes).
[94] *Deghayes Memo* at 6.
[95] Source: *Sami Al Laithi Statement*, July 3, 2005 (unclassified 7/21/05).
[96] Source: *Bisher Al Rawi Statement*, June 28, 2005 (unclassified 7/21/05).
[97] Source: *Usama Abu Kabir Statement*, June 30, 2005 (unclassified 7/20/05).

"The lunch includes boiled tinned vegetables that are tasteless, almost inedible, and most people do not eat them."[98] For example, as counsel observed, on July 3rd, 2005, the lunch included boiled tinned okra, very dry undercooked rice, and a piece of fish that was rancid. On July 4th, 2005, the lunch included boiled tinned potatoes, mushy carrots (that had a bitter taste and were totally inedible) with kidney beans. The food was all boiled without spices – and was all tasteless except for the bad tinned flavor. There was a slice of stale brown bread, and a tasteless apple. On July 5th, 2005, the lunch included a veggie burger (like the one served at breakfast), tinned brussel sprouts boiled like the English do (soggy and tasteless), very dry undercooked rice, and brown pita bread with a strange aftertaste. For Respondents to suggest that this food is of a high quality is risible.

The prisoners have sometimes been given food that is incompatible with their religious beliefs:

> The food is always very limited. One month ago [May 2005] they suddenly started serving food that was clearly unsuitable for Muslims. This went on for a week. Fortunately, only those who could read English knew this, so the others did not starve. But they were very sad when they learned later when word was able to spread that they had been duped into eating such food.[99]

Prisoners have the right to basic, decent nutrition.

II. LEGAL CLAIMS FOR RELIEF

The various facts set forth above give rise to several claims for legal relief. The first we consider are the prohibitions against the abuse of the prisoners' rights to religious freedom.

A. THE RIGHT TO RELIGIOUS FREEDOM: CONTINUALLY VIOLATED

Initially, one must ask why Respondents and the U.S. military would want to violate the prisoners' right to religious freedom, enshrined as one of the most basic issues of our nation in the First Amendment.

[98] Source: *Bisher Al Rawi Statement*, June 28, 2005 (unclassified 7/21/05).
[99] *Deghayes Memo* at 6.

Our commitment to religious freedom has recently been reaffirmed in the Religious Freedom Restoration Act, where Congress reminded the nation that: "the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution." Religious Freedom Restoration Act, 42 U.S.C. § 2000bb(a)(1) (1993). Under RFRA, the federal government:

> shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except ... if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

RFRA clearly covers the military as the act states: "the term 'government' includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States." And, it clearly covers Guantanamo Bay. Respondents depend on the Joint Congressional Resolution of September 2001, as the power under which it can detain prisoners at Guantanamo Bay. Section 2000bb-3 of RFRA states that: "Federal statutory law adopted after November 16, 1993 is subject to [RFRA] unless such law explicitly excludes such application by reference to this chapter." There is absolutely no provision of the September 2001 statute that even mentions RFRA, let alone explicitly excludes application of it to prisoners of the Bush/Cheney War on Terror. See Authorization of the Use of Military Force, Pub. L. No. 107-40, § 2, S.J. Res. 23 (2001) (stating in relevant part that "[t]he 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").[100]

[100] Numerous Courts of Appeal have held that even after City of Boerne v. Flores, 512 U.S. 507, 117 S.Ct. 2157 (1997), which invalidated RFRA as applied to States and their subdivisions, "RFRA ... remains operative as to the Federal Government and federal territories and possessions. See *O'Bryan v. Bureau of Prisons,* 349 F.3d 399, 400-401 (C.A.7 2003); *Guam v. Guerrero,* 290 F.3d 1210, 1220-1222 (C.A.9 2002); *Kikumura v. Hurley,* 242 F.3d 950,

The government cannot even begin to suggest a compelling interest that would justify the abuse of the Qur'an, the refusal to allow prisoners access to religious ministers and books, their right to assemble for prayers, the constant ridicule heaped on the prisioners' exercise of their religious freedom, and so forth.

A compelling governmental interest is defined as an "interest[] of the highest order." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546, 113 S.Ct. 2217 (quoting McDaniel v. Paty, 435 U.S. 618, 628, 98 S.Ct. 1322 (1978)) (stating "[t]o satisfy the commands of the First Amendment, a law restrictive of religious practice must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests"). There is no such interest here to justify the substantial burdens Respondents have placed on Guantanamo prisoners' exercise of religion. There is no compelling governmental interest in having fans turned up so loudly that prisoners cannot hear a call to prayer, no interest in desecrating the Qur'an, no interest in denying a copy of the Qur'an in a prisoner's mother tongue in addition to the religiously-mandated Arabic edition, and no interest in stripping the clothes off prisoners to humiliate them in violation of their religious beliefs.

Even if Respondents were to risk public ridicule by proposing some "compelling governmental interest" in denying prisoners religious books, there would be no way that "the least restrictive means" test could be met. Respondents' actions are gratuitous and violate the Constitution and RFRA. They must stop.

B. THE RIGHT TO ADEQUATE MEDICAL CARE: INTENTIONALLY AND SYSTEMATICALLY VIOLATED

The prisoners of Guantanamo Bay are entirely at the whim of the United States military when it comes to the provision of medical care. Though the prisoners have been neither charged

958-960 (C.A.10 2001); *In re Young,* 141 F.3d 854, 858-863 (C.A.8 1998)." Cutter v. Wilkinson, 125 S.Ct. 2113, 2118 n.2. (2005) (noting Supreme Court has not yet had occasion to rule on the matter).

with nor convicted of any crimes, Respondents hold them as one might a duly sentenced criminal, yet fail to provide the level of medical care owed even to convicts. Respondents want it both ways: refuse to ever give the prisoners a chance at freedom, but continuously ignore their own resulting responsibilities. Worse yet, Respondents condition medical care on Petitioner's cooperation with illegally coercive interrogation.

As the Supreme Court has stated:

> An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases, such a failure may actually produce physical "torture or a lingering death," In re Kemmler, [136 U.S. 436, 447, 10 S.Ct. 930, 933 (1890)], the evils of most immediate concern to the drafters of the [Eighth] Amendment. In less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose. Cf. Gregg v. Georgia, [482 U.S. 153], at 173, 96 S.Ct. at 2924-25 [(1976)] (joint opinion). The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency as manifested in modern legislation codifying the common-law view that "(i)t is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself." ... Spicer v. Williamson, 191 N.C. 487, 490, 132 S.E. 291, 293 (1926).

Estelle v. Gamble, 429 U.S. 97, 103-104, 97 S.Ct. 285 (1976).[101] See also DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 200, 109 S.Ct. 998 (1989) (stating "when the State by the affirmative exercise of its power so restrains an individual's liberty that it

[101] The Eighth Amendment applies "only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions .... [T]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law." Ingraham v. Wright, 430 U.S. 651, 671-672 n. 40, 97 S.Ct. 1401 (1977). There of course has been no formal adjudication of guilt for Petitioner and his fellow prisoners. Far from it. But Respondents are treating them as if there had been, therefore they must assume all responsibilities toward the prisoners required by the Eighth Amendment. It would perhaps be more apt to look at the Guantanamo prisoners as they really are: pretrial detainees. The government does not get off the hook by doing that either, however. "Due process requires that a pretrial detainee not be punished." Bell v. Wolfish, 441 U.S. 520, 535 n.16, 99 S.Ct. 1861 (1979). Failure to provide medical care is just such an illicit punishment. See Cupit v. Jones, 835 F.2d 82, 85 (5th Cir. 1987) (holding that pretrial detainees are entitled to reasonable medical care); Hamm v. DeKalb County, 774 F.2d 1567, 1574 (11th Cir. 1985) (holding "that in regard to providing pretrial detainees with such basic necessities as food, living space, and medical care, the minimum standard allowed by the due process clause is the same as that allowed by the Eighth Amendment for convicted persons.").

renders him unable to care for himself, and at the same time fails to provide for his basic human needs - *e.g.,* food, clothing, shelter, medical care, and reasonable safety - it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. ... The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf-through incarceration, institutionalization, or other similar restraint of personal liberty-which is the 'deprivation of liberty' triggering the protections of the Due Process Clause ... .").[102]

"[D]eliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' Gregg v. Georgia, 482 U.S. [153,] 173, 96 S.Ct. [2909,] 2925 (joint opinion), proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed." Estelle, 429 U.S. at 104-105.

And it is not prison guards and doctors alone who can be held liable for deficient medical care. The implementation of deficient policies by a supervisor can amount to direct participation in a constitutional violation. See Redman v. County of San Diego, 942 F.2d 1435, 1446 (9th Cir. 1991) ("Supervisory liability exists even without overt personal participation in the offensive act if supervisory officials implement a policy so deficient that the policy itself is a repudiation of constitutional rights and is the moving force of the constitutional violation.") (citation omitted).

Responsibility for Guantanamo Bay rises all the way to the Commander-in-Chief. He is fully aware of the substantial risk of serious harm that exists there, as is the Secretary of State,

[102] The Due Process Clauses of the Fifth and Fourteenth Amendments are co-extensive. See, e.g., *Plyler v. Doe,* 457 U.S. 202, 210, 102 S.Ct. 2382 (1982); Bolling v. Sharpe, 347 U.S. 497, 498-99, 74 S.Ct. 693 (1954). Therefore, Fourteenth Amendment jurisprudence is instructive – and indeed binding – on this Court.

his main deputies, every commanding officer at Guantanamo and those they oversee. The inference is unmistakable: the medical care is systemically horrendous and prisoners are suffering greatly as a result.[103] Everyone up the chain of command must be held responsible. The insanity must stop.

C. THE RIGHT TO LIFE: IN IMMINENT JEOPARDY

The protection of life is a profound obligation of the Government of the United States. See Roe v. Wade, 410 U.S. 113, 162, 93 S.Ct. 705 (1973) (recognizing government has an "important and legitimate interest in protecting the potentiality of human life"); Cruzan v. Missouri, 497 U.S. 261, 283 n.10, 110 S.Ct. 2841 (1990) (stating government has "institutional interests ... in life"); U.S. CONST. amend. V ("No person shall ... be deprived of life ... without due process of law"). Indeed, President Bush declared in a debate with Senator Kerry just last year that: "I think it's important to promote a culture of life. I think a hospitable society is a society where every being counts and every person matters."[104]

Guantanamo prisoners face certain death due to Respondents' unnecessary, illegal policies. Respondents reneged on their promises without any regard for the consequences. The sanctity of life must be preserved. Prisoners should not have to die to be treated as human beings.

D. THE GENEVA CONVENTIONS: ROUTINELY FLOUTED

The Bush Administration initially stated that the Geneva Conventions would be applied in Guantanamo[105] and later – wriggling in a way that ill-befits our government – stated that the treatment of the prisoners in Guantanamo Bay would be "consistent" with the Geneva

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[103] See, e.g., Carol D. Leonnig, *Guantanamo Detainee Says Beating Injured Spine*, WASH. POST, August 13, 2005 (reporting beating by U.S. military personnel at Guantanamo hospital; forcing of large object into prisoner's anus on "pretext" of doing a medical exam).

[104] *Third Presidential Candidates' Debate*, October 13, 2004, transcript available at http://www.debates.org/pages/trans2004d.html.

[105] Initially, "President Bush agreed to apply the sections of the 1949 Geneva Conventions pertaining to prisoners." French, *Trials in Times of War: Do the Bush Military Commissions Sacrifice Our Freedoms?*, 63 Ohio St. L.J. 1225, 1273 (2002-03).

Conventions. The semantic distinction should not matter. Treatment is either "consistent" with the Conventions, or it is not. If Respondents' actions are inconsistent with the Conventions, then the promise is a false one.

Additionally, however, the military promised the prisoners, in exchange for an end to the July hunger strike, that their treatment would be in accordance with the Geneva Conventions. Again, this is either true or false – but it adds an element otherwise not present in the case, which is a contractual arrangement between the prisoners and their warders, which can be enforced in such a court as this.

There are four Geneva Conventions, signed August 12, 1949, and the two additional Protocols of June 8, 1977.[106] Geneva IV states in Article 1 that persons 'taking no active part in the hostilities' should 'in all circumstances be treated humanely.'[107] This should provide the bedrock for all decisions in Guantanamo Bay[108] – yet it cannot be said that the prisoners have been – or are – treated humanely there.

Turning to each of the claims made by the prisoners in their hunger strike, and again by Petitioner in this pleading, the Geneva Conventions provide the answer to each question. When

[106] Convention I is for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Convention II is for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Convention III is "Relative to the Treatment of Prisoners of War." Convention IV is "Relative to the Protection of Civilian Persons in Time of War." Protocol I Additional to the Geneva Conventions of 12 August 1949, relates to the Protection of Victims of International Armed Conflict and extends protections to victims of wars against racist regimes and wars of self determination. Protocol II Additional to the Geneva Conventions of 12 August 1949, relates to the Protection of Victims of Non-International Armed Conflicts, and extends protections to victims of internal conflicts in which an armed opposition controls enough territory to enable them to carry out sustained military operations. The Conventions are available at http://www.ohchr.org/english/law/index.htm.

[107] See also Geneva IV, Article 3. There is little material distinction between the relevant rights found in Geneva III and Geneva IV relating to civilians, and so the fact that most of the prisoners in Guantanamo Bay should be treated as interned civilian prisoners rather than military prisoners makes little difference, and the two conventions are therefore cited almost interchangeably in this pleading.

[108] The bottom line must be that there may be *no physical abuse*. Geneva III, Article 17 ("No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.").

the military denies that there is the right to have a Prisoners' Council, and forcibly seeks to prevent such a council from operating, this is clearly inconsistent with the law.[109]

When the military seeks to force prisoners to speak with coercive or even torturous tactics, this clearly violates the Conventions.[110] Abusive incarceration such as Camp V is also clearly illegal.[111]

The prisoners should be allowed to take part in the preparation of the food.[112] Indeed, every prison in the world has prisoners taking part in the preparation of food. The issue of sanitary drinking water should hardly be contentious.[113] Neither should medical care since it is

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[109] The relevant provisions of Geneva III are Articles 79 ("In all places where there are prisoners of war, except in those where there are officers, the prisoners shall freely elect by secret ballot, every six months, and also in case of vacancies, prisoners' representatives entrusted with representing them before the military authorities, the Protecting Powers, the International Committee of the Red Cross and any other organization which may assist them. These prisoners' representatives shall be eligible for re-election."), Article 81 ("Prisoners' representatives may appoint from amongst the prisoners such assistants as they may require. All material facilities shall be granted them, particularly a certain freedom of movement necessary for the accomplishment of their duties (inspection of labour detachments, receipt of supplies, etc.). ... Prisoners' representatives shall be permitted to visit premises where prisoners of war are detained, and every prisoner of war shall have the right to consult freely his prisoners' representative.").

[110] See Geneva III, Article 17 ("Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information. *** No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.").

[111] See Geneva III, Article 21 ("Subject to the provisions of the present Convention relative to penal and disciplinary sanctions, prisoners of war may not be held in close confinement except where necessary to safeguard their health and then only during the continuation of the circumstances which make such confinement necessary."); Article 22 ("Except in particular cases which are justified by the interest of the prisoners themselves, they shall not be interned in penitentiaries.").

[112] See Geneva III, Article 26 ("The basic daily food rations shall be sufficient in quantity, quality and variety to keep prisoners of war in good health and to prevent loss of weight or the development of nutritional deficiencies. * * * Prisoners of war shall, as far as possible, be associated with the preparation of their meals; they may be employed for that purpose in the kitchens. Furthermore, they shall be given the means of preparing, themselves, the additional food in their possession.").

[113] See Geneva III, Article 26 ("Sufficient drinking water shall be supplied to prisoners of war.").

squarely covered by the Conventions.[114] Mail is another major issue, also clearly covered by the law.[115]

Finally, issues of freedom of religion are very important, and also covered by the Conventions.[116]

The issues of the independent enforcement of the Geneva Conventions have been thoroughly discussed in briefing. The additional element in this case is the contractual arrangement that has been created by the military in the wake of the July hunger strike. A binding contract arises between a private party and the United States when there is: (1) mutuality of intent to contract; (2) consideration; (3) an unambiguous offer and acceptance, and (4) actual authority on the part of the government's representative to bind the government. See Schism v. U.S., 316 F.3d 1259, 1278 (Fed. Cir. 2002). All those factors are met here. The prisoners sought adherence to the Geneva Conventions and were willing to starve themselves to death to achieve it.[117] Exactly that – that the United States would finally follow the Geneva Conventions for all

[114] See Geneva III, Article 15 ("The detaining power has to provide free medical attention for POWs."); Article 30 ("Every camp shall have an adequate infirmary where prisoners of war may have the attention they require, as well as appropriate diet. Isolation wards shall, if necessary, be set aside for cases of contagious or mental disease." ... Prisoners of war may not be prevented from presenting themselves to the medical authorities for examination. *** Prisoners of war shall have the attention, preferably, of medical personnel of the Power on which they depend and, if possible, of their nationality."); Article 31 ("Medical inspections of prisoners of war shall be held at least once a month. They shall include the checking and the recording of the weight of each prisoner of war.").

[115] See Geneva III, Article 71 ("POWs are to be allowed a minimum of two letters and four cards monthly."); Article 72 ("Prisoners of war shall be allowed to receive by post or by any other means individual parcels or collective shipments containing, in particular, foodstuffs, clothing, medical supplies and articles of a religious, educational or recreational character which may meet their needs, including books, devotional articles, scientific equipment, examination papers, musical instruments, sports outfits and materials allowing prisoners of war to pursue their studies or their cultural activities."); Article 76 ("Censoring should be done as quickly as possible.").

[116] See Geneva III, Article 34 ("Prisoners of war shall enjoy complete latitude in the exercise of their religious duties, including attendance at the service of their faith, on condition that they comply with the disciplinary routine prescribed by the military authorities."); Article 35 ("Chaplains who fall into the hands of the enemy Power and who remain or are retained with a view to assisting prisoners of war, shall be allowed to minister to them and to exercise freely their ministry amongst prisoners of war of the same religion, in accordance with their religious conscience. They shall be allocated among the various camps and labor detachments containing prisoners of war belonging to the same forces, speaking the same language or practicing the same religion. They shall enjoy the necessary facilities, including the means of transport provided for in Article 33, for visiting the prisoners of war outside their camp."); Article 36 ("Prisoners of war who are ministers of religion, without having officiated as chaplains to their own forces, shall be at liberty, whatever their denomination, to minister freely to the members of their community. For this purpose, they shall receive the same treatment as the chaplains retained by the Detaining Power.").

[117] See *Statement of Binyam Mohammed* (August 11, 2005).

prisoners at Guantanamo – was offered by Colonel [XXXX], the second in command at Guantanamo Bay, who told prisoners that Donald Rumsfeld himself had approved the change.[118] Respondents were desperate to end the hunger strike. The prisoners had achieved their major aim, so they accepted. In exchange, they ended their strike, their lives being the only currency they had to offer. There was unambiguous offer and acceptance.

Respondents have clearly reneged on this contract. Beatings are absolutely not permitted by the Geneva Conventions, and the Conventions require respect of religious practice, but Respondents continue to abuse prisoners and desecrate the Qur'an.[119] To remedy this breach, as money damages will in no way help Petitioner and his fellow prisoners, the Court should order specific performance, namely the adherence to the Geneva Conventions. See RESTATEMENT (SECOND) OF CONTRACTS §§ 357-359 (1981).

E. OTHER LEGAL CLAIMS FOR RELIEF

There are various other legal claims for relief. For example, the Supreme Court has long recognized that:

> the right to personal security constitutes a "historic liberty interest" protected substantively by the Due Process Clause. *Ingraham v. Wright*, 430 U.S. 651, 673, 97 S.Ct. 1401, 1413, 51 L.Ed.2d 711 (1977). And that right is not extinguished by lawful confinement, even for penal purposes. See *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978). If it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed-who may not be punished at all-in unsafe conditions.

Youngberg v. Romeo, 457 U.S. 307, 315, 102 S.Ct. 2452 (1982) (holding mentally retarded adult involuntarily committed to a mental institution had constitutionally protected liberty interests under the due process clause of the Fourteenth Amendment to reasonably safe conditions of

[118] Id.

[119] See Geneva III, Article 3 ("the following acts are and shall remain prohibited at any time and in any place whatsoever ... (a) Violence to life and person, in particular ... mutilation, cruel treatment and torture; ... (c) outrages upon personal dignity, in particular humiliating and degrading treatment)"; Article 93 ("Internees shall enjoy complete latitude in the exercise of their religious duties").

confinement, freedom from unreasonable bodily restraints, and such minimally adequate training as reasonably might be required by these interests).

Indeed, "[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action." Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 18, 99 S.Ct. 2100 (1979).

III. PETITIONER MEETS ALL THE CRITERIA FOR A TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION AS HE WILL DIE WITHOUT AN END TO THE HUNGER STRIKE, WHICH WILL ONLY STOP ONCE RESPONDENTS AGREE TO IMPLEMENT THE GENEVA CONVENTIONS AS PREVIOUSLY PROMISED.

In considering Petitioner's request for a preliminary injunction, the Court must consider four factors: (1) whether the plaintiff has a substantial likelihood of success on the merits; (2) whether the plaintiff would suffer irreparable injury were an injunction not granted; (3) whether an injunction would substantially injure other interested parties; and (4) whether the grant of an injunction would further the public interest.[120] See Davenport v. Int'l Bhd. of Teamsters, AFL-CIO, 166 F.3d 356, 360 (D.C. Cir. 1999). "These factors interrelate on a sliding scale and must be balanced against each other." Id. at 361. "If the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak." CityFed Fin. Corp. v. Office of Thrift Supervision, 58 F.3d 738, 746 (D.C. Cir. 1995). "An order maintaining the status quo is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant. There is substantial equity, and need for judicial protection, whether or not movant has shown a mathematical probability of success." Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 844 (D.C. Cir. 1977).

[120] The standard for granting a temporary restraining order and a preliminary injunction is one and the same. See Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 349 n.26, 105 S.Ct. 3180 (1985).

A. PETITIONER HAS A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS AS HE AND HIS FELLOW PRISONERS ARE BEING HELD IN CONDITIONS IN COMPLETE VIOLATION OF THE UNITED STATES CONSTITUTION, FEDERAL AND INTERNATIONAL LAW.

"[E]ven in times of emergency – indeed, particularly in such times – it is the obligation of the Judicial Branch to ensure the preservation of our constitutional values and to prevent the Executive from running roughshod over the rights of citizens and aliens alike." Gherebi v. Bush, 374 F.3d 727, 730 (9th Cir. 2004). Prisoners at Guantanamo Bay absolutely have rights. See Gherebi v. Bush, 374 F.3d 727, 733 (9th Cir. 2004) ("[Guantanamo Bay] detainees are not wholly without rights to challenge in habeas their ... conditions of ... detention."). They have constitutional rights, including the right to freedom of religion and equal protection. See Turner v. Safley, 482 U.S. 78, 84, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987) ("Prison walls do not form a barrier separating prison inmates from the protections of the Constitution."); O'Lone v. Shabazz, 482 U.S. 342, 349, 107 S.Ct. 2400 (1987) (stating prison regulations offend Free Exercise Clause if they are not reasonably related to legitimate penological interests); City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439, 105 S.Ct. 3249 (1985) (stating Equal Protection Clause directs that "all persons similarly situated should be treated alike"); In re Guantanamo Bay Cases, 355 F. Supp. 2d 443, 445 (D.D.C. 2005). They are protected by the Geneva Conventions and the Convention Against Torture.[121] See In re Guantanamo Bay, 355 F. Supp. 2d at 478-480; Khalid v. Bush, 355 F.Supp.2d 311, 327 n.21 (D.D.C. 2005) ("The implementing legislation for CAT confers [upon aliens] standing to sue"). They are protected by the Religious

[121] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, October 21, 1950, available at http://www.unhchr.ch/html/menu3/b/92.htm; Geneva Convention Relative to the Protection of Prisoners of War, October 21, 1950, available at http://www.unhchr.ch/html/menu3/b/91.htm. Enemy combatants are protected under the provisions of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War. This Convention also applies to civilian non-combatants who are affected by the conflict and due special protections as "protected persons." In other words, the Fourth Geneva Convention covers people being held who are totally innocent yet remain in U.S. custody.

Freedom Restoration Act against the imposition of substantial burdens on their religious exercise. See 42 U.S.C. § 2000cc-1. And the Court must act to protect those rights. See Rasul v. Bush, 542 U.S. 466, 124 S.Ct. 2686, 2698-2699 (2004) (stating "[t]he fact that [Guantanamo] petitioners ... are being held in military custody is immaterial to the question of the District Court's jurisdiction over their nonhabeas statutory claims"); Disconto Gesellschaft v. Umbreit, 208 U.S. 570, 578, 28 S.Ct. 337, 52 L.Ed. 625 (1908) ("Alien citizens, by the policy and practice of the courts of this country, are ordinarily permitted to resort to the courts for the redress of wrongs and the protection of their rights").

1. THERE IS NO VALID PENOLOGICAL INTEREST TO JUSTIFY THE CONDITIONS AT GUANTANAMO BAY

Given the plethora of protections due the prisoners at Guantanamo Bay, the Court must turn to caselaw regarding prison conditions litigation. See Turner, 482 U.S. at 84 ("Because prisoners retain these rights, '[w]hen a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.'") (quoting Procunier v. Martinez, 416 U.S., at 405-406, 94 S.Ct., at 1807-08). The Supreme Court has established that only regulations reasonably related to legitimate penological interests pass constitutional muster. See Turner, 482 U.S. at 84; O'Lone v. Shabazz, 482 U.S. 342, 107 S.Ct. 2400 (1987). Under Turner, the Court must weigh four factors in making this determination: first, whether the regulation bears a "valid, rational connection" to a legitimate and neutral governmental objective; second, whether prisoners have alternative ways of exercising the circumscribed right; third, whether accommodating the right would have a deleterious impact on other inmates, guards, and the allocation of prison resources generally; and fourth, whether alternatives exist that "fully accommodate[ ] the prisoner's rights at de minimis cost to valid penological interests." Turner, 482 U.S. at 90-91.

The conditions suffered by the Guantanamo prisoners these last three and a half years are not reasonably related to a legitimate penological interest. What is the interest that justifies medical care so deliberately indifferent that a broken bone in a prisoner's foot leads to the amputation of half his leg? What interest justifies stomping on the Qu'ran or throwing it to the ground? What interest justifies barring a translation of the Qu'ran for prisoners who do not speak Arabic well, to accompany the religiously-mandated text in the original language? What interest justifies holding innocent prisoners and juveniles in conditions worse than any Death Row?[122] What interest justifies denying people access to edible food and drinkable water? The answer to all these questions is simple, a conclusion this Court should trumpet from the heights of justice: there is absolutely no justification for the U.S. military's horrendous treatment of prisoners at Guantanamo Bay.

There is no alternative to the current system for prisoners to access decent medical care, food or water, religious practice or a fair trial. There would be no deleterious impact on fellow prisoners, guards or prison resources were Respondents to adhere to the Geneva accords. In fact, the cost to penological interests of following the Geneva Conventions would be de minimis.

Respondents refuse to end the shocking abuse of human rights at Guantanamo. The prisoners can do no more to convince their minds to get the basics they need, to exercise their religious freedoms and right to equal protection of the laws. They are now apparently willing to

[122] A deprivation violates the Constitution if "it imposes an 'atypical and significant hardship' on an inmate in relation to the most restrictive confinement conditions that prison officials, exercising their administrative authority to ensure institutional safety and good order, routinely impose on inmates serving similar sentences." Hatch v. District of Columbia, 184 F.3d 846, 856 (D.C. Cir. 1999) (quoting Sandin v. Conner, 515 U.S. 472, 484, 115 S.Ct. 2293 (1995)). Designed for the "worst of the worst," Camp V is definitely an atypical and significant hardship for innocent men like Sami Al Laithi. Secretary of the Navy Gordon England has represented to the public that once a prisoner is cleared by the Combatant Status Review Tribunal: "They're free. We just move them to a different area on Guantanamo. ... It's a better environment, I believe, it is a different area than they've been in, while waiting to be transferred. And we do that as quickly as we can." Secretary England, Defense Department Special Briefing on Combatant Status Review Tribunals (March 29, 2005) (transcript available at http://www.defenselink.mil/transcripts/2005/tr20050329-2382.html). At least, that's what he's told the press the military does.

sacrifice their very lives to enforce their rights, to maintain a shred of dignity. They cannot be forced to die. The Court must intervene.

2. THIS MOTION IS NOT BARRED BECAUSE OF A FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES; THERE ARE NONE AT GUANTANAMO AND THE MILITARY REFUSES TO BE REASONABLE

The Prison Litigation Reform Act requires federal prisoners bringing actions concerning prison conditions to exhaust all available administrative remedies before suing in federal court. See 42 U.S.C. § 1997e(a); Porter v. Nussle, 534 U.S. 516, 532, 122 S.Ct. 983 (2002). The prisoner has the burden of demonstrating that he has exhausted these remedies. Brown v. Toombs, 139 F.3d 1102, 1104 (6th Cir. 1998) (per curiam). Unexhausted claims should be dismissed without prejudice. Hartsfield v. Vidor, 199 F.3d 305, 310 (6th Cir. 1999); 42 U.S.C. § 1997e(c). But the courts have recognized the inherent limitation on such a requirement when no administrative system exists. See, e.g., Massey v. Hellman, 196 F.3d 727, 733 (7th Cir. 1999) ("if a prison *has* an internal administrative grievance system through which a prisoner can seek to correct a problem, then the prisoner must utilize that administrative system before filing a claim") (emphasis added).

There is no such thing as an administrative remedy at Guantanamo Bay. There is no grievance process. After more than three years of verbal and written pleas regarding their simple requests, the prisoners took the only step remaining to them: they started a non-violent protest, a hunger strike. Tens were hospitalized as a result, overflowing the prison's medical facilities. Its wards got so full, the health status of the hunger strikers so tenuous, that medics stopped giving out medicine or attending to anyone else who was sick. The government's response was to lie to the prisoners to get them to eat and drink, and then, once they were no longer on the verge of death, renew beatings, desecration of the Qur'an, forcible cell extractions and a shameful variety of sexual and other humiliations.

When the military created a renewed crisis by beating Mr. Sliti, counsel brought this to the attention of the military authorities by letter dated August 8, 2005, but received no reply.[123] Counsel asked to meet with the Colonel,[124] but was told orally that the Colonel would not meet counsel.[125] Counsel asked to meet with General Hood, but was told that he was off the island.[126]

Petitioner has more than exhausted remedies. There is no legal basis to deny a hearing on these claims.

B. WITHOUT COURT INTERVENTION, PETITIONER WILL CERTAINLY SUFFER IRREPARABLE INJURY – HE WILL DIE DUE TO HIS CONTINUING HUNGER STRIKE

A hunger strike will inevitably do irreparable damage to the body. Do it for long enough and the prisoner will die. Before that almost-merciful death, the prisoner will suffer from severe abdominal pains, vomiting, constipation, headaches and dizziness. He will begin to hallucinate. Dementia sets in. Muscle tissue deteriorates. Bones get brittle. Intestines wither.[127] After four weeks, potentially permanent brain damage sets in. After four to five weeks, internal organs begin to break down and fail.

Prisoners at Guantanamo Bay recently fasted for upwards of 30 days to protest their treatment. All these things began to happen to their bodies. Numerous prisoners came within 48 hours of death.

This time, they will surely die. No verbal agreement the Respondents make can be trusted by Petitioner and his fellow prisoners. Respondents have reneged on the truth so many times already. What would stop them from doing so again? The Court must force the issue.

C. RESPONDENTS WILL SUFFER NO INJURY IF THEY ARE FORCED TO LIVE UP TO THEIR OWN PREVIOUS PROMISE OF ENFORCING THE GENEVA CONVENTIONS

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[123] See *Memo on Conditions in Guantanamo Bay* at 4 (August 13, 2005).
[124] Id.
[125] Oral conversation with Lt. Cdr. De Alaconte (August 13, 2005).
[126] Id.
[127] See *Legal And Ethical Implications Of Medically Enforced Feeding Of Detained Asylum Seekers On Hunger Strike*, Mary A Kenny, Derrick M Silove and Zachary Steel, MJA 2004; 180 (5): 237-240, available at http://www.mja.com.au/public/issues/180_05_010304/ken10552_fm.html.

Respondents have already promised once to adhere to the Geneva Conventions. The problem is that they have reneged on that promise. But their promise alone is enough to show that they will not suffer any injury if they are forced to follow the Conventions.

Under the Geneva Conventions, prisoners may be prosecuted for the same offenses for which the forces of the detaining power could be tried, including common crimes unrelated to the conflict, war crimes, and crimes against humanity. Therefore, the United States is free to actually charge prisoners with crimes, no matter the conditions under which they are held. Of course, that would mean actually having to present a legitimate case for holding these men, something the government has been loathe to do to date, apparently in fear that the truth would come out: the United States has been holding numerous innocent men for over three years. But is embarrassment at mistaken identity or wrongful imprisonment worse than losing 40-plus months of your life? Under no standard can that be considered a fair trade-off. It is a fundamental provision of the Geneva Conventions that all detainees are entitled to "all the judicial guarantees recognized as indispensable by civilized peoples."[128] Nonprivileged combatants are entitled to trial before a "properly constituted, non-political military court," to be informed of the charges against them, to present their defense and call witnesses, to be assisted by qualified counsel of their own choice, to have an interpreter, and to mount an appeal against the conviction and sentence.[129]

The time has come for honest trials for the prisoners of Guantanamo.

D. THE PUBLIC INTEREST STRONGLY SUPPORTS ENDING TORTURE AND AVOIDING THE LOSS OF LIFE AT THE HANDS OF THE UNITED STATES MILITARY

The public has a profound interest in ensuring that Respondents live up to their obligations under United States law and the Convention Against Torture. See G & V Lounge,

[128] Geneva IV, Article 3; Geneva III, Article 3.
[129] See Geneva IV, Articles 71-73; Geneva III, Articles 99-106.

Inc. v. Mich. Liquor Control Comm'n, 23 F.3d 1071, 1079 (6th Cir. 1994) ("[i]t is always in the public interest to protect the violation of a party's constitutional rights"); Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 383, 99 S.Ct. 2898 (1979) ("The public ... has a definite and concrete interest in seeing that justice is swiftly and fairly administered"); Abdah v. Bush, 2005 WL 711814, at *6 (2005) ("the public has a strong interest in ensuring that its laws do not subject individuals to indefinite detention without due process").

If the United States is to be a beacon of democracy and hope in this world, it must start to adhere to those principles within its own institutions. A government considered hypocritical by the world will be able to accomplish nothing. But that is where we stand today. Brutal interrogations, sexual and physical abuse, scandalous medical care, debasement of religion, and a complete and utter lack of the fair trials the United States insists upon for its citizens worldwide. Guantanamo must change. It is of course in the prisoners' interest. Else, they will die. But it is also in the vital national interest of the United States.

At minimum, Petitioner has presented "a serious legal question." Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 844 (D.C. Cir. 1977). The temporary restraining order and preliminary injunction should be granted.

E. THIS IS A TRUE EMERGENCY – IF THE COURT DOES NOT ACT IMMEDIATELY, PRISONERS WILL DIE

Time is absolutely of the essence here. The Court must act and act swiftly. Respondents are paralyzed by their arrogance, blinded by their misguided quest for vengeance. They appear prepared to sit back and have prisoners starve themselves to death in search of dignity and justice. "Delays that might be altogether reasonable in the sphere of economic regulation are less tolerable when human lives are at stake." Public Citizen Health Research Group v. Auchter, 702 F.2d 1150, 1158 (D.C. Cir. 1983). Indeed, even though there can be no question that Death hovers over Petitioner and his fellow prisoners, "[t]he risk to human life need not be a certainty

to justify expedition." Id. at 1159 n.26. Rather, all that must be shown is that a serious hazard is presented for a significant number of people. See, e.g., Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093, 1099 (D.C. Cir. 1970) ("With regard to the request for interim suspension of the registration of DDT, we agree that inaction is tantamount to an order denying suspension. The suspension power is designed to protect the public from an 'imminent hazard'; if petitioners are right in their claim that DDT presents a hazard sufficient to warrant suspension, then even a temporary refusal to suspend results in irreparable injury on a massive scale.").

The hunger strike advances and with each day, the danger to the prisoners' lives deepens. There are two roads to travel down: justice or death. This Court should choose justice.

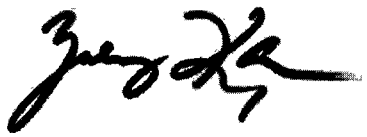
IV. PRAYER FOR RELIEF

WHEREFORE, Petitioner prays for relief as follows:

1. Order an expeditious evidentiary hearing on the issues set forth in this motion;
2. Order that Petitioner be brought before the Court or before a Magistrate Judge assigned by the Court to conduct proceedings under the supervision of the Court to vindicate his rights;
3. Order Respondents to cease all acts of torture and cruel, inhuman and degrading treatment of Petitioner;
4. Enter a Preliminary Injunction mandating that Respondents treat Petitioner at least according to minimum acceptable standards; and,
5. Grant such other relief as the Court may deem necessary and appropriate to protect Petitioner's rights under the common law, the United States Constitution, federal statutory law, and international law.

Dated: August 29, 2005

Respectfully submitted,



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Counsel for Petitioner

CERTIFICATION AND VERIFICATION

Counsel for Petitioner certifies that the foregoing pleading is true and accurate to the best of his information and belief, and that a copy of the foregoing document has been served this day upon Andrew Warden, counsel for Respondents.

Dated: August 29, 2005

P.P. Clive A. Stafford Smith

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMIL EL-BANNA, *et al.*, Petitioners v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 04-1144 (RWR)
OMAR DEGHAYES, *et al.*, Petitioners v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 04-2215 (RMC)
AHAMED ABDUL AZIZ, *et al.*, Petitioners v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 05-0492 (JR)

AHMED ABU IMRAN, *et al.*, Petitioners v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	)	Civil Action No. 05-0764 (CKK)
BENJAMIN MOHAMMED AL HABASHI, *et al.*, Petitioners v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	)	Civil Action No. 05-0765 (EGS)

MEMORANDUM AND ORDER

Counsel for petitioners in the above-captioned cases, each petitioner a detainee at Guantanamo Bay, Cuba, have filed virtually identical motions for preliminary injunctions on petitioners' behalf.[1] The motions request judicial intervention in the conditions of the petitioners' detention, particularly with regard to a hunger strike now in progress at Guantanamo Bay. These

[1] Counsel have filed what appear to be identical motions on behalf of the petitioners in four other cases: *Sliti v. Bush*, No. 05-cv-0429 (D.D.C.) [docket #25], *Kabir v. Bush*, No. 05-cv-0431 [docket #16], *Hamlily v. Bush*, No. 05-cv-0763 [docket #14], and *Hamamy v. Bush*, No. 05-cv-0766 [docket #12]. These motions are not addressed by the instant Memorandum and Order.

motions have been assigned to the undersigned pursuant to established court procedures.[2]

Movants' preliminary injunction motions allege the abuse of the Qur'an and other infringements on religious liberty, inadequate sanitation including inadequate opportunity to bathe, inadequate opportunity to exercise, inadequate opportunity for exposure to daylight, poor quality food and drinking water, inadequate access to educational materials, excessively air-conditioned cells, and the use of loud fans to limit communications. In addition, the motions allege, with regard to detainees other than these movants, past and on-going physical abuse amounting to torture and poor and withheld medical treatment.

In *O.K. v. Bush*, 377 F. Supp. 2d 102 (D.D.C. July 12, 2005), Judge John Bates recently decided a similar motion for preliminary injunction. As Judge Bates stated, our court of appeals "recently emphasized [that] 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.'" *Id.* at 111 (quoting *Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004)). Judge Bates further noted the requirement that "a plaintiff demonstrate a likelihood of injury in the imminent future in order to secure an injunction," *id.* at 113 (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 105, 110 (1983)), and observed that that 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," *id.* (citing *D.L.S. v. Utah*, 374 F.3d 971, 973 (10th Cir. 2004)). Judge Bates concluded that, "[a]bsent a persuasive claim that the conditions of confinement at Guantanamo are so severe that they

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[2] *See* Order of Sept. 27, 2005, *El-Banna v. Bush*, No. 04-cv-1144 [docket #154]; Order of Sept. 26, 2005, *Deghayes v. Bush*, No. 04-cv-2215 [docket #27]; Order of Sept. 23, 2005, *Aziz v. Bush*, No. 05-cv-0492 [docket #23] (order refers to notice of filing [docket #21] because the motion itself [docket #24] had not yet been cleared for public filing); Order of Sept. 21, 2005, *Imran v. Bush*, No. 05-cv-0764 [docket #15]; Order of Sept. 23, 2005, *Habashi v. Bush*, No. 05-cv-0765 [docket #14].

present an imminent threat to petitioner's health, the Court will not insert itself into the day-to-day operations of Guantanamo." *Id.* at 114.

I am persuaded that the principles that guided Judge Bates' decision provide a sound basis for resolution of the instant preliminary injunction motions. The movants here, like the movant in the *O.K.* case, have failed to demonstrate an imminent threat to their health. Movants' complaints about physical abuse and poor and withheld medical treatment fail because the complaints pertain only to detainees other than movants. Movants' other conditions of confinement complaints fail because they do not describe conditions so severe as to constitute an imminent threat to movants' health.

There remain for consideration the movants' allegations about the hunger strike. They allege that during an earlier hunger strike certain Guantanamo Bay medical personnel stated that if a hunger-striking detainee provided written authorization, medical personnel would refrain from using heroic means to preserve the striking detainees' health and, ultimately, life.

In response, respondents have filed a subsequent declaration made under penalty of perjury by United States Army Major General Jay W. Hood, commander of the Joint Task Force -- Guantanamo ("JTF"). *See* Resp.'s Br. Ex. A: Declaration of MG Jay W. Hood (dated Sept. 9, 2005) (copy attached). The general states that he is "responsible for all aspects of detainee operations at Guantanamo Bay, Cuba to include medical care and . . . the operation of the detention hospital that provides medical care to the detainees being held at Guantanamo." *Id.* ¶ 1. Most significantly, he also commits that "[c]onsistent with Department of Defense policy the JTF will prevent unnecessary loss of life by detainees through standard medical intervention, *including involuntary medical intervention when necessary to overcome a detainee's desire to commit suicide*." *Id.* ¶ 2 (emphasis added).

The foregoing considered, movants have not carried their burden of proving an imminent threat by respondents to the health and life of the hunger-striking movants.[3]

Accordingly, it is this 28th day of September, 2005 hereby

ORDERED: that movants' Motions for a Preliminary Injunction Concerning Conditions of Confinement in *El-Banna v. Bush*, No. 04-cv-1144 [docket #153], *Deghayes v. Bush*, No. 04-cv-2215 [docket # 26], *Aziz v. Bush*, No. 05-cv-0492 [docket # 24], *Imran v. Bush*, No. 05-cv-0764 [docket # 16], and *Habashi v. Bush*, No. 05-cv-0765 [docket # 15] are DENIED, without prejudice.

/s/

Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

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[3] Movants' request for an evidentiary hearing and oral argument is denied. Even assuming the truth of all of movants' allegations, movants have failed to demonstrate an imminent threat to movants' health. Regarding movants' hunger-strike claims, movants have specifically alleged only that respondents' representatives threatened non-intervention with regard to a past hunger strike. Movants have not offered specific allegations (but, instead, have offered only general expressions of doubt) to dispute General Hood's subsequent commitment, provided in the context of the current hunger strike, to use "involuntary medical intervention when necessary to overcome a detainee's desire to commit suicide." Declaration of MG Jay W. Hood ¶ 2. As in the summary judgement context, movants' generalized statements of doubt about General Hood's commitment do not effectively traverse his specific commitment. *Cf.* Fed. R. Civ. P. 56(e) (noting in the summary judgment context the insufficiency of "mere allegations or denials" and requiring instead a response that "set[s] forth specific facts showing that there is a genuine issue" requiring resolution by fact-finding).

Exhibit A

DECLARATION OF MG JAY W. HOOD

Pursuant to 28 U.S.C. § 1746, I, JAY W. HOOD, hereby declare under penalty of perjury under the laws of the United States that to the best of my knowledge, information, and belief, the following is true, accurate, and correct:

1. I am a Major General in the United States Army, with 30 years of active duty service. I currently serve as Commander, Joint Task Force-Guantanamo, Guantanamo Bay, Cuba (JTF-GTMO). I have served in that position since March 2004. JTF-GTMO conducts detention and interrogation operations in support of the Global War on Terrorism, coordinates and implements detainee screening operations and supports law enforcement and war crimes investigations. Our detention mission is conducted in a humane manner that protects the security of both detainees and JTF personnel at GTMO. In my capacity as Commander, I am responsible for all aspects of detainee operations at Guantanamo Bay, Cuba to include medical care and I oversee the operation of the detention hospital that provides medical care to the detainees being held at Guantanamo. Currently, there are in excess of 500 detainees being held at Guantanamo Bay, Cuba.

2. Consistent with Department of Defense policy the JTF will prevent unnecessary loss of life of detainees through standard medical intervention, including involuntary medical intervention when necessary to overcome a detainee's desire to commit suicide, using means that are clinically appropriate. Although the principles of autonomy and consent for medical treatment are well established in medical care and are applicable to detainees, there are also clearly recognized exceptions in areas such as communicable disease treatment, occupational health, and

prison medical care, especially to prevent unnecessary loss of life.

3. The U.S. Department of Justice regulations for the Bureau of Prisons (Title 28 of the Code of Federal Regulations, Section 549.65) establishes explicit procedures for involuntary feeding of prison inmates engaged in hunger strikes when necessary to prevent an imminent threat of death or permanent impairment. That program was used as the model for Department of Defense detainee program operations in this area discussed in this declaration.

4. In keeping with the above guidance, it is JTF-GTMO's standard operating procedure (as approved by the Deputy Assistant Secretary of Defense – Detainee Affairs and the Assistant Secretary of Defense – Health Affairs) to avert death from hunger strikes and failure to drink, as well as to monitor the health status of detainees who are fasting voluntarily. Every attempt will be made to allow detainees to remain autonomous up to the point where failure to eat or drink might threaten their life or health.

5. Security forces at JTF-GTMO monitor each detainee's daily intake of meals and water. If a detainee has missed nine consecutive meals or has declined food and water for more than two days, personnel at the detention hospital are notified and a medical evaluation of the detainee is conducted. This evaluation includes a complete medical records review, as well as physical and mental health examinations and testing. Medical personnel on a regular and frequent basis then monitor the detainee.

6. If medical personnel have reason to believe that the continuation of a voluntary fast or hunger strike could endanger a detainee's health or life, the detainee will be admitted to the detention hospital. His food and water intake are again monitored, and his medical condition is

continuously observed. Medical Staff counsel the detainee regarding the risks associated with not following our medical advice directing him to eat life-sustaining food and to drink fluids. We also explain the alternatives available to him, including oral food and fluid, oral rehydration solutions, oral nutritional supplements and intravenous hydration.

7. If the detainee elects to voluntarily begin eating/drinking, the detention hospital follows specific protocols designed to ensure the detainee's health and well being as he increases his caloric and liquid intake.

8. If the detainee continues to refuse to eat and/or drink and if a medical officer determines that the detainee's health or life might be threatened if treatment is not initiated immediately, consideration is given to involuntary medical treatment of the detainee. Interventions of an involuntary manner are deferred, however, until there is a clear medical determination by the attending physician that continued fasting would impair the health seriously or jeopardize the life of a detainee. When, after reasonable efforts, or in an emergency preventing such efforts, a medical necessity for immediate treatment of a life or health threatening situation is determined by the physician to exist, I will authorize doctors to administer treatment without the consent of the detainee. This can include the use of intravenous means or a feeding tube. No request for such authorization has been denied, and where sought, such authorizations have been provided in a timely manner without exacerbating the medical situation of a detainee.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: 9 September 2005

JAY W. HOOD
Major General, USA

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHAFIQ RASUL, *et al.*, **Plaintiffs,** **v.** **GEORGE W. BUSH, *et al.*,** **Defendants.**	**Civil Action No. 02-299 (CKK)**
KHALED A.F. AL ODAH, *et al.*, **Plaintiffs,** **v.** **GEORGE W. BUSH, *et al.*,** **Defendants.**	**Civil Action No. 02-828 (CKK)**
MAMDOUH HABIB, **Plaintiff,** **v.** **GEORGE W. BUSH, *et al.*,** **Defendants.**	**Civil Action No. 02-1130 (CKK)**
NIZAR SASSI, *et al.*, **Plaintiffs,** **v.** **GEORGE W. BUSH, *et al.*,** **Defendants.**	**Civil Action No. 04-547 (JDB)**

MURAT KURNAZ, *et al.*,	:	
Plaintiffs,	:	
v.	:	**Civil Action No. 04-1135 (ESH)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
OMAR KHADR,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 04-1136 (JDB)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
MOAZZAM BEGG, *et al.*,	:	
Plaintiffs,	:	
v.	:	**Civil Action No. 04-1137 (RMC)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
MOURAD BENCHELLALI, *et al.*,	:	
Plaintiffs,	:	
v.	:	**Civil Action No. 04-1142 (RJL)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	

JAMIL EL-BANNA, *et al.*,	:	
Plaintiffs,	:	
v.	:	**Civil Action No. 04-1144 (RWR)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
FALEN GHEREBI,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 04-1164 (RBW)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
LAKHDAR BOUMEDIENE, *et al.*,	:	
Plaintiffs,	:	
v.	:	**Civil Action No. 04-1166 (RJL)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
SUHAIL ABDU ANAM, *et al.*,	:	
Plaintiffs,	:	
v.	:	**Civil Action No. 04-1194 (HHK)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	

ISA ALI ABDULLA ALMUBATI, *et al.*, **Plaintiffs,** **v.** **GEORGE W. BUSH, *et al.*,** **Defendants.**	**Civil Action No. 04-1227 (RBW)**
MOHMOAD ABDAH, *et al.*, **Plaintiffs,** **v.** **GEORGE W. BUSH, *et al.*,** **Defendants.**	**Civil Action No. 04-1254 (HHK)**
CHARLES SWIFT, as Next Friend for SALIM AHMED HAMDAN, **Plaintiff,** **v.** **DONALD H. RUMSFELD, *et al.*,** **Defendants.**	**Civil Action No. 04-1519 (JR)**
RICHARD BELMAR, **Plaintiff,** **v.** **GEORGE W. BUSH, *et al.*,** **Defendants.**	**Civil Action No. 04-1897 (RMC)**

IBRAHIM AHMED MAHMOUDAL QOSI, **Plaintiff,** **v.** **GEORGE W. BUSH, *et al.*,** **Defendants.**	**Civil Action No. 04-1937 (PLF)**
SAIFULLAH PARACHA, **Plaintiff,** **v.** **GEORGE W. BUSH, *et al.*,** **Defendants.**	**Civil Action No. 04-2022 (PLF)**
JARALLAH AL-MARRI, **Plaintiff,** **v.** **GEORGE W. BUSH, *et al.*,** **Defendants.**	**Civil Action No. 04-2035 (GK)**
AHCENE.ZEMIRI, **Plaintiff,** **v.** **GEORGE W. BUSH, *et al.*,** **Defendants.**	**Civil Action No. 04-2046 (CKK)**

OMAR DEGHAYES, *et al.*,	:	
Plaintiffs,	:	
v.	:	**Civil Action No. 04-2215 (RMC)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
KHALED BEN MUSTAPHA, *et al.*,	:	
Plaintiffs,	:	
v.	:	**Civil Action No. 05-22 (JR)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
HANI SALEH RASHID ABDULLAH, *et al.*,	:	
Plaintiffs,	:	
v.	:	**Civil Action No. 05-23 (RWR)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
MAHMOOD SALIM AL MOHAMMED, *et al.*,	:	
Plaintiffs,	:	
v.	:	**Civil Action No. 05-247 (GK)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	

SHERIF EL-MASHAD, *et al.*,	:	
Plaintiffs,	:	
v.	:	**Civil Action No. 05-270 (JR)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
MOHAMMED AL-ADAHI, *et al.*,	:	
Plaintiffs,	:	
v.	:	**Civil Action No. 05-280 (GK)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
MAJID ABDULLA AL JOUDI, *et al.*,	:	
Plaintiffs,	:	
v.	:	**Civil Action No. 05-301 (GK)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
JOHN DOES 1-570,	:	
Plaintiffs,	:	
v.	:	**Civil Action No. 05-313 (CKK)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	

AHMED ABDULLAH-WAZAN,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-329 (PLF)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
ABDULA THANI FARIS AL-ANAZI, *et al.*,	:	
Plaintiffs,	:	
v.	:	**Civil Action No. 05-345 (JDB)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
RAFIQ BIN BASHIR BIN JALLUL ALHAMI, *et al.*,	:	
Plaintiffs,	:	
v.	:	**Civil Action No. 05-359 (GK)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
DJAMEL AMEZIANE,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-392 (ESH)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	

AYMEN SAEED BATARFI,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-409 (EGS)**
GEORGE W. BUSH, ***et al.,***	:	
Defendants.	:	
HISHAM SLITI, ***et al.,***	:	
Plaintiffs,	:	
v.	:	**Civil Action No. 05-429 (RJL)**
GEORGE W. BUSH, ***et al.,***	:	
Defendants.	:	
M.C.,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-430 (ESH)**
GEORGE W. BUSH, ***et al.,***	:	
Defendants.	:	
USAMA HASAN ABU KABIR, ***et al.,***	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-431 (RJL)**
GEORGE W. BUSH, ***et al.,***	:	
Defendants.	:	

RASHID ABDUL MOSLEH QAYED,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-454 (RMU)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
ABDUL-SALAM GAITHAN MUREEF AL-SHIHRY,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-490 (PLF)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
AHAMED ABDUL-AZIZ,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-492 (JR)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
ABU BAKKER QASSIM, *et al.*,	:	
Plaintiffs,	:	
v.	:	**Civil Action No. 05-497 (JR)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	

SALEH ABDULLAH AL-OSHAN, *et al.*, **Plaintiff,** **v.** **GEORGE W. BUSH, *et al.*,** **Defendants.**	**Civil Action No. 05-520 (RMU)**
MUHAMMED KHAN TUMANI, *et al.*, **Plaintiffs,** **v.** **GEORGE W. BUSH, *et al.*,** **Defendants.**	**Civil Action No. 05-526 (RMU)**
SULAIMAN SAAD MOHAAMED AL-OSHAN, **Plaintiff,** **v.** **GEORGE W. BUSH, *et al.*,** **Defendants.**	**Civil Action No. 05-533 (RJL)**
MAJID RADHI AL TOUME AL SHAMRI, **Plaintiff,** **v.** **GEORGE W. BUSH, *et al.*,** **Defendants.**	**Civil Action No. 05-551 (RWR)**

MOHAMMEDOU OULD SALAHI,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-569 (JR)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
AMEUR MAMMAR,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-573 (RJL)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
ABDULRAZZAQ ABDULLA AL-SHAREKH, *et al.*,	:	
Plaintiffs,	:	
v.	:	**Civil Action No. 05-583 (RJL)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
MURTADHA ALI MAGRAM,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-584 (CKK)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	

ABDULLAH IBRAHIM ABDULLAH AL RASHAIDAN, **Plaintiff,** **v.** **GEORGE W. BUSH, *et al.*,** **Defendants.**	**Civil Action No. 05-586 (RWR)**
WAHIDOF ABDUL MOKIT, **Plaintiff,** **v.** **GEORGE W. BUSH, *et al.*,** **Defendants.**	**Civil Action No. 05-621 (HHK)**
OMER SAEED SALEM AL DAINI, **Plaintiff,** **v.** **GEORGE W. BUSH, *et al.*,** **Defendants.**	**Civil Action No. 05-634 (RWR)**
AHMED ERRACHIDI, *et al.*, **Plaintiffs,** **v.** **GEORGE W. BUSH, *et al.*,** **Defendants.**	**Civil Action No. 05-640 (EGS)**

ABDUL SALAM ZAEEF,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-660 (RMC)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
HAZI AHMED,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-665 (JR)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
ELHAM BATTAYAV,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-714 (RBW)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
SALIM MUHOOD ADEM,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-723 (RWR)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	

MOHSEN ABDRUB ABOASSY, *et al.*,	:	
Plaintiffs,	:	
v.	:	**Civil Action No. 05-748 (RMC)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
ADEL HAMLILY,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-763 (JDB)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
AHMED ABU IMRAN, *et al.*,	:	
Plaintiffs,	:	
v.	:	**Civil Action No. 05-764 (CKK)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
BENJAMIN MOHAMMED AL HABASHI,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-765 (EGS)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	

ABDUL HADI IBN EL HATHILY AL HAMAMY,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-766 (RJL)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
SOFIAN EBRAHIM HAMAD HAMOODAH,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-795 (RJL)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
ALLADEEN, *et al.*,	:	
Plaintiffs,	:	
v.	:	**Civil Action No. 05-833 (JR)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
KHIALI-GUL,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-877 (JR)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	

RAHMATTULLAH,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-878 (CKK)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
TAJ MOHAMMAD,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-879 (RBW)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
HAJI NASRAT,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-880 (ESH)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
MOHAMEDUO OULD SLAHI,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-881 (RWR)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	

FAZIL RAHMAN,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-882 (GK)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
KARIN BOSTAN,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-883 (RBW)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
MUHIBULLAH,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-884 (RMC)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
ALIF MOHAMMAD,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-885 (GK)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	

ABDUL WAHAB,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-886 (EGS)**
GEORGE W. BUSH, ***et al.,***	:	
Defendants.	:	
CHAMAN,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-887 (RWR)**
GEORGE W. BUSH, ***et al.,***	:	
Defendants.	:	
NAZUL GUL,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-888 (CKK)**
GEORGE W. BUSH, ***et al.,***	:	
Defendants.	:	
YASIN MUHAMMED BASARDH,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-889 (EGS)**
GEORGE W. BUSH, ***et al.,***	:	
Defendants.	:	

SHARBAT KHAN,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-890 (RMC)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
NASRULLAH,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-891 (RBW)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
ALI HUSSIAN MUHAMMAD MUETY SHAABAN,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-892 (CKK)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
MOHAMMAD MUSTAFA SOHAIL,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-993 (RMU)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	

KASIMBEKOV KOMOLIDDIN TOHIRJANOVICH,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-994 (RCL)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
MOHAMEDOU OULD SLAHI,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-995 (GK)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
AKHTEYAR MOHAMMAD,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-996 (JR)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
KHUDAIDAD,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-997 (PLF)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	

ARKAN MOHAMMAD GHAFIL AL KAAIM,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-998 (RMU)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
ASIM BEN THABIT AL-KHALAQI,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-999 (RBW)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
ABIB SARAJUDDIN,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1000 (PLF)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
ABDULLA MOHAMMED KAHN,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1001 (ESH)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	

AKHTAR MOHAMMED,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1002 (EGS)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
HABIBULLAH MANGUT,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1008 (JDB)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
ADEL HASSAN HAMAD,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1009 (RCL)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
MOHABAT KHAN,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1010 (RJL)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	

ABDUL ZUHOOR,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1011 (JR)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
SYED MUHAMMAD ALI SHAH,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1012 (ESH)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
ABDUL SALAAM,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1013 (JDB)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
ABDULSALAM ALI ABDULRAHMAN AL-HELA,	:	
Plaintiffs,	:	
v.	:	**Civil Action No. 05-1048 (RMU)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	

ALI SHAH MOUSOVI, *et al.*,	:	
Plaintiffs,	:	
v.	:	**Civil Action No. 05-1124 (RMC)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
OMAR MOHAMMED KHALIFH, *et al.*,	:	
Plaintiffs,	:	
v.	:	**Civil Action No. 05-1189 (HHK)**
ABU ABDUL RAUF ZALITA,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1220 (RMU)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
AMEUR MAMMAR,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1233 (RJL)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	

LABED AHMD,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1234 (EGS)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
ABDUL BAQI,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1235 (PLF)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
ABDULZAHER,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1236 (RWR)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
AMINULLAH,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1237 (ESH)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	

HAJJI GHALIB,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1238 (CKK)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
ALI ADEL MOTALEB AWEID AL KHAIY,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1239 (RJL)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
ALI ABDULMOTALIB AWEID HASSAN ALTAIY,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1240 (RJL)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
ABDUL HAKIM ABDUL KAARIN AMIN BUKHARI,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1241 (RMC)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	

AHSANULLAH PIRZAI,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1242 (RCL)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
IHSAN ULLAH PEERZAI,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1243 (GK)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
TARIQ MAHMOUD ALSAWAM,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1244 (CKK)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
ABDUL MAJID MOHAMMADI,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1246 (RWR)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	

ABDULRAHIM ABDUL RAZAK AL GINCO,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1310 (RJL)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
EHSAN ULLAH,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1311 (CKK)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
GHALEB NASSAR AL BIHANI,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1312 (RJL)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
FARHI SAEED BIN MOHAMMED, *et al.*,	:	
Plaintiffs,	:	
v.	:	**Civil Action No. 05-1347 (GK)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	

CYRUS KAR,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1348 (JR)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
MOTAI SAIB,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1353 (RMC)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
SAEED MOHAMMED SALEH HATIM, *et al.*,	:	
Plaintiffs,	:	
v.	:	**Civil Action No. 05-1429 (HHK)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
NASSER MAZYAD ABDULLAH AL-SUBAIY, *et al.*,	:	
Plaintiffs,	:	
v.	:	**Civil Action No. 05-1453 (RMU)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	

JIHAD DHIAB,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1457 (GK)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
AHMED "DOE,"	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1458 (ESH)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
JAWAD JABBER SADKHAN,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1487 (RMC)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
FAIZULLAH,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1489 (RMU)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	

FARAJ ABDL AL HADMI OMAR MAHOUD,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1490 (PLF)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
SAWAT KHAN,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1491 (JR)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
ABDU AHMAD,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1492 (RCL)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
MOHAMMED AMON,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1493 (RBW)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	

ADIL BIN MUHAMMAD AL WIRGHI,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1497 (GK)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
NABIL (LAST NAME UNKNOWN),	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1504 (RMC)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
ABBAR SUFIAN AL HAWARY,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1505 (RMC)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
SHAFIQ (LAST NAME UNKNOWN),	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1506 (RMC)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	

JAMAL KIYEMBA, *et al.*,	:	
Plaintiffs,	:	
v.	:	**Civil Action No. 05-1509 (RMU)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
IBRAHIM OSMAN IBRAHIM IDRIS,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1555 (JR)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
ABDUL HADI OMER HAMOUD FARAJ,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1590 (GK)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
HASSAN BIN ATTASH,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1592 (HHK)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	

HAMID AL RAZAK,	:	
Plaintiff,	:	
v.	:	**Civil ACtion No. 05-1601 (GK)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
EDHAM MAMET,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1602 (RMU)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
ABDUL RAHEEM GHULAM RABBANI, *et al.*,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1607 (JR)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
ABDUL ZAHIR,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1623 (CKK)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	

MOHAMMAD AKHTIAR,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1635 (PLF)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
MOHAMMED RAJEB ABU GHANEM,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1638 (CKK)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
AMEEN MOHAMMAD ALBKRI,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1639 (RBW)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
ABDULAZIZ ABDULRAHMAN AL-BADAH, *et al.*,	:	
Plaintiffs,	:	
v.	:	**Civil Action No. 05-1641 (CKK)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	

HUSSAIN SALEM MOHAMMED,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1645 (PLF)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
WALEED SAEED BNSAEED ZAID,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1646 (PLF)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
HUSSEIN SALEM MOHAMMAD ABDULLAH EL-MARQODI,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1649 (RMU)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
ZEIAD SALEH AL BAHOOTH,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1666 (ESH)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	

ABDALHADI M. AL-SOPAI,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1667 (RBW)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
RASHID AWAD AL AWEDA,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1668 (GK)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
FAHAD SALEH ALGATEL,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1669 (RWR)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
ALLA ALI BIN ALI AHMED,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1678 (GK)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	

JAWAD JABBAR SADKHAN	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1679 (RJL)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
KADEER KHANDAN,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1697 (PLF)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
USAMA HASAN ABU KABIR, *et al.*,	:	
Plaintiffs,	:	
v.	:	**Civil Action No. 05-1704 (JR)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
YOUSIF ABDULLAH AL-RUBAISH,:	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1714 (RWR)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	

SALIM MOHAMMED ADAM BIN AMIR, **Plaintiff,** **v.** **GEORGE W. BUSH, *et al.*,** **Defendants.**	**Civil Action No. 05-1724 (RMU)**
ABRAHIM OTHMAN ABRAHIM EDRIES, **Plaintiff,** **v.** **GEORGE W. BUSH, *et al.*,** **Defendants.**	**Civil Action No. 05-1725 (RWR)**
MUHAMMED QASIM, **Plaintiff,** **v.** **GEORGE W. BUSH, *et al.*,** **Defendants.**	**Civil Action No. 05-1779 (JDB)**
ABDANNOUR SAMEUR, **Plaintiff,** **v.** **GEORGE W. BUSH, *et al.*,** **Defendants.**	**Civil Action No. 05-1806 (CKK)**

MAZIN SALIH AL-HARBI,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1857 (CKK)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
ABU ABDUL AZIZ,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1864 (HHK)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
AYOUB HAJI MAMET, *et al.*,	:	
Plaintiffs,	:	
v.	:	**Civil Action No. 05-1886 (JR)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
FAWAZ NAMAN HAMOUD,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1894 (RWR)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	

MOHAMMED AL-QAHTANI,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-1971 (RMC)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
ISMAIL ALKHEMISI, *et al.*,	:	
Plaintiffs,	:	
v.	:	**Civil Action No. 05-1983 (RMU)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
RAVIL MINGAZA GAMIL,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-2010 (JR)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
BENDER AYED HAMOUD HEZAM AL-OTEIBI AL-SHABANY,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-2029 (JDB)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	

ZAKIRJAN,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-2053 (HHK)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
ABDULKADR ABDULKHALIK DAD,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-2083 (JDB)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
ABU MUHAMMED,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-2087 (RMC)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	
KHALED ADB ELGABAR MOHAMMED OTHMAN,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 05-2088 (RWR)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	

ISSAM HAMID ALI BIN ALI ALJAYFI, *et al.*,	:	
Plaintiffs,	:	
v.	:	**Civil Action No. 05-2104 (CKK)**
GEORGE W. BUSH, *et al.*,	:	
Defendants.	:	

ORDER

Whereas the Calendar and Case Management Committee of the United States District Court for the District of Columbia recognizes the need to promote the orderly and efficient case management of all habeas petitions that are presently pending or will be filed in this Court relating to the rights of detainees held at the United States Naval Base at Guantanamo Base, Cuba, as well as avoid unnecessary duplication of effort, and in the interests of resolving logistical problems as quickly and satisfactorily as possible, the following case management plan is implemented pursuant to the Committee's authority under LCvR 40.5(e):

1. Effective as of the date of this Order, all Motions pertaining to interpretation or construction of any protective order which has been entered in any of the above-cited cases, shall be referred to Magistrate Judge Alan Kay pursuant to LCvR 72.2(a).

2. Effective as of the date of this Order, all disputes pertaining to logistical issues, such as communications with or visits to clients and counsel, shall be referred to Magistrate Judge Kay to facilitate discussion and resolution by the parties as promptly as possible.

/s/
Gladys Kessler, Chair
Calendar and Case Management Committee

November 2, 2005

PREVIOUSLY FILED WITH THE CSO
AND CLEARED FOR PUBLIC FILING

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BENJAMIN MOHAMMED AL HABASHI,	)	
	)	
Petitioner/Plaintiff,	)	
	)	
v.	)	**Civ. No. 05-cv-765 (EGS)**
	)	
GEORGE W. BUSH, et al.,	)	
	)	
Respondents/Defendants.	)	
	)	

MOTION TO PRACTICE AND NOTICE OF ENTRY OF APPEARANCE

Undersigned counsel respectfully files this Motion to Practice and Entry of Appearance pursuant to Local Civil Rule 83.2(g) and Local Civil Rule 83.6(a). Counsel is a member in good standing of the Bar of the District Court for the Northern District of California and the California Supreme Court. Counsel's California Bar Number is 209489. Counsel hereby certifies that Petitioner in this case is indigent and counsel is providing representation without compensation.

Dated: October 18, 2005

Zachary Katznelson
California Bar Number 209489
22 Tudor Street
London EC4Y 0AY England
(207) 353-4640

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BENJAMIN MOHAMMED AL HABASHI,	)	
	)	
Petitioner/Plaintiff,	)	
	)	
v.	)	**Civ. No. 05-cv-765 (EGS)**
	)	
GEORGE W. BUSH, et al.,	)	
	)	
Respondents/Defendants.	)	
	)	

[PROPOSED] ORDER

Pursuant to Local Civil Rule 83.2(g), the Court hereby GRANTS counsel's Motion to Practice. Zachary Katznelson is hereby permitted to appear, file papers and practice before this Court in this case.

IT IS SO ORDERED.

Done this ____ day of _____, 2005.

_____
Judge, District Court

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)
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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".