

**Senator Grassley
Questions for the Record**

**Leslie Joyce Abrams,
Nominee, U.S. District Judge for the Middle District of Georgia**

1. What is the most important attribute of a judge, and do you possess it?

Response: The most important attribute of a judge is the ability to listen and apply the law impartially to the individual facts of each case. If a judge is able to do this, each party will have an opportunity to be heard and will receive justice through a fair and impartial process. I possess this attribute.

2. Please explain your view of the appropriate temperament of a judge. What elements of judicial temperament do you consider the most important, and do you meet that standard?

Response: The appropriate temperament of a judge is measured and decisive. The most important elements of such a temperament are patience, an open mind, humility, devotion to justice, and a strong work ethic. I meet this standard.

3. In general, Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit. Please describe your commitment to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?

Response: Adherence to the rule of law is the cornerstone of our legal system and a principle I hold dear. If lower courts failed to follow the precedents of higher courts, our system would fail. I am wholly committed to following the precedents of higher courts and giving them full force and effect.

4. At times, judges are faced with cases of first impression. If there were no controlling precedent that was dispositive on an issue with which you were presented, to what sources would you turn for persuasive authority? What principles will guide you, or what methods will you employ, in deciding cases of first impression?

Response: In a case of first impression involving the interpretation of a statute, I would first look to the text of the statute to determine if the plain language could resolve the issue. If not, I would then look to relevant or analogous Supreme Court or Eleventh Circuit precedent. If necessary, I would review the precedents of other circuits for persuasive authority. Lastly, I would look to the sources of legislative history deemed appropriate for consideration by the Supreme Court and the Eleventh Circuit. In non-statutory cases, I would be guided first by relevant and analogous Supreme Court and

Eleventh Circuit precedent and, if necessary, relevant and analogous precedent of other circuits.

5. **What would you do if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you apply that decision or would you use your best judgment of the merits to decide the case?**

Response: If confirmed as a district judge, I would apply Supreme Court and Eleventh Circuit precedent without regard to my own opinion as to whether such precedent was rightly or wrongly decided.

6. **Under what circumstances do you believe it appropriate for a federal court to declare a statute enacted by Congress unconstitutional?**

Response: Federal statutes are presumed to be constitutional. If a question of constitutionality arises, a federal judge should first determine whether the case is properly cognizable and whether it can be resolved without reaching the constitutional issue. If the judge determines that the constitutional question must be addressed, then it would be appropriate for her to declare a statute unconstitutional if the statute contravenes a constitutional provision or if Congress exceeded its constitutional authority.

7. **In your view, is it ever proper for judges to rely on foreign law, or the views of the “world community”, in determining the meaning of the Constitution? Please explain.**

Response: The laws of other countries and international authority are never controlling when determining the meaning of the Constitution.

8. **What assurances or evidence can you give this Committee that, if confirmed, your decisions will remain grounded in precedent and the text of the law rather than any underlying political ideology or motivation?**

Response: Political ideology and motivation have no place in a courtroom. Rather, the application of relevant law to a given set of facts is the only appropriate consideration of a judge. While I recognize that my role as an advocate is vastly different than the role I will have if I am confirmed, the legal arguments I have made during my career in private practice and as a prosecutor have been grounded in the relevant law and facts of each case rather than in any personal motivation. I assure the Committee that I will continue to follow this practice if I am confirmed.

9. **What assurances or evidence can you give the Committee and future litigants that you will put aside any personal views and be fair to all who appear before you, if confirmed?**

Response: I believe that the attorneys who have worked with me as co-counsel or opposing counsel would attest to the fact that I have been fair in all of my cases, and I

assure the Committee that I will put aside any personal views and be fair to all who appear before me if confirmed.

10. If confirmed, how do you intend to manage your caseload?

Response: If confirmed, I would adopt the best practices that I have observed in my practice in federal court to manage my caseload. One method I would employ to ensure effective and efficient case management would be to issue clear standing orders regarding scheduling and pre-trial procedures so that advocates know what to expect. I would also establish a realistic but firm schedule to make sure cases remain on track. Most importantly, I would strive to be prepared for court sessions, resolve motions promptly, and rule in a timely manner.

11. Do you believe that judges have a role in controlling the pace and conduct of litigation and, if confirmed, what specific steps would you take to control your docket?

Response: Yes. Judges are central to controlling the pace and conduct of litigation. If confirmed, I would establish a realistic but firm pretrial schedule and strive to resolve motions promptly and issue rulings in a timely manner.

12. You have spent your entire legal career as an advocate for your clients. As a judge, you will have a very different role. Please describe how you will reach a decision in cases that come before you and to what sources of information you will look for guidance. What do you expect to be most difficult part of this transition for you?

Response: If confirmed, I will reach decisions in cases that come before me by reviewing the facts as presented by each side, reviewing the relevant law, and then applying that law to the facts in an impartial manner. My primary sources will be Supreme Court and Eleventh Circuit precedent. The other judges of my court will also be invaluable sources of information.

The most difficult part of the transition, if I am confirmed, will be moving from the highly collaborative environments of a large firm and the U.S. Attorney's Office to the more isolated chambers of a judge; however, I have met all of the judges in the Middle District and I believe that the collegiality of the bench will ease my transition.

13. Please list your representation of any Guantanamo Bay detainees, including the clients' names and the dates on which your representation began and terminated. Please include Westlaw citations to all court submissions you made on their behalf and/or submit copies thereof.

Response: As an associate at Kilpatrick Stockton LLP (now Kilpatrick Townsend, LLP), I was part of a team of attorneys representing several detainees at Guantanamo Bay in *Mohammon et al v. Bush*, 1:05-CV-02386 (D.D.C., Jan. 13, 2005). While I entered appearances on behalf of three detainees, all of whom were represented by Kilpatrick, I actually represented and worked only on Sharaf al Sanani's case. I did not represent al

Sanani in court, nor did I ever meet or speak to him. I have listed all three detainees for whom I entered a notice of appearance and the dates of representation in the chart below, and I have provided copies of the Notice of Appearance and the Notices of Withdrawal. I note that Petitioner Ali Sher Hamidullah's name is included on the Notice of Withdrawal entered on December 13, 2007; but I never entered a Notice of Appearance to represent Hamidullah, and I believe his name was included in error. I also note that my work on al Sanani's case ceased when I left Kilpatrick in June 2007.

Detainee	Notice of Appearance Filed	Notice of Withdrawal Filed
Sharaf al Sanani (Sami Muhydeen, Next Friend)	June 28, 2006	December 13, 2007
Fahd Abu Hafsa (Jamal Kiyemba, Next Friend)	June 28, 2006	January 18, 2007
Omar Ramah (Omar Deghayes, Next Friend)	June 28, 2006	January 18, 2007

I performed Westlaw and Lexis searches and reviewed the *Mohammon* docket to identify the submissions made on behalf of al Sanani, Hafsa and Ramah by Kilpatrick during the period of my representation. I have provided copies of these submissions to the Committee.

14. Every nominee who comes before this Committee assures me that he or she will follow all applicable precedent and give them full force and effect, regardless of whether he or she personally agrees or disagrees with that precedent. With this in mind, I have several questions regarding your commitment to the precedent established in *United States v. Windsor*. Please take any time you need to familiarize yourself with the case before providing your answers. Please provide separate answers to each subpart.

a. In the penultimate sentence of the Court’s opinion, Justice Kennedy wrote, “This opinion and its holding are confined to those lawful marriages.”¹

i. Do you understand this statement to be part of the holding in *Windsor*? If not, please explain.

Response: Yes. The statement that the "opinion and its holding are confined to those lawful marriages," *id.*, is part of the holding in *Windsor*.

ii. What is your understanding of the set of marriages to which Justice Kennedy refers when he writes “lawful marriages”?

¹ *United States v. Windsor*, 133 S.Ct. 2675 at 2696.

Response: I understand the phrase "lawful marriages" to refer to "those persons who are joined in same-sex marriages made lawful by the State." *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013).

iii. Is it your understanding that this holding and precedent is limited only to those circumstances in which states have legalized or permitted same-sex marriage?

Response: Yes. The Court explicitly stated, "[t]his opinion and its holding are confined to those lawful marriages." *Id.* at 2696.

iv. Are you committed to upholding this precedent?

Response: Yes. If I am confirmed, I am committed to faithfully upholding this and all Supreme Court precedent.

b. Throughout the Majority opinion, Justice Kennedy went to great lengths to recite the history and precedent establishing the authority of the separate States to regulate marriage. For instance, near the beginning, he wrote, "By history and tradition the definition and regulation of marriage, as will be discussed in more detail, has been treated as being within the authority and realm of the separate States."²

i. Do you understand this portion of the Court's opinion to be binding Supreme Court precedent entitled to full force and effect by the lower courts? If not, please explain.

Response: Yes. The entirety of *Windsor*, including this portion, is binding Supreme Court precedent entitled to full force and effect by the lower courts.

ii. Will you commit to give this portion of the Court's opinion full force and effect?

Response: Yes. If I am confirmed, I am committed to giving full force and effect to the entirety of *Windsor* and all Supreme Court opinions.

c. Justice Kennedy also wrote, "The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens."³

i. Do you understand this portion of the Court's opinion to be binding Supreme Court precedent entitled to full force and effect by the lower courts? If not, please explain.

Response: Yes. The entirety of *Windsor*, including this portion, is binding Supreme Court precedent entitled to full force and effect by the lower courts.

² *Id.* 2689-2690.

³ *Id.* 2691.

- ii. **Will you commit to give this portion of the Court’s opinion full force and effect?**

Response: Yes. If I am confirmed, I am committed to giving full force and effect to the entirety of *Windsor* and all Supreme Court opinions.

- d. **Justice Kennedy wrote, “The definition of marriage is the foundation of the State’s broader authority to regulate the subject of domestic relations with respect to the ‘[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.’”⁴**

- i. **Do you understand this portion of the Court’s opinion to be binding Supreme Court precedent entitled to full force and effect by the lower courts? If not, please explain.**

Response: Yes. The entirety of *Windsor*, including this portion, is binding Supreme Court precedent entitled to full force and effect by the lower courts.

- ii. **Will you commit to give this portion of the Court’s opinion full force and effect?**

Response: Yes. If I am confirmed, I am committed to giving full force and effect to the entirety of *Windsor* and all Supreme Court opinions.

- e. **Justice Kennedy wrote, “The significance of state responsibilities for the definition and regulation of marriage dates to the Nation’s beginning; for ‘when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States.’”⁵**

- i. **Do you understand this portion of the Court’s opinion to be binding Supreme Court precedent entitled to full force and effect by the lower courts? If not, please explain.**

Response: Yes. The entirety of *Windsor*, including this portion, is binding Supreme Court precedent entitled to full force and effect by the lower courts.

- ii. **Will you commit to give this portion of the Court’s opinion full force and effect?**

Response: Yes. If I am confirmed, I am committed to giving full force and effect to the entirety of *Windsor* and all Supreme Court opinions.

- 15. **According to the website of American Association for Justice (AAJ), it has established a Judicial Task Force, with the stated goals including the following: “To increase the number of pro-civil justice federal judges, increase the level of professional diversity of federal judicial nominees, identify nominees that may have an anti-civil justice**

⁴ *Id.* (internal citations omitted).

⁵ *Id.* (internal citations omitted).

bias, increase the number of trial lawyers serving on individual Senator’s judicial selection committees”.

- a. Have you had any contact with the AAJ, the AAJ Judicial Task Force, or any individual or group associated with AAJ regarding your nomination? If yes, please detail what individuals you had contact with, the dates of the contacts, and the subject matter of the communications.**

Response: No.

- b. Are you aware of any endorsements or promised endorsements by AAJ, the AAJ Judicial Task Force, or any individual or group associated with AAJ made to the White House or the Department of Justice regarding your nomination? If yes, please detail what individuals or groups made the endorsements, when the endorsements were made, and to whom the endorsements were made.**

Response: No.

- 16. Please describe with particularity the process by which these questions were answered.**

Response: On May 20, 2014, I received these Questions for the Record. I prepared my answers, forwarded my responses to an attorney in the Office of Legal Policy of the Department of Justice for review, and revised my responses where I believed it was appropriate.

- 17. Do these answers reflect your true and personal views?**

Response: Yes.

Questions for the Record
Senator Ted Cruz

Responses of Leslie Joyce Abrams
Nominee, U.S. District Judge for the Middle District of Georgia

- 1. Describe how you would characterize your judicial philosophy, and identify which U.S. Supreme Court Justice’s judicial philosophy from the Warren, Burger, or Rehnquist Courts is most analogous with yours.**

Response: My judicial philosophy is that a judge must be fair and impartial and respect the rule of law. The role of a judge is to apply the applicable law to the facts of each individual case. I have not studied the judicial philosophies of the individual Justices of the Supreme Court to an extent that would allow me to analogize my philosophy to a specific Justice's philosophy.

- 2. Do you believe originalism should be used to interpret the Constitution? If so, how and in what form (i.e., original intent, original public meaning, or some other form)?**

Response: The Supreme Court has applied originalism in cases including *District of Columbia v. Heller*, 554 U.S. 570 (2008), in which the Court looked to the original public meaning of the Second Amendment. If confirmed, I would follow Supreme Court and Eleventh Circuit precedent in interpreting the Constitution.

- 3. If a decision is precedent today while you're going through the confirmation process, under what circumstance would you overrule that precedent as a judge?**

Response: As a district court judge I would not have authority to overrule legal precedent, and there is no circumstance where I would do so.

- 4. Explain whether you agree that “State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.” *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528, 552 (1985).**

Response: The Supreme Court’s holding in *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528, 552 (1985) is binding on a district court judge. If confirmed, I would apply this precedent.

- 5. Do you believe that Congress’ Commerce Clause power, in conjunction with its Necessary and Proper Clause power, extends to non-economic activity?**

Response: The Supreme Court has identified three categories of activity which Congress may regulate under the Commerce Clause. *See United States v. Lopez*, 514 U.S. 549, 558-59 (1995); *United States v. Morrison*, 529 U.S. 598, 609 (2000). These categories are: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) activities having a substantial relation to interstate commerce. *Id.* In his concurring opinion in *Gonzales v. Raich*, 545 U.S. 1, 37 (2005), Justice Scalia stated, "Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce." If confirmed, I would apply the law as identified in *Lopez*, *Raich*, *Morrison* and all other relevant Supreme Court and Eleventh Circuit precedent to determine whether the regulation of a particular activity is covered under the Commerce Clause.

6. What are the judicially enforceable limits on the President's ability to issue executive orders or executive actions?

Response: Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), set forth the analysis to use when determining whether the President has exceeded executive authority. If confirmed, I would apply this analysis to assessing the limits of any presidential executive orders or actions.

7. When do you believe a right is "fundamental" for purposes of the substantive due process doctrine?

Response: The Supreme Court defined rights and liberties as "fundamental" for purposes of Due Process Clause protection when the right or liberty is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal quotations and citations omitted). If confirmed, I would apply Supreme Court and Eleventh Circuit precedent when ruling on a case where fundamental rights were implicated.

8. When should a classification be subjected to heightened scrutiny under the Equal Protection Clause?

Response: The Supreme Court has held that a classification is subject to heightened scrutiny under the Equal Protection Clause when the classification involves a suspect class, such as race, alienage, national origin, or gender. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985). If confirmed, I would apply Supreme Court and Eleventh Circuit precedent when determining the appropriate level of scrutiny under the Equal Protection Clause.

9. Do you “expect that [15] years from now, the use of racial preferences will no longer be necessary” in public higher education? *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

Response: If confirmed, I will follow the controlling precedent of the Supreme Court, including *Grutter* and *Fisher v. University of Texas at Austin, et al.*, 570 U.S. ____ (2013), on the appropriate use of racial preferences in public higher education.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMER MOHAMMON, et al.
 Detainee,

SHARAF AL SANANI,
 Petitioner, and
Sami Muhyideen,
as Next Friend of
Mr. Sharaf Al Sanani;

FAHD ABU HAFSA,
 Petitioner, and
Jamal Kiyemba,
as Next Friend of
Mr. Fahd Abu Hafsa;

OMAR RAMAH,
 Petitioner, and
Omar Deghayes,
as Next Friend of
Mr. Omar Ramah,

 Petitioners.

v.

GEORGE W. BUSH, et al.,

 Respondents.

Civil Action No. 05-2386 (RBW)

NOTICE OF APPEARANCE

PLEASE TAKE NOTICE that the attorney listed below will represent Petitioners,
Sharaf Al Sanani, Fahd Abu Hafsa and Omar Ramah, in this matter. Service upon counsel
may be made to:

Leslie J. Abrams
KILPATRICK STOCKTON LLP
1100 Peachtree Street, Suite 2800
Atlanta, GA 30309

Counsel for Petitioner certifies, pursuant to L. Cv. R. 83.2(g), that she is representing
Petitioners without compensation.

Dated: June 28, 2006.

Respectfully submitted.

/s/ Leslie J. Abrams
Leslie J. Abrams, Ga. Bar # 001441
KILPATRICK STOCKTON LLP
Attorney for Petitioners Sharaf Al Sanani,
Fahd Abu Hafsa and Omar Ramah
1100 Peachtree Street, Suite 2800
Atlanta, GA 30309-4530
LABrams@KilpatrickStockton.com
(404) 815-6500 / (404) 815-6555 (fax)

CERTIFICATE OF SERVICE

This is to certify that I have this day served a true and accurate copy of the foregoing upon the following persons, by first-class mail in addition to the service that automatically occurs by virtue of the electronic filing of this document:

The Honorable Alberto Gonzales
United States Attorney General
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

The Honorable Kenneth L. Wainstein
United States Attorney for the District of Columbia
555 4th Street, N.W.
Washington, D.C. 20530

Terry Henry, Esq.
Andrew I. Warden, Esq.
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, NW, Room 7144
Washington, D.C. 20530

This 28th day of June, 2006.

/s/ Leslie J. Abrams
Leslie J. Abrams, Ga. Bar # 001441

Attorney for Petitioners Sharaf Al Sanani,
Fahd Abu Hafsa and Omar Ramah

Dated: January 18, 2007.

Respectfully submitted.

/s/ Leslie J. Abrams

Leslie J. Abrams, Ga. Bar # 001441
KILPATRICK STOCKTON LLP
Attorney for Petitioners Sharaf Al Sanani,
Fahd Abu Hafsa and Omar Ramah
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(404) 815-6500 / (404) 815-6555 (fax)

Dated: Washington, DC
December 13, 2007

Respectfully submitted,

Counsel for Petitioners Sharaf Al Sanani and
Ali LNU:

/s/ Leslie Abrams

A. Stephens Clay (Pursuant to LCvR 83.2(g))

James F. Bogan (Pursuant to LCvR 83.2(g))

C. Allen Garrett (Pursuant to LCvR 83.2(g))

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Fax: (404) 815-6555

CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2007, I caused the foregoing Notice of Withdrawal to be served on all counsel via the Court's Electronic Filing System.

/s/ Leslie J. Abrams
Leslie J. Abrams

Approved for Public Filing by the CSO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
AMER MOHAMMON, <i>et al.</i> ,)	
)	
Petitioners,)	
)	No. 05-CV-2386 (RBW) (AK)
v.)	
)	
GEORGE W. BUSH, <i>et al.</i> ,)	
Respondents.)	
_____)	

MOTION FOR ORDER REQUIRING RESPONDENTS TO PROVIDE COUNSEL FOR PETITIONER SHARAF AL SANANI AND THE COURT WITH 30-DAYS' ADVANCE NOTICE OF ANY INTENDED REMOVAL OF PETITIONER FROM GUANTANAMO

Pursuant to Rule 65 of the Federal Rules of Civil Procedure and the All Writs Act, 28 U.S.C. § 1651, Petitioner Sharaf Al Sanani a/k/a Sharaf Ahmad Muhammad Masud (ISN 170) ("Petitioner"),¹ by and through his undersigned counsel, respectfully moves for an order requiring Respondents to provide counsel for Petitioner and the Court with advance notice of any intended removal of Petitioner from Guantánamo Bay Naval Base in Cuba.

STATEMENT OF FACTS

Petitioner is a citizen of Yemen who is being detained as an "enemy combatant" at the Guantánamo Bay Naval Base in Cuba. As set forth in habeas petition filed on December 21, 2005, he denies being an "enemy combatant" and contends he is being detained in violation of the Constitution, treaties and laws of the United States.

¹ On June 27, 2006, this Court ruled that the Amended Protective Order should be entered as to all Petitioners in this case, except those who already had petitioners pending or whom Respondents were unable to identify. *See* Order (dkt. No. 66) at 4-5; *see also* Order, dkt. No. 108 (entered July 26, 2006). On July 26, 2006, Respondents filed a Status Report stating that the Petitioner could not be identified. *See* Status Report, Exhibit A, No. 57 (excerpts attached hereto as Exhibit A. After being presented with compelling evidence that Sharaf Al Sanani was the detainee identified by the government as Sharaf Ahmad Muhammad Masud (ISN 170), Respondents agreed not to challenge Petitioner's identity. *See* E-mail from Andrew Warden to Vinay J. Jolly (October 13, 2006), copy attached as Exhibit B.

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Petitioner in the instant case has reason to fear he will be transferred to a country where he will be tortured and/or detained indefinitely without due process of law. Upon information and belief, the United States has secretly removed detainees and others suspected of terrorist crimes to other countries for interrogation or detention without complying with extradition or other legal process. This practice, known as "rendition," "irregular rendition," or "extraordinary rendition," is understood to be used to facilitate interrogation by subjecting detainees to torture.

According to reports by American and foreign news organizations, including the *Washington Post*, the *Los Angeles Times*, and the British Broadcasting Corporation, the United States Government has repeatedly transferred detainees into the custody of foreign governments that employ inhumane interrogation techniques. According to a recent article in the *New Yorker*, the "rendition" process was originally "a program aimed at a small, discrete set of suspects – people against whom there were outstanding foreign arrest warrants," but after September 11 came to include a "wide and ill-defined population that the Administration terms 'illegal enemy combatants.'" Jane Mayer, *Outsourcing Torture*, *New Yorker*, Feb. 14, 2005, at http://www.newyorker.com/fact/content/?050214fa_fact6, ¶ 7. According to the *Washington Post*,

Since Sept. 11, the U.S. government has secretly transported dozens of people suspected of links to terrorists to countries other than the United States, bypassing extradition procedures and legal formalities, according to Western diplomats and intelligence sources. The suspects have been taken to countries . . . whose intelligence services have close ties to the CIA and where they can be subjected to interrogation tactics – including torture and threats to families – that are illegal in the United States, the sources said. In some cases, U.S. intelligence agents remain closely involved in the interrogation, the sources said.

Rajiv Chanrasekaran & Peter Finn, *U.S. Behind Secret Transfer of Terror Suspects*, *Wash. Post*, Mar. 11, 2002, at A1; *see also* Dana Priest & Barton Gellman, *U.S. Decries Abuse But Defends Interrogations*, *Wash. Post*, Dec. 26, 2002, at A1. The countries to which detainees may be

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brought are known to practice torture. *See, e.g.,* Megan K. Stack & Bob Drogin, *Detainee Says U.S. Handed Him Over For Torture*, L.A. Times, Jan. 13, 2005, at A1 ("News accounts, congressional testimony and independent investigations suggests that [the CIA] has covertly delivered at least 18 terrorism suspects since 1998 to Egypt, Syria, Jordan and other Middle Eastern nations where, according to State Department reports, torture has been widely used on prisoners.").

According to recent news accounts, Guantánamo detainee Mamdouh Habib was rendered to Egypt by the United States *before* being moved to Cuba. During his six months in Egyptian custody, Mr. Habib was allegedly tortured without mercy:

He said that he was beaten frequently with blunt instruments, including an object that he likened to an electric "cattle prod." And he was told that if he didn't confess to belonging to Al Qaeda he would be anally raped by specially trained dogs. . . . Habib said that he was shackled and forced to stand in three torture chambers: one room was filled with water up to his chin, requiring him to stand on tiptoe for hours; another chamber, filled with water up to his knees, had a ceiling so low that he was forced into a prolonged, painful stoop; in the third, he stood in water up to his ankles, and within sight of an electric switch and a generator, which his jailers said would be used to electrocute him if he didn't confess.

Mayer, *Outsourcing Torture* at ¶ 54. The credibility of Mr. Habib's account is bolstered by the State Department, which has consistently identified the Egyptian government as a practitioner of torture. In a report released on February 28, 2005, for example, the State Department found that "there were numerous, credible reports that security forces tortured and mistreated detainees" and that "torture and abuse of detainees by police, security personnel, and prison guards remained common and persistent." Dep't of State, *Country Reports On Human Rights Practices, Egypt 2004*, at <http://www.state.gov/g/drl/rls/hrrpt/2004/41720.htm>, § 1(c).

Petitioner also has reason to fear that he will be transferred into the custody of the government of Yemen or a third country for continued illegal detention without due process of

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law. On information and belief, a number of detainees have been removed to countries – including Pakistan and Kuwait – where they have been imprisoned and denied access to the courts. Moreover, recent news reports indicate that the United States government has contemplated transferring "large numbers of Afghan, Saudi and Yemeni detainees from the military's Guantánamo Bay, Cuba, detention center into new U.S.-built prisons in their home countries." Dana Priest, *Long-Term Plan Sought For Terror Suspects*, Wash. Post, Jan. 2, 2005, at A1.

ARGUMENT

Under the All Writs Act, 28 U.S.C. § 1651(a), this Court has the inherent power "to issue injunctions to protect its jurisdiction." *SEC v. Vision Communications, Inc.*, 74 F.3d 287, 291 (D.C. Cir. 1996); *Env'tl. Def. Fund v. EPA*, 485 F.2d 780, 784 n.2 (D.C. Cir. 1973). Petitioner's request meets the most fundamental purpose of preliminary injunctive relief, "to preserve the status quo between the parties pending a final determination of the merits of the action." 13 James Wm. Moore, et al., *Moore's Federal Practice* § 65.20 (3d ed. 2004).

Each of the four factors to be weighed in awarding preliminary injunctive relief favors the requested injunction here: (1) Petitioner will suffer irreparable harm if the injunction is denied; (2) no harm will be suffered by Respondents if the injunction is granted; (3) Petitioner are likely to succeed on the merits of their claims; and (4) there is a clear public interest in preventing the United States Government from rendering individuals to foreign countries for detention and torture. See *Al-Fayed v. CIA*, 254 F.3d 300, 303 & n.2 (D.C. Cir. 2001); *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1317-18 (D.C. Cir. 1998); *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1066 (D.C. Cir. 1998).

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Petitioner stands to suffer immeasurable and irreparable harm – from torture to possible death – at the hands of a foreign government. Transfer to another country, even if "only" for continued imprisonment, also circumvents Petitioner's right to adjudicate the legality of their detention in this Court. By contrast, Respondents, who have already held Petitioner for several years, are asked only to provide counsel and the Court with adequate notice of any intended removal of Petitioner from Guantánamo.² Respondents can suffer no conceivable harm from complying with such a request.

Petitioner is likely to succeed on the merits of his claims. Petitioner has properly invoked the jurisdiction of this Court. *See Rasul v. Bush*, 124 S. Ct. 2686, 2698 (2004). Judge Green has already ruled that detainees in similar circumstances to Petitioner have stated actionable claims under the Due Process Clause and the Geneva Conventions. For the United States Government to remove Petitioners to countries that would afford no such protections would be to flout Judge Green's ruling and defeat the Court's jurisdiction. Such a transfer would also violate basic international legal norms embodied not only in the Geneva Conventions but also in the International Covenant on Civil and Political Rights and the Convention Against Torture and Other Cruel and Degrading Treatment and Punishment.

Finally, public policy favors requiring Respondents to provide advance notice to counsel and the Court of any intended removal of Petitioner from the Court's jurisdiction. No matter how satisfied the Executive Branch may be that its actions are lawful, the public good requires that a federal litigant – properly before the Court and represented by counsel – be provided with a meaningful opportunity to contest his transfer into the hands of those who might torture him or detain him indefinitely.

² As of the date of this motion, attorneys from the Atlanta office of Kilpatrick Stockton LLP have not been granted security clearance, despite having submitted their applications in August of 2006.

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CONCLUSION

For the reasons discussed above, the motion should be granted.

Dated: Atlanta, Georgia
November 30, 2006

Respectfully submitted,

Counsel for Petitioner:

/s/ Vinay J. Jolly

A. Stephens Clay IV (Pursuant to LCvR 83.2(g))

James F. Bogan III (Pursuant to LCvR 83.2(g))

C. Allen Garrett Jr. (Pursuant to LCvR 83.2(g))

Vinay J. Jolly (Pursuant to LCvR 83.2(g))

Leslie J. Abrams (Pursuant to LCvR 83.2(g))

Miguel M. Duran (Pursuant to LCvR 83.2(g))

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CENTER FOR CONSTITUTIONAL RIGHTS

666 Broadway, 7th Floor

New York, New York 10012

Telephone: (212) 614-6439

Facsimile: (212) 614-6499

Approved for Public Filing by the CSO

CERTIFICATE OF SERVICE

This is to certify that I have this day served the foregoing **MOTION FOR ORDER REQUIRING RESPONDENTS TO PROVIDE COUNSEL FOR PETITIONER SHARAF AL SANANI AND THE COURT WITH 30-DAYS' ADVANCE NOTICE OF ANY INTENDED REMOVAL OF PETITIONER FROM GUANTANAMO** by serving electronically all attorneys of record for each party via the Court's Electronic Case Filing system.

Respectfully submitted,

Counsel for Petitioner:

/s/ Vinay J. Jolly

A. Stephens Clay IV (Pursuant to LCvR 83.2(g))

James F. Bogan III (Pursuant to LCvR 83.2(g))

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EXHIBIT A

**Petitioners in *Mohammon v. Bush*, No. 05-CV-2386 (RBW),
Whom Respondents Have Been Unable to Identify as Detainees at Guantanamo Bay**

	Petitioner	Citation to Petition	Alleged Citizenship
1.	Abd Al Zaher	¶ 25	Azerbaijan
2.	Abdal Rauf Asibi	¶ 286	Libya
3.	Abdul Rahman	¶ 91	Yemen
4.	Abdul Rhman	¶ 77	Tajikistan
5.	Abdullah Ajaibi	¶ 310	Saudi Arabia
6.	Abdullah LNU	¶ 154	Uzbekistan
7.	Abdullah LNU	¶ 216	Syria
8.	Abdunoor (Abdurahman) LNU	¶ 120	Algeria
9.	Abdurahman LNU	¶ 160	Yemen
10.	Abu Abdullah	¶ 192	Algeria
11.	Abu Ahmed	¶ 69	Sudan
12.	Abu Ahmed	¶ 212	Syria
13.	Abu Ahmed Al Jofi	¶ 49	Saudi Arabia
14.	Abu Rad Al Jofi	¶ 47	Saudi Arabia
15.	Abu Rahan	¶ 27	Bangladesh
16.	Adel LNU	¶ 232	Turkestan
17.	Ahmed Omar	¶ 318	Yemen

EXHIBIT A

**Petitioners in *Mohammon v. Bush*, No. 05-CV-2386 (RBW),
Whom Respondents Have Been Unable to Identify as Detainees at Guantanamo Bay**

	Petitioner	Citation to Petition	Alleged Citizenship
18.	Ahmed Tripoli	¶ 298	Libya
19.	Ali Al Kazmi	¶ 85	Yemen
20.	Ali Al Qatari	¶ 117	Yemen
21.	Ali LNU	¶ 156	Uzbekistan
22.	Ali Waili Khavimi	¶ 320	Yemen
23.	Amir LNU	¶ 67	Sudan
24.	Edress LNU	¶ 107	Yemen
25.	Esam LNU	¶ 103	Yemen
26.	Esmail Ali Ahmad Khalip	¶ 254	
27.	Fadi Dahimi	¶ 324	Yemen
28.	Fahmi LNU	¶ 101	Yemen
29.	Faisil LNU	¶ 136	Saudi Arabia
30.	Faris Darnawi	¶ 290	Libya
31.	Hadj Arab Nabil	¶ 329	
32.	Hasan Yaunas Balgaid	¶ 280	Libya
33.	Isam Himed Ali	¶ 258	
34.	Khald LNU	¶ 115	Yemen

EXHIBIT A

**Petitioners in *Mohammon v. Bush*, No. 05-CV-2386 (RBW),
Whom Respondents Have Been Unable to Identify as Detainees at Guantanamo Bay**

	Petitioner	Citation to Petition	Alleged Citizenship
35.	Mahamoud Al Bhar	¶ 113	Yemen
36.	Mashal LNU	¶ 41	Saudi Arabia
37.	Mohamed Ali	¶ 105	Yemen
38.	Mohamed Hmadi	¶ 99	Yemen
39.	Mohammed Ahmed Saeed Hidar	¶ 260	
40.	Mohammed Harbi	¶ 306	Saudi Arabia
41.	Mohammed LNU	¶ 210	Syria
42.	Mohammed Zahrani	¶ 308	Saudi Arabia
43.	Moosa LNU	¶ 300	Morocco
44.	Muhammed Dawood	¶ 282	Libya
45.	Nabil Hadj	¶ 328	Algeria
46.	Osama LNU	¶ 97	Yemen
47.	Rashed Al Qamdi	¶ 37	Saudi Arabia
48.	Ridwaan Al Magrebi	¶ 128	Morocco
49.	Sabel LNU	¶ 228	Turkestan
50.	Saib Darnawi	¶ 292	Libya
51.	Said Al Russi	¶ 304	Russia

EXHIBIT A

**Petitioners in *Mohammon v. Bush*, No. 05-CV-2386 (RBW),
Whom Respondents Have Been Unable to Identify as Detainees at Guantanamo Bay**

	Petitioner	Citation to Petition	Alleged Citizenship
52.	Saleh LNU	¶ 57	Saudi Arabia
53.	Salih LNU	¶ 294	Libya
54.	Salman Al Bahri	¶ 130	Saudi Arabia
55.	Seed LNU	¶ 111	Yemen
56.	Shah Baba	¶ 242	Pakistan
57.	Sharaf Al Sanani	¶ 109	Yemen
58.	Thabid LNU	¶ 236	Turkestan
59.	Yagoob Al Soury	¶ 75	Syria
60.	Zabin Thaha Assammery	¶ 200	Saudi Arabia
61.	Zaker Chan	¶ 79	Tajikistan
62.	Zeyad Al Gassmy	¶ 61	Saudi Arabia

Exhibit B

Jolly, Vinay

From: Andrew.Warden@usdoj.gov
Sent: Friday, October 13, 2006 3:30 PM
To: Jolly, Vinay
Subject: RE: Mohammon et al. v. Bush, Case No. 1:05-cv-02386-RBW: Identification of Sharaf Al Sanani

Vinay,

Thank you for your e-mail below. Based on the additional information you have provided, we are no longer in a position to contest the identification of petitioner Sharaf Al Sanani.

Best regards,

Andrew

-----Original Message-----

From: VJolly@kilpatrickstockton.com [mailto:VJolly@kilpatrickstockton.com]
Sent: Thursday, October 12, 2006 11:19 AM
To: Warden, Andrew (CIV)
Subject: RE: Mohammon et al. v. Bush, Case No. 1:05-cv-02386-RBW: Identification of Sharaf Al Sanani

Andrew:

Thanks for your e-mail. We appreciate your efforts in investigating the facts we have presented regarding Sharaf Al Sanani's identity. To facilitate your efforts, I am enclosing a revised Declaration from Zachary Katznelson, which includes an additional identification of Sharaf Masood as Sharaf Al Sanani by Jamal Kiyemba, a former detainee at Guantánamo who was released in February of 2006. We will refrain from filing our Motion for Access and will look forward to receiving a response from you by the end of the week. If you will not agree that Sharaf Al Sanani is the detainee identified by the government as Sharaf Ahmad Muhammad Masud (ISN 170) by the close of business on Monday (October 16), however, we must proceed with filing our motion, in order to get a ruling prior to an upcoming visit to Guantanamo by co-counsel. Thanks again for your efforts to resolve this issue.

Regards,

Vinay

-----Original Message-----

From: Andrew.Warden@usdoj.gov [mailto:Andrew.Warden@usdoj.gov]
Sent: Wednesday, October 11, 2006 4:11 PM
To: Jolly, Vinay
Subject: RE: Mohammon et al. v. Bush, Case No. 1:05-cv-02386-RBW: Identification of Sharaf Al Sanani

Vinay,

Thanks for your e-mail. We are in the process of conferring with DoD regarding the additional information you have provided concerning the identity of petitioner Al Sanani. I anticipate providing a response to your e-mail below later this week. We would appreciate a few additional days to confer with our client before any motions are filed in this matter.

Best regards,

Andrew

Andrew I. Warden
Trial Attorney
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., NW, Room 6120
Washington, DC 20530
Tel: 202.616.5084
Fax: 202.616.8470

-----Original Message-----

From: VJolly@kilpatrickstockton.com [mailto:VJolly@kilpatrickstockton.com]
Sent: Friday, October 06, 2006 10:14 AM
To: Warden, Andrew (CIV)
Subject: Mohammon et al. v. Bush, Case No. 1:05-cv-02386-RBW: Identification of Sharaf Al Sanani

Dear Mr. Warden:

We represent Sharaf Al Sanani, whom Respondents have identified as one of the Petitioners in Mohammon v. Bush, No. 05-CV-2386 (RBW), that they cannot identify as a detainee at Guantanamo Bay. Our investigation has revealed a number of facts showing that Sharaf Al Sanani is the detainee identified by the government as Sharaf Ahmad Muhammad Masud, ISN 170, a citizen of Yemen who was born in Sana'a in 1978. Among other facts, we have learned that:

1. There is only one Guantanamo Bay detainee named "Sharaf," from Yemen or from any other country, and the name "Al Sanani" means "from Sana'a."
2. Guantanamo detainee Sami Al Hajj, Sharaf Al Sanani's Next Friend, has stated that Sharaf Al Sanani speaks good English, reached high school in Sana'a, and was in his "mid-twenties." Mr. Al Hajj also noted that Sharaf Al Sanani was the only Sharaf in Guantanamo.
3. Guantanamo detainee Osama Abu Kabir has stated that Sharaf Al Sanani's ISN is 170; that he (Al Sanani) is "light-skinned"; that he is "about 28 or 30"; and that he speaks English. Mr. Kabir also noted that Sharaf Al Sanani was the only Sharaf in Guantanamo.
4. Hassan Masood, the brother of Sharaf Ahmed Mohammed Masood (the phonetic equivalent of Sharaf Ahmad Muhammad Masud, ISN 170), has stated that his brother is a detainee at Guantanamo Bay; that his brother's ISN is 170; that his brother speaks English and finished high school at Sana'a; and that Sharaf is 28 years old. He further stated that American officials has visited his sister's home in Yemen, asked questions about Sharaf, and reported to Sharaf's sister that he is imprisoned at Guantanamo. These officials reviewed pictures of Sharaf, and Mr. Masood subsequently has provided a picture of Sharaf to counsel.
5. Mr. Zachary Katznelson of the Reprieve firm has documented these facts in a declaration and has included the picture of Mr. Masood in that declaration. I attach a copy of Mr. Katznelson's Declaration (with Mr. Masood's picture attached) to this e-mail.

Please let us know by close of business Wednesday, October 11, if you will agree that Sharaf Al Sanani is Sharaf Ahmad Muhammad Masud, ISN 170, such that the Amended Protective Order can be entered and Mr. Masud can have access to counsel. If you do not agree, we will be forced to file a motion for access to counsel.

Regards,

Vinay Jolly

<<http://www.kilpatrickstockton.com/>>
Vinay J. Jolly
Kilpatrick Stockton LLP
Suite 900
607 14th Street, NW
Washington, DC 20005-2018
t 202 508 5800

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

_____)	
AMER MOHAMMON, <i>et al.</i> ,)	
)	
Petitioners,)	
)	No. 05-CV-2386 (RBW) (AK)
v.)	
)	
GEORGE W. BUSH, <i>et al.</i> ,)	
Respondents.)	
_____)	

PROPOSED ORDER

Upon consideration of Petitioner Sharaf Al Sanani a/k/a Sharaf Ahmad Muhammad Masud's November 28, 2006 Motion for an Order requiring Respondents to provide counsel for Petitioner and the Court with advance notice of any intended removal of Petitioner from Guantánamo Bay Naval Base in Cuba it is hereby

ORDERED that the Motion is GRANTED.

SO ORDERED.

Dated: _____

United States District Court Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
AMER MOHAMMON, <i>et al.</i> ,)	
)	
Petitioners,)	
)	No. 05-CV-2386 (RBW) (AK)
v.)	
)	
GEORGE W. BUSH, <i>et al.</i> ,)	
)	
Respondents.)	
_____)	

**REPLY MEMORANDUM IN SUPPORT OF MOTION FOR THIRTY DAYS'
ADVANCE NOTICE OF ANY INTENDED REMOVAL OF PETITIONER
SHARAF AL SANANI FROM GUANTANAMO**

Petitioner Sharaf Al Sanani a/k/a Sharaf Ahmad Muhammad Masud (ISN 170) ("Petitioner"), by and through undersigned counsel, respectfully files this reply in support of his simple request for thirty days' advance notice of any removal from Guantánamo.

Since Messrs. Prosper and Waxman prepared their Declarations back in May and June of 2005, much has changed on the detainee-transfer front, and not simply the number of detainees transferred. As of December 17, 2006, more than 380 detainees have been removed from Guantanamo, 114 in 2006 alone. *See* DoD News Release dated December 17, 2006 (copy attached as Exhibit A). On that date, the Government announced that it had transferred seven detainees to Afghanistan, five detainees to Yemen, three detainees to Kazakhstan, one detainee to Libya, and one detainee to Bangladesh. *Id.* Just three days earlier, sixteen detainees were transferred to Saudi Arabia. *See* DoD News Release dated December 14, 2006 (copy attached as Exhibit B). In contrast to the discreet list of transferee countries identified in 2005, detainees have now been transferred to Albania, Afghanistan, Bahrain, Egypt, Iran, Iraq, Jordan, Kazakhstan, Libya, Maldives, Sudan, Tajikistan, Turkey, Uganda, and Yemen. *Id.*

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Numerous judges of this Court have granted the modest relief requested here, rejecting Respondents' speculative assertions about the potential impact of such rulings. Indeed, according to a recent analysis of this issue, the decisions granting such relief significantly outnumber the rulings denying it. See Robert M. Chesney, *Leaving Guantanamo: The Law of International Detainee Transfers*, 40 U. Rich. L. Rev. 657, 667 & nn.35-38 (2006). Despite all of the rulings granting the requested relief, the "sky has not fallen" on Respondents' diplomatic relations efforts, as confirmed by the continued stream of detainee transfers.

Moreover, notwithstanding Respondents' doubletalk regarding "assurances" received from countries known to violate human rights, a serious risk remains that Respondents will transfer Petitioner from the "frying pan" of illegal detention into the "fire" of a foreign torture den. Against this tangible possibility of the most extreme irreparable injury imaginable (torture and possibly death) is the *de minimus* burden of providing thirty days' advance notice of a transfer – a notice Respondents already provide after-the-fact. See, e.g., Dkt. 39 (notice of transfer of Saleh Mohammed Ali Azoba to Saudi Arabia). Furthermore, as several judges have noted in granting these motions, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Abdah v. Bush*, No. Civ. A. 04-1254, 2005 WL 711814 (D.D.C. Mar. 29, 2005); *Al-Joudi v. Bush*, No. Civ. A. 05-301 (GK), 2005 WL 774847 (D.D.C. Apr. 4, 2005).

Accordingly, the modest relief requested, as balanced against the serious threat of irreparable harm, requires no careful analysis of the Military Commissions Act of 2006 ("MCA"). Petitioner's motion should be granted, and Respondents should be ordered to provide this Court and counsel with thirty days' advance notice of any intended removal of Petitioner from Guantánamo Bay.

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I. Factual Developments Since the Government's Outdated Declarations

Respondents continue to rely upon Declarations prepared in 2005 by then-Ambassador Pierre-Richard Prosper and then-Deputy Assistant Secretary of Defense for Detainee Affairs Matthew C. Waxman. *See* Opp., Exhibits 1-2. According to the later of these Declarations (Mr. Waxman's June 2, 2005 Declaration), the vast majority of removals from Guantanamo were for "release," with only sixty-seven detainees "transferred to the control of other governments for further detention, investigation and/or prosecution, as appropriate." Waxman Decl. ¶ 4.

According to Mr. Waxman's listing of transferee countries, most detainees had been sent to Pakistan or European countries such as the United Kingdom, France, Belgium, and Sweden. *Id.* Only four detainees had been transferred to Saudi Arabia. *Id.* None had been sent to most of the countries now on Respondents' list, such as Albania, Afghanistan, Bahrain, Egypt, Iran, Iraq, Jordan, Maldives, Sudan, Tajikistan, Uganda, and Yemen. *Compare id. with* Exhibit A.

Beginning in July of 2005, Respondents became increasingly willing to transfer detainees to governments with well-established histories of human rights violations. In that month, detainees were sent to Sudan, Afghanistan, Saudi Arabia, and Jordan. *See* DoD News Release dated July 20, 2005 (Exhibit C). By the end of the year, more detainees had been sent to Saudi Arabia, and additional detainees had been transferred to Kuwait and Bahrain. *See* DoD News Releases dated November 3, 2005, and November 5, 2005 (Exhibits D and E). In 2006, Respondents began transferring larger groups of detainees to Saudi Arabia. *See* DoD News Release dated May 18, 2006 (fifteen detainees) (Exhibit F); Exhibit B (sixteen detainees). Respondents continue to transfer to Afghanistan and to countries such as Bahrain, Iran, Libya, and Yemen. *See* Exhibit A; DoD News Releases dated October 12, 2006 and October 16, 2006 (Exhibits G and H).

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Interestingly, in the most recent News Releases, Respondents have discontinued the practice of disclosing the total number of detainees "transferred" rather than "released," instead euphemistically disclosing only the total number of detainees who "have departed Guantánamo for other countries." *See* Exhibits A-B, G-H. Respondents have long since abandoned tallying the number of detainees transferred to a particular country, such as Saudi Arabia. *See id.*

The human rights violations of many of these transferee countries have been well-documented, including by the Department of State. As a citizen of Yemen, Petitioner most likely would be transferred for continued detention by his own government (although, as Respondents note, a detainee can be transferred to any interested government "willing to accept responsibility for ensuring, consistent with their laws, that the detainees will not continue to pose a threat to the United States or its allies"). Waxman Decl. ¶ 3. Such a transfer would subject Petitioner to the control of a government with an abominable human-rights record, as recently reported in the Department of State's most recent report on Yemen's Human Rights Practices (available at <http://www.state.gov/g/drl/rls/hrrpt/2005/61703.htm>). *See* Prosper Decl. ¶ 6 & n.1 (stating that the Human Rights reports are to be consulted in making transfer decisions).

The report's opening summary identifies extreme fundamental violations such as "acknowledged torture," "poor prison conditions," "prolonged pretrial detention," a "weak judiciary," "government corruption," and "trafficking in persons." *Id.* The discussion of "Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment" explains:

The law prohibits such practices; however, members of the Political Security Office (PSO) and Ministry of Interior (MOI) police forces tortured and abused persons in detention. Authorities used force during interrogations, especially against those arrested for violent crimes. Although penal law permits amputations and physical punishment such as flogging for some crimes, which the government maintains is in accordance with Shari'a (Islamic law), there were no reports of amputations or floggings during the year.

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Torture continued to remain a problem in PSO prisons, which were not monitored by other government agencies. There were credible reports pointing to a preferred use of nonphysical abuse, such as sleep deprivation, cold water, and threats of sexual assault, as the primary form of torture in PSO prisons. In October two former PSO prisoners reported being repeatedly tortured and made to sleep without blankets in cold cells while being held without charge. There were reports that the MOI's Criminal Investigative Department (CID) routinely used torture to obtain confessions. On February 4, CID forces investigating a theft case in Dhamar governorate rounded up five suspects who were reportedly beaten during interrogation. One suspect confessed to the crime and was referred to the Attorney General's office for prosecution. The other four were released. Defense attorneys and some human rights NGOs observed that most confessions introduced as evidence against defendants in criminal courts were obtained through torture. Government sources vehemently denied this.

Report § 1.c.

The section of the report discussing the "Prison and Detention Center Conditions"

Petitioner would face upon transfer to Yemen is equally bleak:

Although some observers noted improvements in MOI prison conditions in the past year, local and international observers reported that prison conditions, particularly in rural areas, remained poor and did not meet internationally recognized standards. Although the MHR and a number of NGOs were granted limited access to MOI prisons, the government severely limited access to PSO prisons by independent human rights observers.

During his six-month incarceration in the Sana'a Central Prison, Abdulkarim al-Khaiwani, who was imprisoned on violations of the press law and treason charges (see section 2.a.), was beaten several times by other prisoners.

Many prisons, particularly in rural areas, were still overcrowded with poor sanitary conditions and inadequate food and health care. In some cases prison authorities exacted bribes from prisoners to obtain privileges or refused to release prisoners who completed their sentences until family members paid a bribe.

Id.

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Both Declarations offered by Respondents seek to justify transfer to countries with a risk of torture by noting that "appropriate assurances" will be given by the transferee government. Waxman Decl. ¶ 6; Prosper Decl. ¶¶ 7-9. Here again, however, Yemen has a well-documented history of violating its own stated laws and policies, not only with respect to torture (*see* Report § 1.c), but also with respect to virtually every other human rights criteria measured in the Report, including "Arbitrary Arrest and Detention" (*id.* § 1.d) "Denial of Fair Public Trial" (*id.* § 1.e), "Arbitrary Interference with Privacy, Family, Home or Correspondence" (*id.* § 1.f), "Freedom of Speech and Press" (*id.* § 2.a), and "Freedom of Peaceful Assembly and Association" (*id.* § 2.b).

Perhaps the most distressing prospect of being turned over to a Yemeni government obliged to continue his incarceration is the likely possibility that Petitioner will be continue to be detained for additional years without being charged with any crime. Despite constitutional and other legal provisions, "arbitrary arrest and prolonged detention without charge or, if charged, without a public preliminary judicial hearing within a reasonable time remained common practices." Report § 1.d. Thus, a "large percentage of the total prison population consisted of pretrial detainees, some of whom have been imprisoned for years without charge." *Id.* Even if he is charged, Petitioner could never expect a fair trial. *See id.* § 1.e.

All of the above findings were made by the U.S. Government itself. Non-governmental organizations have long reported on torture and abuses in Yemen, which emerged from a civil war only a decade ago. In a September 2003 report entitled *Yemen: The Rule of Law Sidelined in the Name of Security* (Exhibit I), Amnesty International described how Yemen's enforcement of laws against torture had significantly deteriorated since the September 11, 2001 attacks. Specifically referencing detainees held on suspicions of terrorist activity in connection with the U.S.S. Cole and September 11, 2001 incidents in Yemen, the report noted how "[s]ome detainees

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said that they were not tortured ... but others said they were beaten with electric batons, handcuffed and shackled, and subjected to insults and verbal abuse. Others said they were threatened with the imprisonment of their female relatives if they did not confess." *Id.* at 8. This report referenced a statement made by Yemen's Minister of Interior on July 16, 2003, in which he said that 195 people accused of belonging to Al Qaeda remained detained, but "did not refer to any judicial process for these detainees because the rule of law has been sidelined. They are held totally at the mercy of the government and security forces, far removed from judicial scrutiny." *Id.* at 1. In the weeks and months following this statement by the Minister to Yemen's Parliament, "[a]rrests were made without the judicial supervision required by law, and detainees have invariably been subjected to lengthy incommunicado detention, during which some of the detainees alleged that they were tortured or ill-treated." *Id.*

Yemen authorities do not even claim to comply with international human rights obligations and with their own law, instead arguing they had no choice but to "'fight terrorism' and avert the risks of military action against Yemen by the US in the wake of the 11 September events." Amnesty International Report, at 3. *See also id.* at 6 ("After 11 September, the government's message to Amnesty International has been articulated as the 'fight against terrorism' to preserve the security of the country which necessitates action by the arresting authorities beyond the confines of the law and Yemen's international human rights obligations."). The report concludes by noting how "the Yemeni Government has sidelined the rule of law and its human rights obligations in the name of 'fighting terrorism' and 'national security.' It has given the green light to the security forces, particularly the Political Security, to act with impunity in total disregard for the law and the role of the judiciary What is more disturbing

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about these human rights violations is that they are being carried out as a deliberate policy by the government." *Id.* at 26.

Reports of abuse and torture of detainees in Yemen are widespread, and the Government is disingenuous in its attempts to suggest otherwise. It is similarly absurd for the Respondents to seek to avoid an injunction by claiming that the Petitioner has not proven that a transfer is "imminent." The Respondents' own affidavits assert that "[t]he United States has no interest in detaining enemy combatants longer than necessary," and Mr. Prosper even complains that judicial review of a decision to transfer the Petitioners may "undermine the United States' ability to reduce the number of individuals under U.S. control." Prosper Decl. ¶¶ 2, 12.

The United States Government has publicly announced its goal of reducing the population of Guantánamo to some 100 "hard-core detainees." *See Chesney, supra*, 40 U. Rich. L. Rev. at 665 & n.25 (citing Robin Wright & Josh White, *U.S. Holding Talks on Return of Detainees*, Wash. Post, Aug. 9, 2005, at A13). Earlier news reports similarly confirmed that the Government has a "plan to cut by more than half the population at its detention facility in Guantanamo Bay, Cuba, in part by transferring hundreds of suspected terrorists to prisons in Saudi Arabia, Afghanistan and Yemen, according to senior administration officials." *See Douglas Jehl, Pentagon Seeks to Transfer More Detainees from Base in Cuba*, N.Y. Times, Mar. 11, 2005.

II. Decisions of Multiple Judges of this Court Granting the Relief Sought in this Motion

Respondents selectively point to two decisions rejecting detainee requests for advance notice of transfer. *See Opp.*, at 3. Even Respondents, however, begrudgingly acknowledge one of the many decisions rejecting their position and providing the modest relief Petitioner seeks. *See id.* at 17 n.7 (citing *Al-Marri v. Bush*, Civ. A. No. 04-2035, 2005 WL 774847 (D.D.C. Apr.

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4, 2005)). In fact, the decisions granting detainees their requests for a mere month of advance warning of transfer far outnumber the handful of cases adopting Respondents' position. *See Chesney, supra*, 40 U. Rich. L. Rev. at 667 & nn.35-38 (surveying entire Guantánamo docket and finding "twenty-seven pro-detainee decisions imposing the requested notice requirement and six pro-government decisions denying that relief," with one "split decision").

In *Abdah v. Bush*, No. Civ. A. 04-1254, 2005 WL 711814 (D.D.C. Mar. 29, 2005), for example, Judge Kennedy granted a motion for preliminary injunction seeking precisely the relief Petitioner seeks here. Quoting the leading *CityFed* decision cited by Respondents (Opp., at 11), *Abdah* explained that "[i]f the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak." 2005 WL 711814, at *3 (quoting *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1985)).

The factor forming the "basis" of a request for injunctive relief is the risk of irreparable harm. *Id.* Transferred detainees face two such risks: (1) being sent to countries "for torture or indefinite imprisonment without due process of law" and (2) having their habeas claims terminated by executive "fiat." *Id.* at *3-*4. As in *Abdah*, Respondents here embrace the claim that transfer eliminates jurisdiction, confirming the risk of irreparable harm. Opp., at 11-12.

As to the requirement of a likelihood of success on the merits, the *Abdah* court dismissed Respondent's frivolous argument that "advocating for release into freedom" somehow means the same thing as "transfer from ongoing detention in one locale to ongoing detention in another." *Id.* at *4 & n.3. Respondents nevertheless repeat that argument here, again suggesting that transferring a detainee for torture basically provides all the relief sought under his habeas claim. Opp., at 12-13. Rejecting this absurd contention and focusing on the true merits of a transfer challenge, *Abdah* found a strong likelihood of success on a claim by a detainee that a putative

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transfer should be blocked as an improper attempt to eliminate an otherwise valid habeas claim. 2005 WL 711814, at *5 (citing, *inter alia*, Fed. R. App. P. 23(a)); *see also Kurnaz v. Bush*, No. Civ. A. 04-1135 (ESH), 2005 WL 839541, at *2 (D.D.C. Apr. 12, 2005) (explaining that Fed. R. App. P. 23(a) protects district court's as well as appellate court's jurisdiction over pending habeas petitions) (citing *Jago v. U.S. District Court*, 570 F.2d 618, 623 (6th Cir. 1978)).

As for Respondents' claimed "parade of horrors" arising from judicial review of a proposed transfer, the *Abdah* court correctly noted that nothing in the narrow relief requested by the detainees would mandate the two purported evils of diplomacy described, *i.e.*, disclosure of governmental communications with the transferee country or internal governmental analyses of the propriety of the transfer. *Id.* at *5. To the contrary, the only burden imposed by the relief was a minimal delay in one aspect of the government's management of the detainees, which was insufficient to outweigh the harm to detainees from potential loss of their entire claim. *Id.* at *6.

As to the public's rights, the *Abdah* court summarily rejected Respondents' self-serving contentions that the "public interest" element automatically was met because Respondents represent the Government. *Id.* To the contrary, "the public has a strong interest in ensuring that its laws do not subject individuals to indefinite detention without due process; 'it is always in the public interest to prevent the violation of a party's constitutional rights.'" *Id.* (quoting *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994)).

Two days after *Abdah*, Judge Urbina granted substantially similar relief to other petitioners, explaining that a transfer "would abuse the process now put in place for the purpose of adjudicating matters on their merits." *Al-Oshan v. Bush*, Civ. A. No. 05-0520 (RMU), Order Granting, *inter alia*, 30 Days' Notice of Any Intent to Move Petitioners, at 2 (D.D.C. Mar. 31, 2005) (Exhibit J). Thus, Respondents were precluded from removing the Petitioners in that case

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"unless this court and counsel for petitioners receive thirty days' advance notice of such removal." *Id.* at 3. On April 1, Judge Friedman followed *Abdah* and *Al-Oshan* and granted substantially similar injunctive relief against Respondents. *Al-Shiry v. Bush*, Civ. A. No. 05-0490 (PLF), Order (D.D.C. Apr. 1, 2005) (Exhibit K).

On April 4, 2005, Judge Kessler entered two separate orders granting the same relief Petitioner seeks here. *See Al-Joudi v. Bush*, Civ. A. No. 05-301 (GK), 2005 WL 774847 (D.D.C. Apr. 4, 2005); *Al-Marri v. Bush*, Civ. A. No. 04-2035 (GK), Mem. Order (D.D.C. Apr. 4, 2005) (Exhibit L). Judge Kessler identified two "obvious and substantial threats" faced by detainees such as Petitioner: (1) "transfer to a country where they might be tortured or indefinitely confined," such as Saudi Arabia, Pakistan, or Morocco (citing Department of State Human Rights reports); and (2) the "potential elimination of their habeas claims." 2005 WL 774847, at *4. Both of these threats are "serious" and "imminent." *Id.*

Judge Kessler took a different approach to the requirement of a likelihood of success on the merits. *Id.* at *4-*5. Rather than focusing on the narrow issue of a possible success on a transfer challenge, she considered the merits of the *entire* habeas claim that potentially would be eliminated by an executive transfer. *Id.* In this Circuit, the "likelihood of success" prong is met by the presence of questions that "so 'serious, substantial, difficult and doubtful, as to make them a fair ground of litigation.'" *Id.* at *5 (quoting *Washington Metro. Area Transit Comm'n v. Holiday*, 559 F.2d 841, 844 (D.C. Cir. 1977)). As confirmed by the continued disunity of decisions even within this Court and the Supreme Court's repeated rulings on detainee-related issues, the Guantánamo cases manifestly present significant and serious questions. *Id.* at *5.

In an effort to show harm, Respondents again relied upon its assertions that having to defend transfers potentially would impair its negotiations with foreign governments regarding

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the transfers. *Id.* As in *Abdah*, the *Al-Joudi* court dismissed such contentions as "speculation" as to future possible efforts to defend a proposed transfer (*id.* at *5 n.12):

The Court fails to see any injury whatsoever that the Government would suffer from granting the requested preliminary injunction. Petitioners request only 30 days' notice of transfer – a narrow and discrete request that would impose no burden on the Government. Beyond "vague premonitions" that such relief would harm the executive's ability to conduct foreign policy, there is no concrete evidence that such notice actually will intrude upon executive authority. For example, granting Petitioners' request for 30 days' notice of transfer would not require the Court to second-guess foreign policy decisions of the Executive, would not require the Government to divulge information relating to its negotiations with foreign governments, and would not prevent the Government from speaking with one voice.

Id. at *5 (citations omitted). On balance, the "minimal burden" on the Government of filing "a few pieces of paper" did not "outweigh the imminent threats of indefinite detention, potential torture, and the elimination of Petitioners' claims before this Court." *Id.* at *6

On the public interest element, while the Government again endeavored to "conflate[] the public interest with the Government's own position," the public interest "undeniably is served by ensuring that Petitioner's constitutional rights can be adjudicated in an appropriate manner." *Id.*

Judge Huvelle followed all of the above decisions in *Kurnaz v. Bush*, No. Civ. A. 04-1135 (ESH), 2005 WL 839542, at *2 (D.D.C. Apr. 12, 2005), with a small modification: notice was required for any "transfer" but not for a mere "release." Among other things, Judge Huvelle was concerned about transfers to a United States Government custodian in a foreign country; transfers in which the detainee would still be held under the direction and control of the United States (albeit through a foreign agent); and transfers to a country where the detainee could not possibly have had an occasion to violate the law. *See* 2005 WL 839542, at *2.

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Thus, numerous judges of this Court already have granted precisely the type of relief sought by Petitioner. Notwithstanding Respondents' dire warnings as to the implications of providing this limited relief, these rulings have not had any appreciable impact on the Government's transfer process whatsoever. To the contrary, the risks presented to the detainees has increased in the interim, because Respondents are increasingly willing to ship detainees to known human rights violators.

Under Respondents' own argument, moreover, a significant "risk" of transfer – the potential loss of valid *habeas* claims – is enhanced by the recent ruling in *Quassim v. Bush*, 466 F.3d 1073 (D.C. Cir. 2006). *See Opp.*, at 11-12 & n.5. Although Petitioner does not agree that the reasoning of *Quassim* (which held that the *release* of detainees from Guantanamo mooted their habeas claims) applies equally to *transfers* for continued detention, the fact remains that Respondents continue to assert that their unilateral decision to transfer a detainee would terminate that detainee's habeas claim, thereby confirming that there remains a risk of irreparable harm (loss of valid *habeas* claims) from such a transfer.

Nor is there any legitimate fear of "disclosure" of confidential communications between the Government and a foreign government. Respondents' alleged "chilling effect" would come from "public" disclosures. *Opp.*, at 9-10. In this case, however, secure facilities have already been established specifically for the handling, review, and maintenance of classified information. Respondents have failed to identify any manner in which "sensitive" negotiations would be affected if they were "disclosed" only to the Court and counsel in this case.

The Respondents assert that they, and only they, can determine whether or when a Guantanamo detainee should be transferred to a foreign country, and that they will do so unless they, in their alleged sole and unreviewable discretion, find it "more likely than not" that the

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transferee "will" be tortured. Waxman Decl. ¶ 6; Prosper Decl. ¶ 4. In other words, Respondents claim that this Court can do nothing to prevent the loss of its jurisdiction or the violation of applicable law, so long as the Secretary of the Navy, apparently, can convince himself that there is only a 50% chance that a detainee "will" (not may) be tortured. Regardless of how satisfied the Executive Branch may feel about its own decisions, when a federal litigant is properly before a Court that has exercised jurisdiction over the underlying claims in a case, that litigant must be provided a meaningful opportunity to contest a transfer seeking to place him outside the Court's jurisdiction or otherwise into the hands of a police state that will torture him.

For this reason, the Respondents' lengthy discussion of extradition proceedings is not relevant. *See Opp.*, at 20-22. This is not an "extradition" issue, for the Government in no way claims that these transfers follow the formal process that applies to extradition or that the transfers are otherwise subject to procedural protections. The "rule of non-inquiry" posited by Respondents may or may not limit the inquiries conducted in extradition proceedings, but this is not an extradition case, and the rule cannot in any event prevent federal courts from acting to protect their own jurisdiction over an underlying substantive claim in an already-existing case.

Finally, it is important to note that this motion does not of itself prevent any transfers the Government wishes to effect. All that is sought is thirty days' advance notice of a transfer. If that motion is granted and the Government provides such notice, Petitioner may well decide not to challenge the Government's proposed transfers. Respondents' claims of harm to the diplomatic process are, at best, premature. Given the limited relief sought by Petitioner as compared to the risk of incalculable harm if he was transferred to a country such as Yemen, the injunctive relief factors tilt heavily in Petitioner's favor. Petitioner's motion for thirty-days' advance notice should be granted.

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III. It is Not Necessary to Examine the MCA's Constitutionality to Rule on This Motion

Respondents open their Opposition with their standard mantra about the impact of the recently-enacted MCA (as well as the DTA) upon the jurisdictional bases for all of these cases. *See Opp.*, at 1-4. Yet they also acknowledge, as they must, that the constitutionality of the MCA was fully briefed in the D.C. Court of Appeals as of November 20, 2006. *Id.* at 4. There is no good reason for this Court to undertake a searching constitutional analysis of the MCA when the jurisdictional issues inevitably will undergo a full cycle of appellate review. This relief sought in this motion would do nothing more than provide a mechanism to preserve the *status quo* while the jurisdictional issues (and any subsequent merits issues) are fully litigated.

To the extent the Court wishes to examine the issues presented by the MCA, Petitioner hereby refers to and incorporates by reference the analysis of the MCA found in pages 2-14 of the "Reply Memorandum Supporting Request for 30-Days' Advance Notice of any Intended Removal of Petitioner from Guantanamo" filed by Petitioner Maher El Falsteny on November 28, 2006 (dkt. no. 219).

IV. Conclusion

Inflicted torture cannot be undone. This Court's ability to enforce its orders, if lost, may be impossible to regain. Petitioner's requested relief does nothing more than preserve this Court's jurisdiction and ability to enforce its orders. Respondents are simply wrong in claiming that this Court must stand aside, or even assist, while Respondents transfer illegally-held prisoners into the custody of a torture-practicing foreign state, in violation of the United States' obligations under international and domestic law.

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For the foregoing reasons and the reasons stated in the motion, Petitioner respectfully requests that this Court grant the motion.

Dated: Atlanta, Georgia
December 18, 2006

Respectfully submitted,

Counsel for Petitioner:

/s/ Vinay Jolly

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James F. Bogan III (Pursuant to LCvR 83.2(g))
C. Allen Garrett Jr. (Pursuant to LCvR 83.2(g))
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CERTIFICATE OF SERVICE

This is to certify that I have this day served the foregoing **REPLY MEMORANDUM IN SUPPORT OF MOTION FOR ORDER REQUIRING RESPONDENTS TO PROVIDE COUNSEL FOR PETITIONER SHARAF AL SANANI AND THE COURT WITH 30-DAYS' ADVANCE NOTICE OF ANY INTENDED REMOVAL OF PETITIONER FROM GUANTANAMO** by serving electronically all attorneys of record for each party via the Court's Electronic Case Filing system.

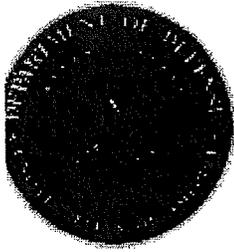
Respectfully submitted,

Counsel for Petitioner:

/s/ Vinay J. Jolly

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IMMEDIATE RELEASE

**No. 1287-06
December 17, 2006**

Detainee Transfer Announced

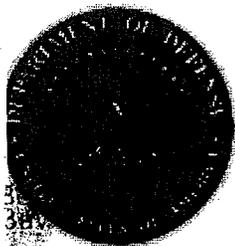
The Department of Defense announced today that it transferred seven detainees from Guantanamo Bay, Cuba, to Afghanistan, five detainees to Yemen, three detainees to Kazakhstan, one detainee to Libya, and one detainee to Bangladesh. Additionally, one detainee was released to Yemen. These detainees were recommended for transfer or release by multiple review board processes conducted at Guantanamo Bay.

Approximately 85 detainees remain at Guantanamo who the U.S. Government has determined eligible for transfer or release through a comprehensive series of review processes. Departure of these remaining detainees approved for transfer or release is subject to ongoing discussions between the United States and other nations. The United States does not desire to hold detainees for any longer than necessary. The department expects that there will continue to be other transfers and releases of detainees.

There are ongoing processes to review the status of detainees held at Guantanamo. A determination about the continued detention, transfer, or release of a detainee is based on the best information and evidence available at the time, both classified and unclassified.

This increases the number of detainees who have departed Guantanamo this year to 114. Since 2002, approximately 380 detainees have departed Guantanamo for other countries including Albania, Afghanistan, Australia, Bangladesh, Bahrain, Belgium, Denmark, Egypt, France, Germany, Iran, Iraq, Jordan, Kazakhstan, Kuwait, Libya, Maldives, Morocco, Pakistan, Russia, Saudi Arabia, Spain, Sweden, Sudan, Tajikistan, Turkey, Uganda, United Kingdom, and Yemen.

Approximately 395 detainees remain at Guantanamo.



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IMMEDIATE RELEASE

No. 1279-06
December 14, 2006

Detainee Transfer Announced

The Department of Defense announced today that it transferred 16 detainees from Guantanamo Bay, Cuba, to Saudi Arabia. These detainees were all recommended for transfer by an administrative review board conducted at Guantanamo Bay.

With today's transfer, approximately 100 detainees remain at Guantanamo who the U.S. government has determined eligible for transfer or release through a comprehensive series of review processes. Departure of these remaining detainees approved for transfer or release is subject to ongoing discussions between the United States and other nations. The United States does not desire to hold detainees for any longer than necessary. The department expects that there will continue to be other transfers and releases of detainees.

There are ongoing processes to review the status of detainees held at Guantanamo. A determination about the continued detention or transfer of a detainee is based on the best information and evidence available at the time, both classified and unclassified.

This transfer increases the number of detainees who have departed Guantanamo this year to 96. Since 2002, approximately 360 detainees have departed Guantanamo for other countries including Albania, Afghanistan, Australia, Bahrain, Belgium, Denmark, Egypt, France, Germany, Iran, Iraq, Jordan, Kuwait, Maldives, Morocco, Pakistan, Russia, Saudi Arabia, Spain, Sweden, Sudan, Tajikistan, Turkey, Uganda, United Kingdom, and Yemen.

Approximately 415 detainees remain at Guantanamo.



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IMMEDIATE RELEASE

**No. 739-05
July 20, 2005**

Detainee Transfer Announced

The Department of Defense announced today that it released or transferred eight detainees from Guantanamo Bay, Cuba. This movement included the releases of one detainee to Sudan, two to Afghanistan, three detainees to Saudi Arabia, one to Jordan and one detainee transferred to the government of Spain. This movement increases the number of detainees who have departed GTMO to 242.

This movement included three detainees found no longer to be enemy combatants by a Combatant Status Review Tribunal. One detainee found no longer to be an enemy combatant was released to Sudan, one was released to Saudi Arabia and one was released to Jordan.

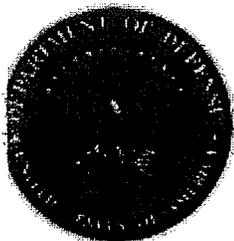
This movement included three detainees recommended for release by the Administrative Review Board - the two detainees released to Afghanistan and one detainee released to Saudi Arabia.

There are ongoing processes to review the status of detainees. A determination about the continued detention or transfer of a detainee is based on the best information and evidence available at the time. The circumstances in which detainees are apprehended can be ambiguous, and many of the detainees are highly skilled in concealing the truth.

During the course of the war on terrorism, the department expects that there will be other transfers or releases of detainees.

Because of operational and security considerations, no further details can be provided.

Prior to this transfer, DoD has transferred or released 234 detainees from GTMO - 167 for release, and 67 transferred to other governments (29 to Pakistan, five to Morocco, seven to France, seven to Russia, four to Saudi Arabia, one to Spain, one to Sweden, one to Kuwait, one to Australia, nine to Great Britain and two to Belgium). There are approximately 510 detainees currently at Guantanamo.



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IMMEDIATE RELEASE

**No. 1140-05
November 03, 2005**

Detainee Transfer Announced

The Department of Defense announced today that it transferred five detainees from Guantanamo Bay, Cuba to Kuwait. This movement increases the number of detainees who have departed Guantanamo Bay to 252.

These detainees were recommended for transfer by the administrative review board.

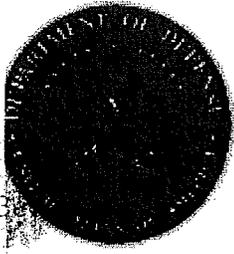
There are ongoing processes to review the status of detainees. A determination about the continued detention or transfer of a detainee is based on the best information and evidence available at the time. The circumstances in which detainees are apprehended can be ambiguous, and many of the detainees are highly skilled in concealing the truth.

During the course of the war on terrorism, the department expects that there will be other transfers or releases of detainees.

Because of operational and security considerations, no further details can be provided.

With this transfer, DoD has transferred or released 252 detainees from Guantanamo Bay – 179 for release and 73 transferred to other governments, including Australia, Belgium, Denmark, France, United Kingdom, Kuwait, Morocco, Pakistan, Russia, Saudi Arabia, Spain and Sweden.

There are approximately 500 detainees currently at Guantanamo Bay.



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IMMEDIATE RELEASE

No. 1151-01
November 05, 2001

Detainee Transfer Announced

The Department of Defense announced today that it released or transferred four detainees from Guantanamo Bay, Cuba. This movement included the release of one detainee to Saudi Arabia and the transfer of three detainees to Bahrain. This movement increases the number of detainees who have departed GTMO to 256.

This movement included three detainees approved for transfer to Bahrain through the administrative review board.

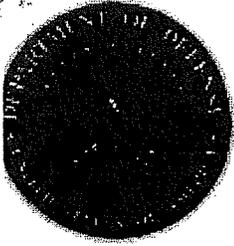
There are ongoing processes to review the status of detainees. A determination about the continued detention or transfer of a detainee is based on the best information and evidence available at the time. The circumstances in which detainees are apprehended can be ambiguous, and many of the detainees are highly skilled in concealing the truth.

During the course of the war on terrorism, the department expects that there will be other transfers or releases of detainees.

Because of operational and security considerations, no further details can be provided.

With this transfer, DoD has transferred or released 256 detainees from GTMO: 180 for release and 76 transferred to other governments, including Australia, Belgium, Denmark, France, United Kingdom, Kuwait, Morocco, Pakistan, Russia, Saudi Arabia, Spain and Sweden.

There are approximately 500 detainees currently at Guantanamo.



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IMMEDIATE RELEASE

No. 458-06
May 18, 2006

Detainee Transfer Announced

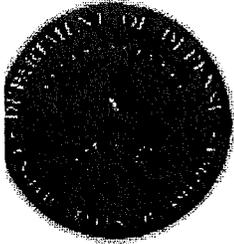
The Department of Defense announced today that it transferred 15 Saudi detainees from Guantanamo Bay, Cuba, to Saudi Arabia. This movement consisted of detainees approved for transfer by an Administrative Review Board (ARB) decision at Guantanamo.

With today's transfer, approximately 120 detainees remain at Guantanamo who the U.S. government has determined eligible for transfer or release through a comprehensive series of review processes. Departure of these remaining detainees approved for transfer or release is subject to ongoing discussions between the United States and other nations. The United States does not desire to hold detainees for any longer than necessary. The department expects that there will continue to be other transfers or releases of detainees.

There are ongoing processes to review the status of detainees held at Guantanamo. A determination about the continued detention or transfer of a detainee is based on the best information and evidence available at the time, both classified and unclassified. The circumstances in which detainees are apprehended can be ambiguous, and many of the detainees are highly skilled in concealing the truth.

With this transfer, 287 detainees have departed Guantanamo - 192 released and 95 transferred to other governments, including Albania, Afghanistan, Australia, Bahrain, Belgium, Denmark, France, Great Britain, Kuwait, Morocco, Pakistan, Russia, Saudi Arabia, Spain, Sweden and Uganda.

Approximately 460 detainees remain at Guantanamo.



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IMMEDIATE RELEASE

No. 1023-06
October 12, 2006

Detainee Transfer Announced

The Department of Defense announced today that it transferred 16 detainees from Guantanamo Bay, Cuba, to Afghanistan, and one detainee to Morocco. These detainees were recommended for transfer following multiple review processes conducted at Guantanamo Bay.

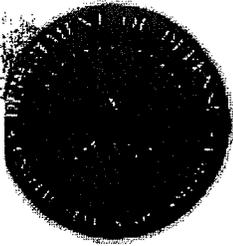
With today's transfer, approximately 110 detainees remain at Guantanamo who the U.S. government has determined eligible for transfer or release through a comprehensive series of review processes. Departure of these remaining detainees approved for transfer or release is subject to ongoing discussions between the United States and other nations. The United States does not desire to hold detainees for any longer than necessary. The department expects that there will continue to be other transfers and releases of detainees.

There are ongoing processes to review the status of detainees held at Guantanamo. A determination about the continued detention or transfer of a detainee is based on the best information and evidence available at the time, both classified and unclassified.

With this transfer, approximately 335 detainees have departed Guantanamo for other countries including Albania, Afghanistan, Australia, Bahrain, Belgium, Denmark, Egypt, France, Germany, Iran, Iraq, Jordan, Kuwait, Maldives, Morocco, Pakistan, Russia, Saudi Arabia, Spain, Sweden, Sudan, Tajikistan, Turkey, Uganda, United Kingdom, and Yemen.

Approximately 440 detainees remain at Guantanamo.





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IMMEDIATE RELEASE

No. 1037-06
October 16, 2006

Detainee Transfer Announced

The Department of Defense announced today that it transferred one detainee to Bahrain, one detainee to Iran and two detainees to Pakistan. These detainees were all recommended for transfer due to Administrative Review Board processes conducted at Guantanamo Bay.

With today's transfer, approximately 110 detainees remain at Guantanamo who the U.S. government has determined eligible for transfer or release through a comprehensive series of review processes. Departure of these remaining detainees approved for transfer or release is subject to ongoing discussions between the United States and other nations. The United States does not desire to hold detainees for any longer than necessary. The department expects that there will continue to be other transfers and releases of detainees.

There are ongoing processes to review the status of detainees held at Guantanamo. A determination about the continued detention or transfer of a detainee is based on the best information and evidence available at the time, both classified and unclassified.

With this transfer, approximately 340 detainees have departed Guantanamo for other countries including Albania, Afghanistan, Australia, Bahrain, Belgium, Denmark, Egypt, France, Germany, Iran, Iraq, Jordan, Kuwait, Maldives, Morocco, Pakistan, Russia, Saudi Arabia, Spain, Sweden, Sudan, Tajikistan, Turkey, Uganda, United Kingdom, and Yemen.

Approximately 435 detainees remain at Guantanamo.

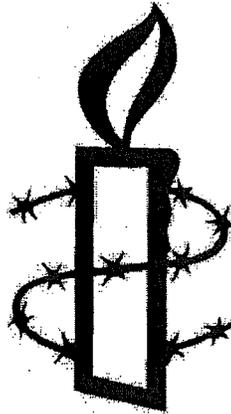
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Yemen

The Rule of Law Sidelined in the Name of Security



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1. Introduction

On 16 July 2003 the Minister of Interior of Yemen told Parliament that 95 people accused of belonging to *al-Qa'ida* were released because they "had changed their ideas", and that 195 others remained in detention because they "persist in holding on to the ideas they believe in". He did not refer to any judicial process for these detainees because the rule of law has been sidelined. They are held totally at the mercy of the government and security forces, far removed from judicial scrutiny.

The case of these detainees reflects a significant regression in the government's human rights policy and practice since the 11 September 2001 attacks on the US, which Amnesty International condemned unreservedly. Ten days after these attacks the Yemeni Prime Minister announced "we have decided that investigation[s] must be carried out into anyone who had any connections (with Afghanistan)".¹

In the weeks and months following this statement, security forces carried out mass arrests targeting Yemeni and foreign nationals, including women, and children as young as 12 years of age. Arrests were made without the judicial supervision required by law, and detainees have invariably been subjected to lengthy incommunicado detention, during which some of the detainees alleged that they were tortured or ill-treated. Most of the Yemenis who were arrested were held for weeks or months before they were released uncharged or tried. Those who remain continue to be held indefinitely outside any recognized legal framework, without charge and without judicial supervision. Most foreign nationals were deported after weeks or months of interrogation in incommunicado detention. They were denied access to asylum procedures and the judiciary to challenge their deportation, and no assessment of the risks of torture or execution in the countries to which they were sent were known to have been carried out.

Government political discourse, coupled with security forces acting beyond judicial control and with total impunity, generated a climate of fear among civil

¹ See, for example, the Yemeni Arabic weekly *al-Ayyam*, dated 22 September 2001.

society which had been progressively developing into a vibrant agency for positive human rights changes. It initially remained silent in the face of the blatant disregard for the human rights achievements made by Yemen in recent years. This silence facilitated the persistent pattern of harassment against journalists. Reporting events in the wake of the 11 September attacks required extreme caution from journalists in order to avoid warnings, threats or arrest by security forces. However, Amnesty International is encouraged by the re-emerging voice of civil society, including journalists, calling for the restoration of the rule of law and respect for Yemen's international human rights obligations.

During 2002 Amnesty International delegates visited Yemen twice, in February and August, and held talks with government authorities on the deteriorating human rights situation in the country. The authorities, while recognizing that they were in breach of their international human rights obligations and their own laws, argued that this was because they had to "fight terrorism" and avert the risks of military action against Yemen by the US in the wake of the 11 September events. Amnesty International, while understanding the new security and international relations challenges faced by Yemen, believes that the solution to such challenges cannot lie in sacrificing human rights and the rule of law. At times of security crises, such as the one brought about by the 11 September events, human rights need more, not less, protection.

2. Background

Yemen has made noticeable institutional legal progress in the field of human rights over the last decade. It has become a state party to most international human rights instruments and its legislation governing arrest and detention is consistent with international human rights standards. This has been accompanied by significant growth in governmental human rights institutions which resulted in the appointment in 2001 of a Minister of State for Human Rights and the upgrading of this position to ministerial level in 2003. There has also been significant development of non-governmental human rights organizations and an emerging civil society concerned with issues of social justice and human rights.

The government has also developed substantive dialogue with international non-governmental human rights organizations, including Amnesty International, and has cooperated with United Nations human rights thematic mechanisms, and the Office of the High Commissioner for Human Rights. Human rights organizations have been granted access to Yemen to carry out investigations into human rights violations, including the detention of prisoners of conscience, torture, extrajudicial

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executions, the death penalty, "disappearances", discrimination against women, concerns about juvenile justice, and laws inconsistent with international human rights standards.

Regrettably, this progress is today threatened by the changes in regional and world politics brought about by the 11 September 2001 attacks on the US. The government's security policies adopted in the wake of 11 September events represent a serious setback to its previous progressive undertakings and a further drift away from its obligations under international human rights treaties, including Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR) which states: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

3. Arbitrary arrest and detention

Article 47(b) of the Constitution categorically prohibits arrests made without warrant issued by a judge or prosecutor. This protection from arbitrary arrest is backed up by strict safeguards contained in the Code of Criminal Procedures (CCP). Article 7 of the CCP provides that arrest is not permitted except for acts punishable by law. Under Articles 70 and 72 of the CCP arrests must be carried out with a written and signed order from the competent authority. The order may also be oral, but this is allowed only when the arrest is carried out in the presence of the authority competent to issue the arrest order.² In addition, Article 246 of the Penal Code provides for a maximum of five years imprisonment for any official who subjects any person to arbitrary arrest.

In reality, few political detainees have been apprehended in a manner that accords with the law. Instead, arrests have been made without any judicial supervision by members of the Political Security, a security force under the nominal control of the Interior Ministry. In various locations across the country, the common pattern has been for security officers, in uniform or in plain clothes, to remove an individual from his home or work during the mid-afternoon or early evening, without providing any reason or indication of the destination.

In the wake of the 11 September events, those arrested in this manner included many individuals with connections to Afghanistan, but also individuals who had no such connection. They included Ali Mikon, a 17-year-old British national holding a

² For detailed analysis of the legal safeguards against arbitrary arrest in Yemen see Amnesty International's report: "Yemen, Ratification without implementation: The state of human rights in Yemen", AI Index: MDE 31/01/97, March 1997, PP 5-10.

student visa valid from 21 February 2001 to 21 February 2002. He was with three of his friends, also British nationals, one of them aged 15. All four were arrested on 31 December 2001 at 11.00 pm from the Yarmouk Hotel in Sana'a and taken to the Political Security headquarters. They were detained until 30 January 2002, when they were deported to the UK. They were never charged with any criminal offence. During their detention they were held in communal cells with other children and adults, including Ismail Shuhada, a 12-year-old Indonesian national who was arrested with 42 other Indonesians and detained for weeks or even months before they were released. This practice is in violation of the Convention on the Rights of the Child, ratified by Yemen. In 1999 when it examined Yemen's report on implementing this Convention, the UN Committee on the Rights of the Child expressed concerns about the general situation of the administration of juvenile justice in Yemen.³

Two academics, Dr Abdelsalam Nur al-Din, British national and Director of the Centre for Red Sea Studies (CRSS) at Exeter University in the United Kingdom, and his colleague, Dr Ahmad Saif, a Yemeni national, were on an official business visit to Yemen to establish joint cooperation projects between the CRSS and Yemen University when they were detained. Prior to their arrest they had meetings with government ministers and other officials, many of whom they knew personally. They were arrested by members of the Political Security force on 26 October 2001, at their hotel in Sana'a, and were detained incommunicado for three days. They were interrogated about their visit to Yemen and about their views of Osama bin Laden. They were released only after Yemeni government officials intervened. They were arrested without a warrant and were never brought before a judge.

In some cases relatives of someone sought by the security forces have been held in an attempt to force the person to hand himself in. Amnesty International considers that anyone held solely because of their relationship to another individual would be a prisoner of conscience and as such should be immediately and unconditionally released. In the evening of 21 September 2001 members of the Political Security in Ibb went to the house of Rashad Muhammad Sa'id Isma'il to arrest him. When they did not find him, they took his father, Muhammad Isma'il, aged 47, and detained him. Two days later they detained Rashad's father-in-law, 'Abd al-Karim Ahmad Naji al-Bu'dani, aged 60. As a result Rashad gave himself up on 27 September and his relatives were released without charge. In a separate case in Hudayda in December 2001, a relative of the detainee⁴ told Amnesty International "security men in four vehicles came to the house at about 11.00 am. They broke the

³ See Concluding Observations of the Committee on the Rights of the Child: Yemen. 10/05/99. CRC/c/15/Add.102, Para 34.

⁴ The names have been withheld at their request.

door and took over the house while the mother was washing clothes. They asked her 'where is Sulayman?' She told them he was out. One officer said to her 'you bring him or we will take you and the rest of the family.'

The arrests described above were carried out without a judicial warrant and without any judicial supervision. Although arbitrary arrest, particularly by the Political Security, is a long standing pattern of human rights violations in Yemen, it has since 11 September 2001 become further entrenched and is marked by three new developments.

- Prior to 11 September 2001 when arresting authorities acted with impunity they did so without explicit political legitimacy. By contrast, in the wake of 11 September events, such arrests became a deliberate public policy of the government.
- Prior to the 11 September events the practice of arrest by security forces was mainly limited to political opponents and critics of the state, such as members of political parties, journalists and writers. In post 11 September, guided by the vague term of "fighting terrorism", in cooperation with other security forces in the region and beyond, such as the US security forces, the practice of arrest by Yemeni security forces has progressively become borderless. Many relatives of detainees have told Amnesty International that the Political Security frequently threatens handing detainees over to US security forces to take them to Guantánamo Bay.
- There is a noticeable change in the government's message in its dialogue with Amnesty International. Prior to the 11 September events the government maintained that while it was not perfect, any arbitrary arrest taking place in the country was not the result of government policy. After 11 September, the government's message to Amnesty International has been articulated as the "fight against terrorism" to preserve the security of the country which necessitates action by the arresting authorities beyond the confines of the law and Yemen's international human rights obligations.

4. Incommunicado detention and allegations of torture and ill-treatment

Khaled Salah 'Abdullah's brother, Muhammad, was a teacher in the small town of Hudayda. In September 2001 he was arrested at home after he accompanied three friends seeking visas for Saudi Arabia. After 20 days, the family learned that they would be able to see Muhammad, but when Khaled and another brother tried to visit

him in the offices of the Political Security, they too were arrested. Khaled and his other brother were held for three months without any notice to their family and without access to a lawyer. During that time they were repeatedly blindfolded and questioned about the whereabouts of their brother's passport.

Individuals held by the Political Security are commonly subjected to a prolonged initial period of detention where communication with the outside world is denied. In many cases, family members may have to wait weeks or months before they learn where their relatives are being held. Several families reported that they were able to visit their relatives only when the Political Security was ready to acknowledge that they were holding them. For those arrested after 11 September 2001, it appears in many cases that it was only through the diligent search by family members and friends that the detainee's location was verified. In one case, that of Salih Mana' al-Najar, his relatives informed Amnesty International that it was by coincidence that they managed to establish his whereabouts. Salih Mana' al-Najar was arrested on 18 October 2001 in Sana'a. His relatives visited different places of detention in Sana'a and sought the help of an officer in the Political Security to establish his whereabouts, but to no avail. Three weeks later, and while the family was still searching for him in Sana'a, they were informed by someone that he had seen Salih handcuffed on the Yamania airline flight from Sana'a to Aden. One relative told Amnesty International, "When we received this information we went directly to the Director of the Political Security in Aden and asked him about Salih...the Director was surprised at how we found out...He told us that Salih's case is in Sana'a". Salih's parents were allowed to visit him approximately one month after his arrest.

Due to the systematic practice of incommunicado detention and the secrecy surrounding the fate of detainees, Amnesty International has not been able to obtain sufficient information to enable it to make an accurate assessment of the scale and frequency of torture and ill-treatment. However, it has received a number of complaints of torture and ill-treatment of some of those detained including, for example, Dr Abdelsalam Nur al-Din and Ali Mikon.

Dr Abdelsalam Nur al-Din was reportedly made to stand blindfolded with his hands pressed against the wall and was beaten with a stick on his back and punched in the chest. He was also said to have been held in solitary confinement in a small cell with very little ventilation, denied regular access to toilets and sometimes drinking water, and threatened with further torture, execution and "disappearance".

Ali Mikon told Amnesty International, "one morning...I had a bad stomach pain and was desperate to use the toilet, but the guard said no because other detainees

were using it. I had to use a bucket with a friend holding a blanket hiding me from other detainees in the cell...when I took the bucket out the guard hit me in the chest...and threatened to make me use the bucket again next time”.

A special commission of inquiry set up by the Yemeni Parliament in September 2002 to look into the conditions of detention of detainees held in connection with the attack on the USS Cole on 12 October 2000, and those held in the wake of the 11 September 2001 event observed: “Some detainees said that they were not tortured...but others said they were beaten with electric batons, handcuffed and shackled, and subjected to insults and verbal abuse. Others said they were threatened with the imprisonment of their female relatives if they did not confess”.⁵

5. Indefinite detention without charge or trial

Yemen’s legal system provides significant safeguards against indefinite detention and is in this regard consistent with international human rights standards. Individuals have the right under Article 76 of the CCP and Article 47(c) of the Constitution to see a judge or prosecutor within 24 hours of being detained, and they have the right to challenge the legal basis of their detention. Articles 73 and 77 of the CCP establish a suspect’s right to seek prompt legal assistance.

These provisions are rarely honoured when detainees are held by the Political Security, and this pattern of human rights violations has been exacerbated by the government’s security policy in the wake of the 11 September events. None of those arrested after 11 September 2001 are known to have been charged with any criminal offence, and they are invariably denied access to lawyers as well as the opportunity to take proceedings before the judiciary to challenge the legality of their detention. Amnesty International raised these issues with the judiciary and the government and found neither authority concerned about the rights of these detainees.

In meetings with the Attorney General and the Minister of Justice in February 2002, the organization sought clarification of the legal process followed in these cases, together with the role of the judiciary in the arrest and detention of the detainees. Both authorities claimed not to have been aware of any arrests or to have had any role in the proceedings.

⁵ See Report of the Parliamentary Special Commission of Inquiry into detainees held in connection with the attack on the USS Cole and 11 September 2001, dated 24 September 2002, P 13.

In a second meeting with the Attorney General in August 2002, Amnesty International again sought clarification of the role of the judiciary with regard to the fate of the detainees. Specifically, Amnesty International delegates asked if any judicial proceedings had been initiated to allow them access to lawyers, or to enable them to challenge the legality of their detention if they were not to be charged with recognizably criminal offences and given prompt and fair trials. The Attorney General told delegates that the detainees were not held under his jurisdiction but that he understood that the case of 14 people held in connection with the attack on the destroyer USS Cole was about to be transferred to his office to start their trial proceedings. However, even in this case no trial proceedings are known to have been initiated, almost three years after their arrest.

Amnesty International delegates submitted to the Attorney General a copy of a complaint addressed to him by lawyers from the National Organisation for the Defence of Rights and Freedoms, who had been given power of attorney by some 30 relatives of detainees. The lawyers formulated their complaint under Article 13 (first paragraph) of the CCP, which states that: "Anyone who learns of the arrest of someone without legal reason or his detention in places other than those made for that purpose must inform a member of the public prosecution". They argued that their clients were unlawfully detained, citing Articles 76 and 172 of the CCP. Article 76 states that: "Anyone detained temporarily on suspicion of having committed a crime must be brought before the judiciary within the maximum period of 24 hours from the time of arrest. The judge or member of the public prosecution must inform him of the reasons of arrest, question him and enable him to present his defence or objections, and must promptly issue an order with justification for his preventive detention or release. In any case, it is prohibited to continue the detention for more than seven days without a judicial order."⁶

Article 172 states that no one should be "...detained except by order of the public prosecution or the court and on a legal basis."

The lawyers urged the Attorney General to assume his responsibility and address the cases of their clients as required by Articles 7(2) and 13 of the CCP. Article 7(2) states that the prosecution should "...promptly release everyone whose freedom is, unlawfully restricted, or put in preventive detention for a longer period than is permitted by law, or decided by a court ruling or an order by the judge." Under Article 13 the prosecution is required to promptly release anyone held unlawfully.

⁶ Amnesty International's translation of Article 76 of the CCP.

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Amnesty International delegates asked the Attorney General what steps he would take to address the lawyers' complaint and guarantee them access to their clients in detention. The only undertaking he made in this regard was that he would write a letter to the Director of the Political Security raising the issues. The absence of any commitment to address issues about the legality of detention illustrates the way in which the rule of law is subordinated, and the increasing powers accorded to the security authorities.

With regard to those held in connection with the attack on the Destroyer USS Cole, Yemeni officials indicated to Amnesty International that the government has been planning to bring them to trial but faced strong objections by the US Government. Defendants in this case have been in detention for almost three years and have yet to be formally charged or given access to a lawyer. They include Murad Salih al-Sururi, aged 22. According to his relatives, he was taken into custody suspected of having acted as a witness in the issuing of false identification papers used by one of the suspects in the attack on the USS Cole. His home was searched soon after he was arrested, and, according to one of his brothers, he has been interviewed by agents of the US Federal Bureau of Investigations. Some relatives of detainees have appointed a lawyer but he has been denied access to them in violation of Principle 1 of the Basic Principles on the Role of Lawyers which states that: "All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings."

With the rule of law sidelined and the door of the judiciary firmly shut in their faces, relatives of the detainees do not know who to turn to in order to seek justice and redress. Many of the families told Amnesty International that they had spent considerable time going from one Political Security detention centre to another looking for their loved ones or to find out why they are being held and what is going to happen to them. In a number of cases, the relatives, with the backing of their community, submitted written appeals to the Political Security. One such appeal was made by the family of the detainee 'Abdullah 'Abdu 'Abdullah al-Khatib, who wrote:

"Dear Director of Hudayada Political Security,

We, the signatories of this letter, testify that 'Abdullah 'Abdu 'Abdullah al-Khatib...had returned from Saudi Arabia in September 2001 in order to complete arrangements for an employment contract in Saudi Arabia. We were surprised to learn that strangers came and took him from his home in al-Shahariya area (in Hudayda) and we had no idea where or why they took him. After one month we learned that he was being detained by the Political Security in Hudayda. We, the

residents of al-Shahariya area, testify before God and before you, and we consider this to be the word of justice, for which we will be responsible until the Day of Judgment, that 'Abdullah has always been of good behaviour and has never acted dishonourably towards his family or the security forces. 'Abdullah is the only breadwinner for his family, which consists of his elderly father and eight other persons.

We are sending you this reference with hope and confidence in God and your sense of justice to urge you to look into his case and release him for the sake of justice and compassion for his parents and young brothers. God is witness to our testimony.”

In the meantime, family members as well as the detainees must live with the anguish of uncertainty. For many families, the emotional distress is exacerbated by economic hardship, for in several cases the detainee was the sole source of income for a family of limited means. This human cost is brought on by the government's deliberate disregard for the rule of law and international human rights obligations particularly those enshrined in Article 9(3) of the ICCPR which states: “Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release...” Similarly, Article 14(3) of the ICCPR provides the right to prompt and fair trial for anyone suspected of a criminal offence.

6. Secret and forcible deportation of foreign nationals

Yemen has for many years provided shelter for thousands of refugees escaping persecution in various countries, particularly those in the Horn of Africa. However, government laws and practice towards those fleeing persecution remains based on political considerations even when these are in flagrant violation of international standards such as the 1951 Convention Relating to the Status of Refugees.

Under Law No. 47 of 1991, foreign nationals resident in the country can be expelled if they are considered a threat to “...the internal or external security and integrity of the state, its national economy and public health or public morals...” The process by which a person may be expelled does not involve the judiciary and contains no safeguards relating to access to asylum procedures and respect for the principle of *non-refoulement* (the prohibition of returning someone to face torture or other grave human rights abuses). The weakness of this legal framework is undermined further by bilateral and multilateral security agreements which are devoid of international safeguards for the protection of people fleeing persecution in their

countries. Such security agreements include the Arab Convention for the Suppression of Terrorism.⁷

For example, in 1998 Fahd Abdullah Jassim al-Malki, a Qatari national, was forcibly handed over by the Yemen authorities to the Qatari government which sought his extradition in connection with the failed coup attempt of 1996. He was not offered the opportunity to seek asylum. Upon his return to Qatar he was reportedly subjected to torture and has been sentenced to death after an unfair trial.

The weakness of the human rights protection regime for foreign nationals has been exacerbated by the 11 September events. Mass deportations of foreign nationals have taken place in secret since then. Most of them were targeted for arrest because of their nationality and religion, held incommunicado for weeks or months and then expelled after interrogation. No one is known to have been given the opportunity to challenge the government's decision before the courts or to seek legal assistance during whatever process the government followed in their expulsion.

When Amnesty International sought clarification of the reasons for the expulsions it was simply informed that they were "illegal residents". However, the organization obtained details of some people who were deported even though their resident permits were valid, and the only reason for their deportation appears to have been connected with the government crackdown on Islamist groups and Islamic religious schools.

Amnesty International requested a list of all those deported together with the country to which they were sent, in order to follow their cases and seek assurances that they would not be subjected to torture and execution in the countries to which they were sent. The government failed to provide this information. However, the deportees are known to have included nationals from Algeria, Egypt, Libya, Pakistan, Sudan, Saudi Arabia, Indonesia, Somalia, the US, UK and France.

In light of the secrecy surrounding these deportations and the human rights records of many of the countries to which the deportees have been sent, the organization remains concerned about the fate and whereabouts of those deported. In Saudi Arabia, for example, torture⁸ and executions are grave concerns. In September

⁷ For analysis of the provisions of the Convention See Amnesty International's report, "The Arab Convention for the Suppression of Terrorism a serious threat to human rights", AI Index: IOR 51/001/2002.

⁸ For more details see Amnesty International's report "Saudi Arabia Remains a Fertile Ground for Torture with Impunity", AI Index: MDE 23/004/2002, May 2002. See also Amnesty International's report "Saudi Arabia: Defying world trends – Saudi Arabia's extensive use of capital punishment", AI

2002 the Saudi Arabian Minister of Interior announced that a group of Saudi Arabian nationals were handed over to his government by the Yemeni Government and that they were being detained and interrogated. He was quoted as having said that “we will announce the details about them at the appropriate time”.⁹ No information is known to have been released since then. Such detainees in Saudi Arabia are routinely denied access to lawyers, held without charge or trial, and when they are brought to trial this invariably takes place in secret and without any legal assistance.

Deportations are continuing. Recently, in July 2003, seven Saudi Arabian nationals were said to have been handed over to the Saudi Arabian Government. They were reportedly handed over in exchange for eight Yemeni nationals who had been detained in Saudi Arabia. Neither these seven nor those deported before them are known to have been offered any opportunity to exercise their right to seek asylum or oppose their extradition on the grounds of the risk of torture or execution.

Amnesty International delegates’ attempts during their meetings with Yemeni government officials in February and August 2002 to establish the legal framework followed in the deportations shed no light on what processes were being applied nor how the rights of the deportees under international human rights standards were being protected. The Yemeni Government continues to deport foreign nationals with total disregard for its international obligations which include serious assessment of the risks of torture in the country to which a person may be deported. Article 3(2) of the Convention Against Torture requires that in assessing grounds for the risk of torture “...the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the state concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”

Following its examination of Yemen’s report in July 2002, the UN Human Rights Committee, the expert body monitoring the implementation of the ICCPR, expressed “...concern about cases of expulsion of foreigners suspected of terrorism without an opportunity for them to legally challenge such measures. Such expulsions would, furthermore, be decided without taking into account the risks to the physical integrity and lives of the persons concerned in the country of destination”.¹⁰

7. Harassment and detention of journalists

Index: MDE 23/015/2001, November 2001.

⁹ See for example Agence France Presse report of 11/9/2002.

¹⁰ See Concluding observations of the Human Rights Committee: Yemen. CCPR/CO/75. (26/07/2002). Para. 18.

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Freedom of the press is guaranteed under the Yemeni Constitution. In reality, however, the margin of freedom of the press is expanded and restricted in accordance with the political circumstances of the day. Seen in this context, freedom of journalists has narrowed in the wake of the 11 September events.

While the Constitution guarantees freedom of expression and thought¹¹, this is seriously undermined by operational laws, including penal laws, which facilitate the targeting of journalists and critics of state policy. Laws regulating freedom of expression such as Law 25 of 1990 relating to press and publications and the Penal Code, repeatedly qualify such freedom by the vaguely worded phrases of "...within the limits of the law" and for the interests of "national security". In addition to these restrictions which can be made to apply to any situation, freedom of expression is restricted by many other articles which can be equally open to interpretation. For example, Article 103 of Law 25 of 1990, lists 12 restrictions, one of which contains the prohibition of the publication of "...anything that leads to the propagation of ideas against the principles of the Yemeni Revolution or damage to national unity, or distorts the Yemeni heritage of Islamic and Arab civilization". The punishment for acts deemed to be contrary to the terms of this article is a fine of 10,000 Yemeni Riyals (about 40US\$) or a maximum imprisonment of one year under Article 104 of the same law. The punishment could be even harsher if the charge is formulated under the Penal Code. For example, if the offence is deemed to amount to apostasy the punishment is death under Article 259 of the code.

The many legal restrictions imposed on freedom of opinion and expression have facilitated a pattern of harassment of journalists and critics of state policy. In September 2001, the Minister of State for Human Rights told the Union of Yemeni Journalists that "press freedom and human rights are two faces of one coin", yet two months later, eight editors of newspapers were summoned to appear before the West Sana'a Court to answer law suits against them. They included a case brought by the Ministry of Information against *al-Shura* newspaper for publishing excerpts from a novel which was deemed by the Ministry to be "inconsistent with the Islamic religion". The consequences suffered by different newspapers include fines, suspension, and continuing threat of imprisonment of editors or proprietors.

Security forces also target individual journalists in the form of warnings, threats, or even arrest and detention if their reporting or criticism is deemed to breach the many restrictions. The events of 11 September have further narrowed the margin of governmental tolerance for journalists' freedom of expression. The detrimental

¹¹ Article 42(3) of the Constitution states that: "Every citizen shall have the right to participate in political, economic, social and cultural life. The state shall guarantee freedom of thought and expression of opinion orally, in writing or in graphic form, within the limits of the law."

effect this has on the role of journalists was clearly visible to an Amnesty International delegation visiting Sana'a in February 2002. Many journalists told the delegation that they had refrained from documenting cases of the mass arrests after 11 September 2001 in Yemen and neighbouring countries for fear of being identified with the views of those arrested, and being subject to arrest themselves. Those who had written about the arrests told the delegation that they had been questioned or received warnings from members of the arresting authorities, particularly the Political Security.

Among those subjected to arrest and detention were Hassan al-Zaidi and Nabil al-Kumaim. Hassan al-Zaidi, a journalist with the weekly newspaper *The Yemen Times*, was arrested in the wake of the 11 September 2001 events by the Political Security and detained for up to three weeks because of an interview he had conducted with the leader of an Islamist group published in August 2001. He told Amnesty International that publication of his interview only became of interest to the security forces in the wake of 11 September 2001 and that this was the main reason for his arrest and detention. Nabil al-Kumaim, a Sana'a based Yemeni correspondent of the Qatari newspaper *al-Rayah*, was arrested on 29 April 2002 and detained for hours, at night, during which he was interrogated about his knowledge of *al-Qa'ida* organization in Yemen. His interrogation followed a news item in which he referred to a report by another newspaper claiming that members of *al-Qa'ida* were operative in the government security forces. Article 19 (2) of the ICCPR states that "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

In July 2002, the UN Human Rights Committee expressed concern about legal restrictions on freedom of the press in Yemen and "about the difficulties encountered by journalists in the exercise of their profession particularly when criticisms of the authorities are expressed". The Committee called on the government to "ensure respect for the provisions of Article 19 of the Covenant".¹²

8. Civil society emerging from a climate of fear

One of the setbacks brought on by the events of 11 September and the subsequent sidelining of the rule of law was the negative impact on civil society and its role as

¹² See Concluding observations of the Human Rights Committee: Yemen. CCPR/CO/75. (26/07/2002). Para. 21.

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human rights protector. Mass arrests, detention and deportations, backed up by political discourse from the highest authorities of the government portraying those targeted by security forces as "terrorists", generated a climate of fear. This was heightened by a further fear felt widely in society, namely that of a possible US military attack or economic sanctions against the country. Faced with these fears, members of civil society felt that they had no option but to remain silent in the face of the onslaught on human rights by security forces.

This impact was felt by Amnesty International delegates who visited the country in February 2002. During their stay in Sana'a, delegates found that while people were being arrested, detained or deported by the hundreds, no one was coming forward to provide information, not even the relatives of those directly affected. This was a situation never previously encountered by Amnesty International in Yemen, not even during the civil war of 1994. Members of civil society had always been an asset for penetrating the walls of secrecy, which can create a fertile environment for human rights violations.

However, after months of silence, civil society began to regain its ground. Taking the lead in this regard has been the National Organization for the Defence of Rights and Freedoms, led by Yemeni lawyer and member of Parliament Mohammed Nagi Allow. It has provided a focal point for relatives of detainees, and has received much attention from the Yemeni press.

In solidarity with civil society, Amnesty International organized, in August 2002 in Sana'a, a public debate, entitled "Human Rights for All". Participants included human rights organizations, including women's rights groups, NGOs, journalists, writers and lawyers. The debate began with a panel discussion of the universality of human rights, and was attended by more than 130 people. Following presentations by panellists, participants raised questions about the detainees being held by the Yemeni authorities. Under what circumstances were individuals being held, had any charges been filed, when would detainees be charged, tried, or released? They raised the same questions about the status of Yemeni detainees held by the United States in Camp X-Ray, Guantánamo Bay, Cuba, and asserted that there should be no double standards. The debate was given extensive media coverage in Yemen and other Gulf countries.

This re-emergence of civil society began to generate pressure for the restoration of the rule of law. In September 2002, parliament set up a commission to look into the situation of the detainees. It has been the first and only civil authority to be given access to the detainees with the aim of investigating breaches of their rights.

The message of this re-emerging civil society is clearly that security cannot be purchased at the price of human rights.

9. Government justification and the role of the US

9.1. The Yemeni Government response

The Government of Yemen informed Amnesty International that it had “no option” but to continue the practice of detention without charge or trial of those held and to offer them no opportunity of access to lawyers or the judiciary to challenge the legality of their detention. The authorities argued that the primary reason for the arrests and detentions was the priority of security, not justice. They explained that the security risks which the detainees present for the government lies in their “extremist views” of Islam. Specifically, the government told Amnesty International that its plans were to change the “extremist views” of the detainees rather than to prosecute them and that it had already started a program of re-education. The government had formed a committee of Muslim scholars to engage them in discussion in order to change their views on issues such as *al-Jihad* (holy war) and people of other faiths. The authorities added that having them in detention made the government task easy to accomplish. In particular, the government elaborated its rationale and strategy as follows:

9.1.1 The war in Afghanistan presented Yemen with at least two real dangers for its security and stability. One was the fear that some elements from Islamist movements in Yemen might resort to violent actions, particularly against people from Western countries, in support of the Taliban. The other was the fear of US military action against Yemen because of the involvement of Yemeni nationals in the 11 September attacks on New York and Washington as well as media reports about the presence of suspected members of *al-Qa'ida* in Yemen. Confronted with these threats the Yemeni Government said it had to act to reassure the US Government with full cooperation against “terrorism”, in order to avert US military action against Yemen.

9.1.2 After the 11 September events the international community called on its member nations to stand firm against “terrorism”. The government said Yemen could not shirk its responsibility towards the international community. Yemen is not alone in adopting the measures it had taken. Countries in Europe and North America, have taken similar measures. Yemeni nationals living in

those countries had been subjected to arbitrary arrest and detention for no reason other than their nationality. Yemeni nationals studying in the US who have returned to Yemen during their vacation to visit their families have been denied visas to return to their studies.

While Amnesty International is well aware of the changes in the international political climate and the pressures brought on Yemen, particularly from the United States, it does not believe that this can be used by the government to justify human rights violations. On the contrary, Amnesty International believes that it is at times of harsh political realities that human rights need more, not less, protection. In the name of "security" children have been detained, peaceful dissent silenced, persons deported to countries where they would face torture or execution, and suspects subjected to indefinite detention without charge or trial and without access to lawyers and the judiciary.

The Yemeni Government was reminded of this danger by the UN Human Rights Committee upon examination of its report on compliance with the ICCPR: "While it understands the security requirements connected with the events of 11 September 2001, the Committee expresses its concern about the effects of this campaign on the human rights situation in Yemen, in relation to both nationals and foreigners. It is concerned, in this regard, at the attitude of the security forces, including the Political Security, proceeding to arrest and detain anyone suspected of links with terrorism, in violation of the guarantees set out in the Covenant (Article 9). The Committee also expresses its concern about cases of expulsion of foreigners suspected of terrorism without an opportunity for them to legally challenge such measures. Such expulsions would, furthermore, be decided without taking into account the risks to the physical integrity and lives of the persons concerned in the country of destination (Articles 6 and 7)".

The Committee went on to urge the government to "... ensure that the measures taken in the name of the campaign against terrorism are within the limits of Security Council resolution 1373 and are fully consistent with the provisions of the Covenant". It further requested the government to "ensure that the fear of terrorism does not become a source of abuse".¹³ The UN Commission on Human Rights has affirmed that "States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law".¹⁴

13. See Concluding Observations of the Human Rights Committee: Yemen. CCPR/CO/75. (26/07/2002). Para. 18.

14 See Commission on Human Rights resolution 2003/68 adopted on 25 April 2003, Para. 3.

9.2. The role of the US

Yemen-US relations bear direct relevance to the deterioration of the human rights situation in Yemen since the 11 September 2001 events. In the wake of these events the two countries forged a special military and security cooperation. The impact of such cooperation on human rights is manifested in the practice of detention, training of Yemen security forces, and the possible extra-judicial killing of six men in November 2002 (see below).

The US government is holding scores of Yemeni nationals in Guantánamo Bay under conditions which are contrary to international human rights and humanitarian laws.¹⁵ Relatives of these detainees met by Amnesty International in Sana'a informed the organization that they had not received any clarification from the US Government or the Yemeni Government on the legal status or fate of the detainees. Amnesty International raised their cases with Yemeni officials, but they did not provide precise clarification on the legal process followed in these cases, nor on

¹⁵ Amnesty International's concerns on all the detainees held in Guantánamo Bay are that the US government has:

- transferred and held people in conditions that may amount to cruel, inhuman or degrading treatment, and that violate other minimum detention standards;
- refused to grant people in its custody access to legal counsel, including during questioning by US and other authorities;
- refused to grant people in its custody access to the courts to challenge the lawfulness of their detention;
- undermined the presumption of innocence through a pattern of public commentary on the presumed guilt of the people in its custody in Guantánamo Bay;
- failed to facilitate promptly communications with or grant access to family members;
- undermined due process and extradition protections in cases of people taken into custody outside Afghanistan and transferred to Guantánamo Bay;
- threatened to conduct trials before military commissions – executive bodies lacking clear independence from the executive and with the power to hand down death sentences, and without the right of appeal to an independent and impartial court;
- raised the prospect of indefinite detention without charge or trial, or continued detention after acquittal, or repatriation that may threaten the principle of *non-refoulement*;

For more detailed accounts of these concerns see Amnesty International's report, "United States of America: Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantánamo Bay", AI Index: AMR 51/053/2002, 15 April 2002 and "United States of America: The threat of a bad example: Undermining international standards as "war on terror" detentions continue", AI Index: AMR 51/114/2003, 19 August 2003.

family access and receipt of information about the fate of the detainees. These conditions of detention have been challenged by the Court of Appeal in the UK in a case involving Feroz Abbasi, UK national, held in Guantánamo Bay. In November 2002, the Court of Appeal, the second highest court in England and Wales, referred to Feroz Abbasi's detention in Guantánamo Bay as "in apparent contravention of fundamental principles recognized by both jurisdictions [US and UK] and by international law".¹⁶

As mentioned before, US security forces have been directly involved in the questioning of at least those held in connection with the USS Cole case. In addition, the Yemeni authorities have told Amnesty International that their plans to bring these detainees to trial were obstructed by the US authorities. The consequences for the detainees, most of whom have been held for almost three years, are that their right to legal assistance and access to the judiciary to challenge the legality of their detention have been and continue to be denied.

The training of Yemeni security forces by US security forces, has been acknowledged by the two governments. US Defense Secretary Donald H. Rumsfeld told news reporters "we have some folks in that country that have been working with the government and helping them think through ways of doing things. It's been a good cooperation...".¹⁷ Similarly, the Foreign Minister of Yemen is reported to have said that "...there is no security agreement with the US...but there is security cooperation in training and exchange of information ... and there are US trainers for the Special Forces and security forces (as well as) exchange of names, particularly these days."¹⁸

¹⁶ The Court of Appeal ruling came as a result of a judicial review, initiated by the mother of Feroz Abbasi, of a March 2002 decision of the High Court that had stated that UK courts had no jurisdiction to rule on her claim that the UK authorities had not been doing enough to ensure respect for the rights of UK nationals detained at Guantánamo Bay. In its November 2002 ruling the Court of Appeal dismissed his mother's claim for relief. Feroz Abbasi from Croydon is one of nine confirmed UK nationals, including Moazzam Begg from Birmingham, England, Asif Iqbal and Shafiq Rasul from Tipton, England, who remained in US military custody at Guantánamo Bay without charge or trial or access to the courts, lawyers or relatives. For more details on this ruling see Amnesty International Press Release, News Flash, "UK: Government must take action to protect UK nationals held in US custody at Guantánamo Bay", AI Index: EUR 45/023/2002, News Service No: 200, 6 November 2002 and Amnesty International's Media Briefing, "UK: Government must act now on behalf of Guantánamo detainees", AI Index: EUR 45/019/2003, News Service No 167, 11 July 2003.

¹⁷ Quoted in Associated Press report "U.S. Strike Six in Al Qaeda Missile Fired by Predator Drone; Key Figure in Yemen Among Dead", dated 5 November 2002.

¹⁸ See Parliamentary Special Commission of inquiry into the detainees held in connection with the attack on the USS Cole and 11 September 2001, dated 24 September 2002, P 11.

Concerned that transfers of military or police expertise or training must not contribute to human rights violations, Amnesty International sought clarification of this from the US authorities in a letter, dated 6 June 2003, addressed to the Secretary of State, Colin Powell (see section 10 below). Specifically, Amnesty International asked the following questions: Which Yemeni security forces are receiving such training and do they include the Political Security? Have individuals receiving training from the United States authorities been screened for previous involvement in human rights violations in accordance with Section 556 of US Public Law 107 – 105? What human rights provisions are included in the training programs?

In a letter addressed to Amnesty International, dated 11 July 2003, the US State Department acknowledged that “the U.S. has provided military training to Yemen’s counter terrorism forces as part of our cooperative efforts in the global war on terrorism”. It added that “no...funding or training is provided to any Yemeni security units for which there is credible evidence that they have committed gross violations of human rights”. However, the letter did not give any details as to the security branches which received funding or training assistance and whether these included or excluded the Political Security. This branch of the arresting authorities remains the main perpetrator of human rights violations with impunity.

Perhaps the most visible indication for the disregard for human rights in the US-Yemen security cooperation is the killing of six men in the Governorate of Ma’rab on 3 November 2002. The six were driving in a car when they were blown up reportedly by a missile launched by a CIA-controlled Predator drone aircraft. The group were alleged to be suspected members of *al-Qa’ida* and included Ali Qa’id Sinan al-Harithi, a Yemeni national, allegedly a leading member in the organization.

Fearing that the six may have been victims of extrajudicial killing, Amnesty International sought urgent clarification of the circumstances surrounding the killing from the US and Yemeni governments. Amnesty International wrote to both governments, asking if the killings were carried out as a result of cooperation between the two governments or with the agreement or knowledge of the Yemeni government; whether any attempts were made to arrest the six; and what threat, if any, the suspects posed to security forces or others at the time of their killing. Amnesty International stated that if the attack was a deliberate killing, in lieu of arrest, in circumstances in which the men did not pose an immediate threat, the killings would amount to extrajudicial executions in violation of international human rights law.¹⁹ Amnesty

¹⁹ See Amnesty International, Yemen/USA: government must not sanction extra-judicial executions, 8 November 2002 (AI Index: AMR 51/168/2002).

International called for an investigation of the killings and for anyone found responsible for any extrajudicial execution to be brought to justice.

Amnesty International has received no direct response from either government. However, the Yemeni government has since declared publicly that it had cooperated with the US Government. The Minister of Interior was reported on 19 November 2002 to have said that the "hunt for the group which ended in their deaths...took place in the context of security cooperation and coordination between Yemen and the United States to fight terrorism".²⁰ More recently the Yemeni President reiterated his government's role in the operation during an interview with *al-Jazeera* television. In reply to a question on how the US attacked the six he replied "in coordination with us...in coordination with us..." Concerning those killed he said "These are a harmful minority...They are corrupt on earth, they are playing with the national economy and seek to make the country a terrorist country...Let them go (die), three, four, or twenty five for the sake of the country...any traitor...anyone who puts the security of the country at risk let them go".²¹ He made no reference to any attempt by the Yemeni or US governments to observe international human rights standards in carrying out this operation.

The US Government has disputed that the killings were extrajudicial executions. In response to the UN Special Rapporteur on extrajudicial, summary and arbitrary executions, the US Government disagreed that "military operations against enemy combatants could be regarded as extrajudicial executions", adding that the "conduct of a government in legitimate military operations, whether against *al-Qa'ida* operatives or any other legitimate military target, would be governed by the international law of armed conflict." It concluded that "enemy combatants may be attacked unless they have surrendered or are otherwise rendered hors de combat", and that any "*al-Qa'ida* terrorists who continue to plot attacks against the United States may be lawful subjects of armed attacks in appropriate circumstances". It stated that the mandate of the Special Rapporteur does not extend to "allegations stemming from any military operations conducted during the course of an armed conflict with *al-Qa'ida*", and that both the Special Rapporteur and the UN Commission on Human Rights lacked competence "to address issues of this nature arising under the law of armed conflict"²².

²⁰ Agence France Presse report dated 19 November 2002.

²¹ See *al-Jazeera* program "Without frontiers" (Bila Hudud), broadcast on 16 July 2003.

²² Letter dated 14 April 2003 from the Chief of Section, Political and Specialized Agencies, of the Permanent Mission of the United States of America to the United Nations Office at Geneva addressed to the Secretariat of the Commission on Human Rights. E/CN.4/2003/G/80, 22 April 2003.

In Amnesty International's view, it is not at all clear why the laws of war would apply to this situation. Under existing international humanitarian law, it is not possible to have an international armed conflict between a state on the one hand and a non-state actor on the other, should the armed group not form part of the armed forces of a Party to the Geneva Conventions. The Geneva Conventions apply to situations of "armed conflict which may arise between two or more of the High Contracting Parties".²³ There is no armed conflict between the US and Yemen, and the Yemeni Government clearly cooperated in the air strike. In addition, there is no internal armed conflict between the government of Yemen (with the support of US forces) and *al-Qa'ida*. Accordingly, the proper standards applicable to this situation were law enforcement standards according to which the US and Yemen should have cooperated to try to arrest these suspects rather than kill them.

The applicable law enforcement standards include the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and the UN Code of Conduct for Law Enforcement Officials. These set out clearly the limitations that apply to the use of force in situations of law enforcement, most specifically that firearms should only be used if lives are in danger and if no other means are available. Basic Principle 9 states "In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life." Principle 8 states "exceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any departure from these basic principles." Further, Principle 1 of the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions states "Governments shall prohibit by law all extra-legal, arbitrary and summary executions and shall ensure that any such executions are recognized as offences under their criminal laws, and are punishable by appropriate penalties which take into account the seriousness of such offences. Exceptional circumstances including a state of war or threat of war, internal political instability or any other public emergency may not be invoked as a justification of such executions."

10. Amnesty International's approaches to the two governments

In its investigation of human rights violations in Yemen, Amnesty International approached both the Yemeni authorities and the US authorities for information and policy clarification with regard to the concerns detailed in this report. With regard to the Yemeni authorities the organization raised the following issues:

²³ The exception is the case of armed groups fighting against colonial domination, which is not relevant to what the USA deems to be its "war on terror".

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- Amnesty International asked the authorities for their reaction to the widespread claim that the Political Security was working very closely with the FBI in the mass arrests it had carried out and that this cooperation included the FBI involvement in the interrogation of detainees. The authorities, while stating that they were fully cooperating with the US in the fight against “terrorism”, categorically denied the claim of the FBI being directly involved in the interrogation of detainees. However, the Parliamentary Special Commission of inquiry, the only civilian authority to have been granted access to the detainees so far, has claimed that it was told by those held in connection with the attack on the USS Cole that they were questioned by the FBI by questions put to them through Yemeni interrogators.²⁴ According to the Commission findings the US interrogators had warned the detainees of their right not to be questioned except in the presence of a lawyer and apparently offered to provide them with lawyers free of charge. The detainees were apparently forced by Yemeni interrogators to refuse the offer and were questioned by the US interrogators through their Yemeni interrogators, without legal assistance.
- Amnesty International sought access to the detainees, but this was not granted. In addition Amnesty International asked for the lists of detainees, together with details of the reasons for their arrest and the authority which ordered the arrest. Amnesty International was told that this was not possible because the list was constantly changing.
- Amnesty International communicated its concerns about the violations of the rights of those held by the US in Guantánamo Bay and sought clarification of any measures taken by the Yemeni Government to ensure that international human rights and humanitarian law are applied to its nationals detained there. The organization raised this issue in meetings with government officials on two occasions. The first occasion was in February 2002 when a government delegation was preparing to travel to Guantánamo Bay. Amnesty International asked if the terms of reference of the visit included looking into the rights of the detainees, and if so, whether the delegation would include lawyers and doctors. The organisation was told that the delegation was facing difficulties in obtaining permission from the US government and to add lawyers and doctors would complicate the matter even further. The second occasion was at the end of August 2002 after the visit by the Yemeni Government’s delegation to

²⁴ See Report of the Parliamentary Special Commission of Inquiry into detainees held in connection with the attack on the USS Cole and 11 September 2001, P13.

Guantánamo Bay. Amnesty International asked if the delegation had raised the issue of the detainees' rights, and requested a meeting with members of the delegation in Sana'a. Amnesty International received no clarification except that the delegation had taken medicines for the detainees, and no meeting was arranged.

Similarly, Amnesty International approached the US authorities through the US Embassy in Sana'a and its letter, dated 6 June 2003, addressed to the Secretary of State, Colin Powell, seeking clarification, in addition to the training program of Yemen security forces referred to above, of the following issues:

- In the period following 11 September 2001, many governments, including the United States Government, were concerned that the Yemen Political Security did not notify them of the arrest and detention of their nationals who were subsequently deported. The reasons behind the arrests were, according to various embassies in Sana'a, explained by the Political Security as having to do with their "being Muslims" or students of particular Islamic schools. In light of this fate befalling Yemeni citizens, what is the United States position on the Yemenis currently detained by the Political Security under circumstances that breach the rule of law and Yemen's international human rights obligations?
- Credible sources have informed Amnesty International that the widespread arrests and detention without charge or trial conducted by the Political Security in the wake of 11 September 2001 were prompted by United States pressure and that any inquiries as to the reason of such arrests should be directed to the United States Government. What has been the role of the United States Government in these arrests and the current detention of scores of people particularly in Sana'a, and what efforts have been made by the United States Government to ensure that officials in Yemen respect domestic and international human rights norms with regard to due process? What is the United States reaction to the public perception implicating it in the deterioration of the human rights situation in Yemen since 11 September 2001?

In its 11 July 2003 letter of reply to Amnesty International the US State Department stated that "In concert with partners in the war on terrorism, the Government of Yemen detained suspects accused of links to terrorism after the October 2000 attack on the USS Cole and after the September 11, 2001 attacks. Many detainees were subsequently released following investigation and some cases have begun moving towards trial". No further details about such trials were provided. The arrests referred to here are those detailed in the previous sections of this report which

were carried out without judicial supervision and the detainees were invariably subjected to lengthy incommunicado detention. Those who continue to be held are denied access to lawyers and the judiciary to challenge the legality of their detention. As mentioned before, the letter did not specify whether the Political Security has received training and funding assistance from the US. However, the letter added that "The 2002 Country Report on Human Rights Practices for Yemen notes U.S. concern regarding arbitrary arrests, prolonged detention without charges and pre-trial detainees, among other important issues. ...In order to address the remaining shortcomings addressed in the...Report, the U.S. will continue to provide direct assistance to bolster Yemeni judicial reform efforts, democratic development and human rights awareness by security forces". Amnesty International would welcome any initiatives to end the sidelining of the rule of law by restoring to the judiciary its rightful duty of upholding the rule of law.

11. Conclusion

Amnesty international is concerned that the Yemeni Government has sidelined the rule of law and its human rights obligations in the name of "fighting terrorism" and "national security". It has given the green light to the security forces, particularly the Political Security, to act with impunity in total disregard for the law and the role of the judiciary. Mass arbitrary arrest, detention, and deportations have taken place and continue to take place. More than 200 people, many of them arrested nearly two years ago, continue to be detained without charge or trial and denied access to lawyers or the courts to seek justice.

What is more disturbing about these human rights violations is that they are being carried out as a deliberate policy by the government. The rationale for this situation presented to Amnesty International by the authorities in Yemen was that the government had no option but to break its own laws and its international human rights obligations in order to "fight terrorism" and contain the risks of a US military attack against Yemen. Amnesty International believes that sacrificing human rights can never be the solution.

The government of Yemen cannot be exonerated for the human rights violations which have occurred and continue to occur in the country since 11 September 2001. However, Amnesty International believes that the US Government's security policy towards Yemen has also played a significant role in the deterioration of the human rights situation in the country. It has carried out apparent extrajudicial killings in Yemen. It has close security cooperation with Yemen security forces with no apparent consideration for the upholding of universal human rights. It is detaining scores of Yemeni nationals in Guantánamo Bay with total disregard of their

fundamental human rights, and has turned a blind eye to the similar practices carried out by the Yemeni authorities in their own country, as elsewhere.

Amnesty International recognises the duty of any state to bring to justice anyone suspected of recognizable criminal offences, but this should always be in line with international human rights standards. Amnesty International opposes unconditionally arbitrary arrest, indefinite detention without charge or trial or the imprisonment of people because of their political or religious views, their colour, ethnic origin, language or sex or other identity. The organization equally opposes torture, extra-judicial execution, the death penalty, and the forcible expulsion of anyone to any country where they would face serious human rights abuses including torture or execution. In this regard, Amnesty International calls on the Yemeni and US Governments to ensure that their security cooperation is not purchased at the expense of human rights and urge them to take immediate steps to restore the rule of law and the human rights of the detainees held both in Yemen and in Guantánamo Bay. Amnesty International urges the international community to bring pressure on the Governments of Yemen and the US to address the human rights violations documented in this report.

12.0. Recommendations

12.1 To the Government of Yemen

Amnesty International calls on the Yemeni authorities to:

- 12.1.1 Release immediately anyone held solely for the non-violent expression of their conscientiously held beliefs, as such detention is contrary to Article 9(1) of the ICCPR;
- 12.1.2 Ensure that all detainees held by the Political Security on criminal charges are given prompt access to judges in accordance with Article 9(3) of the ICCPR;
- 12.1.3 Ensure that all detainees are given prompt access to lawyers and to the judiciary to challenge the legality of their detention as recognised by Article 9(4) of the ICCPR;
- 12.1.4 Take immediate steps to ensure that arrest and detention are always carried under independent and impartial judicial supervision in order to protect suspects from being arrested and detained solely on the basis of their political, religious or other beliefs, ethnic origin, or other discriminatory basis such as the targeting of journalists for their criticism of the state;
- 12.1.5 Investigate allegations of torture and bring to justice anyone found responsible in accordance with Articles 12 and 13 of the Convention Against Torture.

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Such investigations should be carried out by an independent and impartial body;

- 12.1.6 Halt the expulsion of foreign nationals to countries where they would face serious human rights violations such as torture or execution, and ensure that the rights of refugees and asylum seekers in accordance with, *inter alia*, Yemen's obligations under the 1951 Refugee Convention;
- 12.1.7 Implement recommendations by UN thematic mechanisms, and the Human Rights Committee.

12.2 To the Government of the US

Amnesty International calls on the US Government to:

- 12.2.1 Investigate the apparent extrajudicial killing on 3 November 2002 of six alleged suspected members of *al-Qa'ida*, and bring to justice anyone suspected of having been responsible for these killings;
- 12.2.2 Ensure that human rights standards are strictly adhered to in the cooperation between its security forces and those of Yemen, particularly in the arrest and questioning of detainees, and that such standards are also observed in their training programs for Yemeni forces;
- 12.2.3 Take immediate steps to restore the rights of Yemeni and other nationals held in Guantánamo Bay and urge the Yemeni Government to do likewise for those held under similar circumstances in Yemen.

12.3 To the international community

Amnesty International calls on the international community to:

- 12.3.1 Urge the Governments of Yemen and the US to implement the above recommendations.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EXHIBIT J

SALEH ABDULLA AL-OSHAN <i>et al.</i> ,	:		
	:		
Petitioners/	:		
Plaintiffs,	:		
	:		
v.	:	Civil Action No.:	05-0520 (RMU)
	:		
GEORGE W. BUSH <i>et al.</i> ,	:	Document Nos.:	3, 11
	:		
Respondents/	:		
Defendants	:		

MEMORANDUM ORDER

GRANTING MOTION FOR STAY;
ORDERING 30 DAYS' NOTICE OF ANY INTENT TO MOVE PETITIONERS;
DENYING WITHOUT PREJUDICE MOTION FOR PRELIMINARY INJUNCTION AS MOOT

This matter comes before the court on the respondents' motion to stay proceedings pending related appeals and for continued coordination. On January 19, 2005, Judge Leon issued opinions in *Khalid v. Bush* and *Boumediene v. Bush* granting the government's motion to dismiss petitions for writ of habeas corpus brought by detainees at the United States Naval Station at Guantanamo Bay, Cuba ("GTMO"). *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005). On January 31, 2005, Judge Green issued an opinion in *In re Guantanamo Cases*, granting in part and denying in part the government's motion to dismiss in eleven cases consolidated for the purpose of that motion. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005). The petitioners in the above cases filed notices of appeal, and the D.C. Circuit has yet to issue an opinion. Accordingly, the state of the law in this circuit concerning the habeas rights of GTMO detainees is unclear.

In its motion to stay, the government points to the inefficiency of resolving the merits of the instant habeas petition prior to the D.C. Circuit issuing a ruling that will cover similar matters. Respondents' Mot. to Stay at 1-2. The government states that during the pendency of the stay the government will not "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." *Id.* at 2.

The court is well aware of the petitioners' concern that the government may remove the petitioners from GTMO in the near future, thereby divesting (either as a matter of law or *de facto*) the court of jurisdiction. Such an outcome would abuse the processes now put in place for the purpose of adjudicating matters on their merits. *See Rasul v. Bush*, 124 S.Ct. 2686 (2004). Accordingly, the court cannot allow such a scenario to unfold; the court will "guard against depriving the processes of justice of their suppleness of adaptation to varying conditions." *Landis v. North American Co.*, 299 U.S. 248, 256 (1936). Coextensive with the district court's inherent power to stay proceedings is the court's power to craft a stay that balances the hardships to the parties. *Id.* at 255 (noting concerns regarding the stay causing "even a fair possibility . . . [of] damage to some one else"); *see also Clinton v. Jones*, 520 U.S. 681, 707 (1997) (noting that "burdens [to the parties] are appropriate matters for the District Court to evaluate in its management of the case").

Accordingly, it is this 31st day of March, 2005,

ORDERED that the respondents' motion for stay is **GRANTED**; and it is

FURTHER ORDERED that the respondents, their agents, servants, employees, confederates, and any persons acting in concert or participation with them, or having actual or implicit knowledge of this Order by personal service or otherwise, may not remove the petitioners from GTMO unless this court and counsel for petitioners receive thirty days' advance notice of such removal; and it is

FURTHER ORDERED that the court **ENTERS** by way of reference the protective order previously entered in the other Guantanamo detainee cases. *E.g.*, Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba, *In re Guantanamo Detainee Cases*, No. 02-0299 (D.D.C. Oct. 8, 2004); and it is

FURTHER ORDERED that, in light of this order, the petitioners' motion for preliminary injunction is denied without prejudice as moot.

SO ORDERED.

RICARDO M. URBINA
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EXHIBIT K

_____)	
ADBUL-SALAM GAITHAN)	
MUREEF AL-SHIRY, <u>et al.</u> ,)	
)	
Petitioners,)	
)	
v.)	Civil Action No. 05-0490 (PLF)
)	
GEORGE W. BUSH, <u>et al.</u> ,)	
)	
Respondents.)	
_____)	

ORDER

This matter is before the Court on petitioner's motion for a preliminary injunction enjoining respondents from removing him from the Guantanamo Bay Naval Base and rendering him to the custody of a foreign country without 30 days' advance notice to petitioner's counsel and leave of court. Upon consideration of the arguments of the parties, and in view of the Opinion and Order issued by Judge Henry Kennedy in Abdah v. Bush, Civil No. 04-1254 (D.D.C. Mar. 29, 2005), granting a substantially identical motion for preliminary injunction filed by petitioners in that case and the Memorandum Order issued by Judge Urbina in Al-Oshan, et al. v. Bush, Civil No. 05-0520 (D.D.C. Mar. 31, 2005), ordering the government to give petitioners' counsel 30 days' advance notice before removing petitioners from Guantanamo Bay, it is hereby

ORDERED that the respondents, their agents, servants, employees, confederates, and any persons acting in concert or participation with them, or having actual or implicit knowledge of this Order by personal service or otherwise, may not remove petitioner from the Guantanamo Bay Naval Base unless this court and counsel for petitioners receive thirty days'

advance notice of such removal; and it is

FURTHER ORDERED that in light of this order, [5] petitioners' motion for preliminary injunction is DENIED as moot.

SO ORDERED.

/s/ _____
PAUL L. FRIEDMAN
United States District Judge

DATE: April 1, 2005

EXHIBIT L

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JARALLAH AL-MARRI, et al., :
: Petitioners, :
: v. : Civil Action No. 04-2035 (GK)
: GEORGE W. BUSH, et al., :
: Respondents. :
:

MEMORANDUM OPINION

Petitioner, Jarallah Al-Marri, brings this action against Defendants, seeking release from the Guantanamo Bay Naval Station ("GTMO") in Cuba, where he is being detained.¹ This matter is before the Court on Petitioner's Motion for a Preliminary Injunction and Motion for a Temporary Restraining Order, in which he seeks 30 days' notice before any transfer from GTMO. Upon consideration of the Motions, Opposition, Reply, and the entire record herein, and for the reasons stated below, Petitioner's Motion for a Preliminary Injunction is **granted**, and Petitioner's Motion for a Temporary Restraining Order is **denied as moot**.

¹ Technically, there are two Petitioners in this case, one of whom is Jarallah Al-Marri's Next Friend, who obviously is not subject to transfer from Guantanamo. All references herein will be to the one Petitioner.

I. BACKGROUND

A. Procedural History

Petitioner, a citizen of Qatar, has been detained at GTMO for more than three years.² On November 10, 2004, he filed a Petition for Writ of Habeas Corpus. He is one of many GTMO detainees who have filed such petitions in the United States District Court for the District of Columbia since the Supreme Court held that "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." Rasul v. Bush, 124 S. Ct. 2686, 2699 (2004).

On November 30, 2004, the Court transferred this case to Judge Joyce Hens Green for coordination and management, as reflected in the September 15, 2004, Resolution of the Executive Session. On December 28, 2004, Respondents filed a Motion to Dismiss, which became ripe on January 21, 2005.

On January 19, 2005, Judge Richard Leon granted the Government's Motion to Dismiss the detainees' Petition for Writ of Habeas Corpus in Khalid v. Bush, 355 F. Supp. 2d 311 (D.D.C. 2005). On January 31, 2005, Judge Green granted in part and denied in part the Government's Motion to Dismiss in eleven consolidated cases.

² Petitioner's counsel has very limited knowledge of Petitioner's precise circumstances. Counsel has met with Petitioner, but only very briefly and before actual representation began, when counsel was visiting other clients at GTMO. Transcript of Motions Hearing ("Tr.") at 12 (March 30, 2005). Counsel is scheduled to meet with his client in the very near future. Id.

In re Guantanamo Cases, 355 F. Supp. 2d 443 (D.D.C. 2005).³ The cases before Judges Leon and Green have been fully briefed in the United States Court of Appeals for the District of Columbia and are under submission.

_____ On February 3, 2005, Judge Green granted a stay in the eleven cases to which her January 31, 2005, Opinion and Order applied. On March 8, 2005, this Court stayed the instant case until the Court of Appeals resolves the appeals in Khalid and In Re Guantanamo Cases.⁴

B. Transfers from GTMO

Approximately 540 foreign nationals currently are being held at GTMO. Decl. of Matthew C. Waxman ¶ 2 ("Waxman Declaration").⁵ The Department of Defense ("DOD") states it is conducting a review of each detainee's case, at least annually, to determine whether continued detention is warranted. Id. at ¶ 3. Since the Government began detaining individuals at GTMO, the DOD has transferred 211 detainees to other countries. Id. at ¶ 4.

³ Judge Green's Memorandum Opinion and Order did not apply to eight consolidated cases, including the instant case. In re Guantanamo Cases, 355 F. Supp. 2d at 452 n.15.

⁴ The stay issued in this case does not preclude the Court from considering the merits of the instant Motion. The stay was entered to preserve the status quo until resolution of issues on appeal in similar cases. The instant Motion does not require the Court to lift the stay or to adjudicate the case on the merits; rather, it seeks emergency relief to prevent Petitioner's habeas claims from being extinguished and to preserve the status quo. Abdah v. Bush, No. 04-CV-1254, slip op. at 4 (D.D.C. March 29, 2005).

⁵ Waxman is the Deputy Assistant Secretary of Defense for Detainee Affairs. Id. at ¶ 1.

Detainees are subject to two types of transfer: (1) transfer to the custody of another country, with the understanding that they will be released, Tr. at 22-23; and (2) transfer to the custody of another country with the understanding that the country's government has "an independent law enforcement interest" in them and that they likely will face continued detention and processing by that country's judicial system. Id. at 24. In each case, the United States loses all control of the detainees once they are transferred to another country. Waxman Decl. at ¶ 5.

Of the 211 detainees who have been transferred, 146 have been transferred with the understanding that they would be released. Id. at ¶ 7. The Government represents that most of those individuals actually have been released, Tr. at 29, but it cannot provide precise numbers. Id.

Sixty-five detainees have been transferred to the control of other countries for detention. Waxman Decl. at ¶ 7. Of that group, 29 were transferred to Pakistan; 9 to the United Kingdom; 7 to Russia; 5 to Morocco; 6 to France; 4 to Saudi Arabia; and 1 each to Australia, Denmark, Kuwait, Spain, and Sweden. Id.

When transfers for detention are being considered, DOD coordinates with various other Government agencies, including the Department of State ("DOS"). Id. ¶ 6. The Government states that, as a matter of policy, it does not "repatriate or transfer individuals to other countries where it believes it is more likely than not that they will be tortured." Id.

The Government claims that it ensures compliance with this policy by obtaining "assurances" from officials within the foreign government. The process for obtaining such assurances "involves a frank dialogue, discussion, [and] communication with officials of the other government." Tr. at 32. The Government evaluates the adequacy of the assurances by considering "the identity, position, or other information concerning the official relaying the assurances," Decl. of Pierre-Richard Prosper at ¶ 8 ("Prosper Declaration")⁶; political or legal developments in the country that would provide context for the assurances, *id.*; and U.S. relations with the country. *Id.* Senior Government officials ultimately make the final decision on whether to transfer a detainee. Waxman Decl. at ¶ 7. The Government's papers do not indicate which DOD official has this responsibility.

In recent months, a number of newspaper articles about the transfer and treatment of detainees have been published. Petitioner has submitted as exhibits articles quoting current and former employees of the United States government who have been involved in transferring detainees to other countries, including countries that practice torture. See, e.g., Petr.'s Ex. E (Dana Priest, Jet Is an Open Secret in Terror War, Wash. Post, Dec. 27, 2004, at A1). In addition, Petitioner has submitted articles quoting by name former Guantanamo detainees who allege that they

⁶ Prosper is the Ambassador-at-Large for War Crimes Issues and has supervised the operation of the DOS Office of War Crimes Issues. *Id.* at ¶ 1.

have been moved by the United States government to countries where they have been tortured. See, e.g. Petr.'s Ex. B (Douglas Jehl and David Johnson, Rule Change Lets C.I.A. Freely Send Suspects Abroad, N.Y. Times, Mar. 6, 2005, at A1).

On March 11, 2005, an article in The New York Times reported that DOD plans to transfer "hundreds of suspected terrorists to prisons in Saudi Arabia, Afghanistan, and Yemen." Douglas Jehl, Pentagon Seeks to Shift Inmates from Cuba Base, N.Y. Times, Mar. 11, 2005, at A1.

In response to this article, several petitioners, including the Petitioner in the instant case, filed motions for temporary restraining orders and preliminary injunctions. On March 12, 2005, Judge Rosemary Collyer granted a request for a temporary restraining order in Abdah v. Bush, No. 04-CV-1254 (D.D.C. March 12, 2005) (order granting temporary restraining order) and denied a similar request in John Does 1-570 v. Bush, No. 05-CV-313 (March 12, 2005) (order denying request for temporary restraining order). On March 29, 2005, Judge Henry H. Kennedy granted a Preliminary Injunction in Abdah.

After the Motions were filed in the instant case, the Government represented to this Court that Petitioner was not scheduled for transfer within the next several weeks. In addition, counsel agreed to a combined hearing on the Motion for Temporary Restraining Order and Motion for Preliminary Injunction. On March 17, 2005, based on those representations, the Court scheduled the hearing on both Motions for March 30, 2005.

II. STANDARD OF REVIEW

In considering Petitioner's request for a preliminary injunction, the Court must consider four factors: (1) whether Petitioner would suffer irreparable injury if an injunction were not granted; (2) whether Petitioner has a substantial likelihood of success on the merits; (3) whether an injunction would substantially injure other interested parties; and (4) whether the grant of an injunction would further the public interest. Al-Fayed v. CIA, 254 F.3d 300, 303 (D.C. Cir. 2001).⁷ "These factors interrelate on a sliding scale and must be balanced against each other." Serono Labs, Inc. v. Shalala, 158 F.3d 1313, 1318 (D.C. Cir. 1998). "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).

When the balance of hardships tips decidedly toward the movant, it will "ordinarily be enough that the [movant] has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation.'" Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 844 (D.C. Cir. 1977) (quoting Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d

⁷ The same factors apply when considering a request for a temporary restraining order. Al-Fayed, 254 F.3d at 303, n.2. However, since the Court has granted the Motion for Preliminary Injunction, it is not necessary to apply these factors to his Motion for Temporary Restraining Order.

738, 740 (2d Cir. 1953)). "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." Id. at 844.

III. ANALYSIS

A. Harm to Petitioner

Petitioner argues that he will suffer irreparable harm if transferred to the custody of another country that practices torture or other inhumane treatment of prisoners. Respondents argue that there is no potential harm to Petitioner, because there is no credible evidence that detainees are being transferred to countries that practice torture; instead, any transfers will be largely for purposes of release.⁸

Irreparable harm to the moving party is "the basis of injunctive relief in the federal courts." CityFed Fin. Corp., 58 F.3d at 747 (quoting Sampson v. Murray, 415 U.S. 61, 88 (1974)). To obtain preliminary injunctive relief, Petitioner must show that

⁸ The Government also argues that transferring Petitioner from United States custody provides him with the very relief he seeks. Tr. at 40. That argument is overly simplistic, however. Petitioner ultimately seeks total freedom from all custody, not just United States custody. He can only obtain such relief in this litigation if the Court determines that his underlying detention was unconstitutional or illegal. Furthermore, a determination by a United States court that Petitioner is not an enemy combatant might carry significant weight in his home country, thereby facilitating release from custody if he was transferred for continued detention. Finally, on the most human level, proud people have a strong interest in clearing their names from association with acts of violence and terrorism.

the threatened injury is not merely "remote and speculative." Milk Indus. Found. v. Glickman, 949 F. Supp. 882, 897 (D.D.C. 1996).

In this case, there are two obvious and substantial threats to Petitioner. First, he faces the possibility of transfer to a country where he might be tortured or indefinitely confined, which undeniably would constitute irreparable harm. While the Government presents declarations that attempt to mitigate these concerns, they neither refute Petitioner's claims nor render them frivolous.⁹ Indeed, the Government admits that 65 of the 211 detainees transferred to date have been transferred for detention, not release. Several of the 65 have been transferred to countries that our own State Department has acknowledged torture prisoners, including Pakistan, Saudi Arabia, and Morocco. See Country Reports on Human Rights Practices -- 2004, available at <http://www.state.gov/g/drl/rls/hrrpt/2004>. Finally, the Government was unable to provide any details about the type or form of "assurances" given, the scope of the monitoring that takes place after transfer, or the consequences of noncompliance.¹⁰ Tr. at 32-33. In short, the threatened injury is not merely remote and speculative; it is a serious potential threat.

⁹ The Court notes that the Government's affidavits do not address the Central Intelligence Agency's involvement in any transfer or "rendition" programs.

¹⁰ Notably, the Government was also unaware of several other important facts, such as the availability of extradition treaties with Qatar or Saudi Arabia, or the consequences if a detainee's home country refuses to accept him.

Second, Petitioner faces the threat of irreparable harm based on the potential elimination of his habeas claims. It is unclear at this point whether transferring Petitioner would strip this Court of jurisdiction. See Abdah v. Bush, No. 04-CV-1254, Slip op. at 7 (D.D.C. March 29, 2005) (transfer to another country "would effectively extinguish [Petitioner's] habeas claim[] by fiat"); but see Abu Ali v. Ashcroft, 350 F. Supp. 2d 28, 54 (D.D.C. 2004) (holding that an individual detained in Saudi Arabia could survive a motion to dismiss his habeas claim based on the theory of constructive custody). However, given the danger that, upon transfer, the Court could lose jurisdiction to adjudicate Petitioner's claims, it follows that such a transfer could obviate Petitioner's right to "test the legitimacy of [his] executive detention." Lee v. Reno, 15 F. Supp. 2d 26, 32 (D.D.C. 1998). Since such a turn of events would certainly constitute a threat of irreparable harm, an order preserving the status quo in this case is appropriate.¹¹

Both threats are imminent. While the Court certainly has relied upon the Government's representations that Petitioner will

¹¹ The Court has the authority to issue such an injunction pursuant to the All Writs Act, 28 U.S.C. § 1651(a), which "empowers a district court to issue injunctions to protect its jurisdiction." SEC v. Vison Communications, Inc., 74 F.3d 287, 291 (D.C. Cir. 1996); see also Abdah v. Bush, No. 04-CV-1254, slip op. at 7 (March 12, 2004); Abu Ali, 350 F. Supp. 2d at 54 (quoting Alabama Great S. R. Co. v. Thompson, 200 U.S. 206, 218 (1906)) ("It is well-established that 'the federal courts may and should take such action as will defeat attempts to wrongfully deprive parties entitled to sue in the Federal courts for the protection of their rights in those tribunals.'").

not be transferred in the next several weeks, the Government is clearly maintaining its right to transfer him at any time after the Court rules upon the instant Motion. Thus, the threats are not distant or speculative, and transfer could occur in the near future.

B. Likelihood of Success on the Merits

Petitioner contends that, given Judge Green's Opinion in In re Guantanamo Cases, he has a substantial likelihood of success on the merits of his habeas claim. The Government responds that Petitioner's claim would be barred because the treaties under which he seeks review are non-self-executing, and because the review sought would encroach upon the foreign policy authority of the executive.

To justify granting a preliminary injunction, Petitioner need not show "a mathematical probability of success." Washington Metro. Area Transit Comm'n, 559 F.2d at 844. Rather, "it will ordinarily be enough" that the questions raised are so "serious, substantial, difficult and doubtful, as to make them a fair ground for litigation." Id. (quoting Hamilton Watch Co., 206 F.2d at 740).

The exact chances of success in this case are extremely difficult to assess. It is clear, however, that, at a minimum, Petitioner has raised "fair ground[s] for litigation." Washington Metro. Area Transit Comm'n, 559 F.2d at 844. The issues raised in these motions are sensitive and involve complex constitutional questions. Indeed, there are areas of disagreement even among the

judges on this Bench about the legal issues raised in these Petitions. Like the issues in Hamdi v. Rumsfeld, Padilla v. Rumsfeld, and Rasul, there is a strong probability that they ultimately will be resolved by the Supreme Court.

For example, there is disagreement about whether the detainees have any constitutional rights at all. See Khalid, 355 F. Supp. 2d 311 (holding that Guantanamo detainees have no constitutional rights); but see In re Guantanamo Cases, 355 F. Supp. 2d 311 (holding that Guantanamo detainees have some constitutional rights). There is also disagreement over whether the Court will lose jurisdiction over the cases if Petitioner is transferred to another country.¹² See Abdah v. Bush, No. 04-CV-1254, slip op. at 7 (D.D.C. March 29, 2005); but see Abu Ali v. Ashcroft, 350 F. Supp. 2d at 54. And, there is disagreement about whether the Geneva Conventions are self-executing. See Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 164 (D.D.C. 2004).

In short, even though the mathematical probability of success is impossible to assess, there can be no doubt that the questions raised here are so "serious, substantial, difficult, and doubtful,"

¹² The Government also argues that the Supreme Court in Rasul failed to protect its jurisdiction over detainees that were transferred. Rasul, 124 S.Ct. at 2690 n.1 (noting that two petitioners had been "released from custody" to the United Kingdom). However, the issue of transfer was not before the Court, and the Rasul petitioners were released to the United Kingdom, not a country known to torture its prisoners. See Country Reports on Human Rights Practices: United Kingdom, available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41716.htm> ("[t]he [British] Government generally respected the human rights of its citizens").

as to make them a "fair ground for litigation." Washington Metro. Area Transit Comm'n, 559 F.2d at 844.

C. Harm to Government

Petitioner argues that there is absolutely no harm to the Government if it is required to provide the Court and Petitioner's counsel with 30 days' notice before transferring him to another country. The Government contends, however, that there is great potential harm to its ability to conduct negotiations with foreign governments regarding the transfer and subsequent release of GTMO detainees, because such negotiations are often conducted in secret and divulging their details could seriously impair their success.

The Court fails to see any injury whatsoever that the Government would suffer from granting the requested preliminary injunction. Petitioner requests only 30 days' notice of transfer -- a narrow and discrete request that would impose no burden on the Government. Beyond "vague premonitions" that such relief would harm the executive's ability to conduct foreign policy, there is no concrete evidence that such notice actually will intrude upon executive authority. Abdah, slip op. at 10 (D.D.C. March 29, 2005). For example, granting Petitioner's request for 30 days' notice of transfer would not require the Court to second-guess foreign policy decisions of the executive, would not require the Government to divulge information relating to its negotiations with

foreign governments, and would not prevent the Government from speaking with one voice.¹³

In weighing the respective hardships imposed upon the parties, the balance clearly tilts in favor of Petitioner. The requested relief does not constitute even a minimal burden on the Government; at most, it would require the Government to file a few pieces of paper. Such a minimal consequence does not outweigh the imminent threats of indefinite detention, potential torture, and the elimination of Petitioner's claims before this Court.

D. Public Interest

Petitioner argues that the public has a strong interest in protecting the constitutional rights of detainees. The Government responds that the requested relief would be contrary to the public interest, because it could frustrate the Government's ability to conduct foreign policy, which ultimately could harm the nation by impairing the effectiveness of the war on terrorism.

The Government's argument is unpersuasive, however, for it "simply conflate[s] the public interest with [the Government's] own position," Abdah, 04-CV-1254, slip op. at 11 (March 29, 2005), and asks the Court to accept its predictions of harm without challenge. This the Court is not prepared to do. It is obvious beyond words that there is a strong public interest in the zealous pursuit of those who wish to commit acts of terrorism against the United

¹³ Such issues could arise if Petitioner ultimately is scheduled for transfer and actually requests additional relief. However, speculation about future requests is no justification for denying the narrow relief requested at this point.

States and its citizens. However, the narrow relief sought in this case will not compromise that effort in any way.

In contrast, the public interest undeniably is served by ensuring that Petitioner's constitutional rights can be adjudicated in an appropriate manner. G & V Lounge, 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"). Retaining jurisdiction over this case is essential to protecting that public interest. Thus, the public interest clearly favors entering the preliminary injunction sought by Petitioner.

V. CONCLUSION

Petitioner has requested 30 days' notice of any transfer from GTMO, a concrete, narrow, and minimally burdensome remedy. Based on the Court's analysis of the four relevant factors set forth in the applicable caselaw, it is clear that Petitioner has satisfied his burden. He is faced with an imminent threat of serious harm, which far outweighs any conceivable burden that the Government might face. Furthermore, while it is not possible to demonstrate a "mathematical probability of success," the questions are "serious, substantial, difficult and doubtful." Washington Metro. Area Transit Comm'n, 559 F.2d at 844. Certainly, the Government cannot argue that its success on the merits is a foregone conclusion. Finally, the public interest in granting Petitioner the requested relief is strong. Therefore, for the foregoing

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT COURT OF COLUMBIA**

AMER MOHAMMON, et al.
Detainee,

SHARAF AL SANANI,
Petitioner, and
Sami Muhyideen,
as Next Friend of
Mr. Sharaf Al Sanani;

FAHD ABU HAFSA,
Petitioner, and
Jamal Kiyemba,
as Next Friend of
Mr. Fahd Abu Hafsa;

OMAR RAMAH,
Petitioner, and
Omar Deghayes,
as Next Friend of
Mr. Omar Ramah,

Petitioners.

v.

GEORGE W. BUSH, et al.,

Respondents.

Civil Action No. 05-2386 (RBW)

**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 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 *Mohammon, et al., v. Bush et al.*, Civ Action No. 05-2386 (RBW).

(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 *Mohammon, et al., v. Bush et al.*, Civ Action No. 05-2386 (RBW), and I agree to comply with the provisions thereof.

/s/ Leslie J. Abrams
Leslie J. Abrams

January 5, 2007
Date

ACKNOWLEDGMENT

The undersigned hereby acknowledges that she has read the Protective Order entered in the United States District Court for the District of Columbia in the case captioned *Mohammon, et al., v. Bush et al.*, Civ Action No. 05-2386 (RBW), 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 her other than as provided by the Protective Order. The undersigned acknowledges that 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 sanction by the Court.

DATED: January 5, 2007

BY: Leslie J. Abrams
(type or print name)

SIGNED: /s/ Leslie J. Abrams

CERTIFICATE OF SERVICE

I, Leslie J. Abrams, state that on January 5, 2007, I electronically filed the foregoing MEMORANDUM OF UNDERSTANDING REGARDING ACCESS TO CLASSIFIED NATIONAL SECURITY INFORMATION with the Clerk of the Court using the ECF system, which will send notification of such filings to counsel of record who are registered ECF users.

DATED: January 5, 2007

BY: Leslie J. Abrams
(type or print name)

SIGNED: /s/ Leslie J. Abrams

Approved for Public Filing by the CSO

The need for counsel to have some understanding of the basis of Petitioner's detention is particularly acute because, according to an e-mail recently received from the Office for the Administrative Review of the Detention of Enemy Combatants ("OARDEC"), information pertinent to Petitioner's 2007 Administrative Review Board ("ARB") proceeding must be received no later than February 23, 2007. *See* Exhibit C. Accordingly, Respondents should be ordered to produce immediately, but in any event no later than February 9, 2007, all information pertaining to Petitioner, including all records of Petitioner's proceeding(s) before the Combat Status Review Tribunal ("CSRT"), all records of Petitioner's proceedings before any prior ARB, and all decisions or recommendations made by the CSRT or the ARB about him.¹

Such a production would not prejudice, influence, or bear upon the jurisdictional questions pending before the Court of Appeals. To the contrary, as found by numerous judges of this Court, the information requested is essential to the representation of Petitioner in any forum. The burden on Respondents is minimal at best.

Accordingly, Petitioner requests that the Court enter an Order requiring Respondents to produce a factual return to his habeas petition, including his CSRT and ARB information, as quickly as possible but in no event later than February 9, 2007 (two weeks prior to the February

¹ In response to the Supreme Court's decisions in *Rasul v. Bush*, 542 U.S. 466 (2004), and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the Department of Defense created the CSRT to review the classification of Guantanamo detainees as so-called "enemy combatants." *See* Denbeaux, et al., *No-Hearing Hearings, CSRT: The Modern Habeas Corpus? An Analysis of the Proceedings of the Government's Combatant Status Review Tribunals at Guantanamo* ("Seton Hall Report on CSRTs"), at 4, available at http://law.shu.edu/news/final_no_hearing_hearings_report.pdf. CSRT procedures provide that each detainee found to be an enemy combatant must be reviewed annually by the ARB. *Id.* at 35 n.30. The purpose of the ARB is to make a recommendation as to whether an enemy combatant should continue to be detained, either because he is a threat to the United States or its allies or because his continued detention is needed for intelligence or other law enforcement purposes. *See* Revised Implementation of Administrative Review Board Procedures for Enemy Combatants at U.S. Naval Base at Guantanamo Bay, Cuba, at 2, available at <http://www.defenselink.mil/news/Sep2004/d20040914adminreview.pdf>.

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23 deadline for Petitioner's 2007 ARB submission). Petitioner further requests that the Court enter an Order granting this emergency motion by February 2, thereby providing Respondents with seven calendar days to produce the return. For the Court's review and consideration, a proposed Order is attached.

STATEMENT OF FACTS

I. THE PAUCITY OF PUBLICLY-AVAILABLE INFORMATION JUSTIFYING PETITIONER'S FIVE-YEAR DETENTION

Even though these and other detainee cases have been pending for years, virtually no information has been disclosed to justify the detention of the hundreds of men who remain at Guantánamo. The limited information that the government has been ordered to produce so far confirms that most of the detainees – a full 55% of them, according to a recent comprehensive study – are not even alleged to have taken up arms or engaged in a single hostile act against the United States or its allies. *See* Denbeaux, et al., *Report on Guantanamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data* ("Seton Hall Report on Detainees"), at 6-7, available at http://law.shu.edu/news/guantanamo_report_final_2_08_06.pdf.

Petitioner is no exception. As with the summaries of evidence against most of his fellow detainees, the Combat Status Review Tribunal summary of the evidence against Petitioner *omits entirely* any entry under paragraph 3(b), the paragraph in which a detainee's purported "hostile acts" against the United States or its coalition partners should be specified. *See* Exhibit A (available at page 265 of <http://www.dod.mil/pubs/foi/detainees/index.html>); Seton Hall Report on Detainees, at 6. Petitioner is not even alleged to have been a "Fighter for" or "Member of" al Qaeda, the Taliban, or any other terrorist organization. *See* Seton Hall Report on Detainees, at 9 (noting that only 38% of the detainees are alleged to have been "Fighters for" or "Members of" a terrorist group, whereas a full 60% of the detainees are alleged merely to have been "associated

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with" a terrorist organization). Instead, as with a full 60% of the detainees, Petitioner is alleged merely to have been "associated with" a terrorist organization (al Qaeda), an incredibly broad designation capable of reaching the most attenuated of relationships. *See id.*

Regarding Petitioner's alleged "association with" al Qaeda, the only specific allegations about that are that he

- (a) "left Sana'a, Yemem [sic], and traveled to Kandahar, Afghanistan" in June of 2001;
- (b) spent two months in Afghanistan for "religious training";
- (c) traveled to Kabul, Afghanistan and Jalalabad, Afghanistan in September of 2001; and
- (d) "fled Jalalabad" in December of 2001, where he allegedly "surrendered to the Pakastani [sic] Army."

See Exhibit A (page 265 of <http://www.dod.mil/pubs/foi/detainees/index.html>). In other words, Petitioner is alleged to have been in Afghanistan for several months in 2001;² to have "fled" the country in December of 2001; and to have "surrendered" to Pakistani authorities then. Not a single criminal act is alleged, much less any hostile act directed at the United States or its allies.

The "Summarized Detainee Statement" for ISN 170 (copy attached as Exhibit B), which purportedly reflects the statements made on Petitioner's behalf at the CSRT proceeding (counsel has not been able to confirm the validity of the Summarized Detainee Statement), also is publicly available, at pages 14-15 of http://www.dod.mil/pubs/foi/detainees/csrt/Set_39_2629-2646.pdf. According to this document, Petitioner expressly asserted that he is "not associated with" al Qaeda and responded to every one of the "allegations" against him, acknowledging that he

² As the United States Supreme Court recognized in *Hamdi v. Rumsfeld*, a party's mere presence in a country in which combat operations are taking place is an insufficient basis for concluding that a party was "part of or supporting forces hostile to the United States or coalition partners" and "engaged in an armed conflict against the United States," as required under the judicially-reviewed definition of "enemy combatant." 542 U.S. 507, 526-527 (2004).

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- (a) went to Kandahar for "religious purposes to visit";
- (b) spent two months in Kandahar "in one place";
- (c) went to "Kabul" for the purpose of observing "how they did Islamic practices in different places in Afghanistan," only to leave and go to Jalalabad because "the Afghans were trying to kill Arabs at the market" in Kabul; and
- (d) traveled with a group to Pakistan, where he "surrendered to the Pakistani forces so they would take me to the Yemeni Embassy in Pakistan."

See Exhibit B, at 1.

Rather than assisting him in getting to the Yemeni Embassy, however, the Pakistani authorities "put me in jail, then transferred me to the Americans." *See id.* The Seton Hall Report on Detainees confirms that capture in Pakistan – where the government disseminated numerous flyers promising significant bounties in exchange for delivering purported al Qaeda and Taliban members – is another recurring Guantánamo theme. *See* Seton Hall Report, at 14-15 (in those instances in which the detainee captor was identified, 66% of detainees were delivered by Pakistani authorities or captured in Pakistan). Petitioner, who is epileptic, would have been a particularly vulnerable target for an opportunistic bounty hunter, because he lost his passport in the course of crossing the mountains into Pakistan. *See* Exhibit B, at 1 (explaining that he had left his passport and the rest of his belonging behind during the difficult trip across the mountains because "I was weak and could no longer carry my bag because it was really heavy").

The Statement ended with the following two sentences:

All the rules in the United States and in the world, the person is innocent until you prove his is guilty not innocent. But, here with Americans, the Detainees are guilty until proven innocent.

Id. Given the absence of any allegations even arguably justifying his detention, Petitioner's claim of "guilty until proven innocent" appears a deplorable but apt characterization of his five-

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year detention at Guantánamo, a detention apparently predicated on nothing more than the unexplained conclusion that Petitioner was somehow "associated with" al Qaeda.

II. THE NEED FOR INFORMATION IN CONNECTION WITH PETITIONER'S UPCOMING 2007 ADMINISTRATIVE REVIEW BOARD PROCEEDING

On December 22, 2006 (the Friday before the Christmas holiday), counsel for Petitioner received an e-mail from LTC David N. Cooper of OARDEC, notifying detainees' counsel of the "opportunity to provide input regarding [Petitioner] for review and consideration by the 2007 Administrative Review Boards." *See* Exhibit C. The message further stated that any submission must be made "no later than February 23, 2007." *Id.* The message also included a "Fact Sheet for Habeas Counsel Regarding Administrative Review Boards (ARBs)" (copy attached as Exhibit D), which described the purpose of the ARB procedure:

The ARBs are an administrative review process to annually assess whether there is reason to believe that an enemy combatant might pose a continuing threat to the United States or its allies in the ongoing conflict against al Qaeda and its affiliates and supporters, and whether there are other factors warranting the enemy combatant's continued detention.

See Exhibit D, at 1. This official guidelines for the ARBs similarly describe their purpose as determining whether to recommend that an enemy combatant continue to be detained, either because he is a threat to the United States or its allies or because his continued detention is needed for intelligence or other law enforcement purposes. *See* Revised Implementation of ARB Procedures for Enemy Combatants at U.S. Naval Base at Guantanamo Bay, Cuba, at 2, *available at* <http://www.defenselink.mil/news/Sep2004/d20040914adminreview.pdf>.

The Fact Sheet confirms that Respondents will not allow counsel to appear at the ARB hearings, that the February 23 submission is counsel's only opportunity to submit information for consideration this year, and that any information received after Petitioner's ARB occurs "will be retained for consideration at your client's next annual review." Exhibit D, at 1. Thus, unless

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counsel is able to review the factual return for Petitioner in advance of the February 23 deadline, then counsel's ability to respond to the purported evidence against Petition and "provide input regarding [Petitioner] for review and consideration by the 2007 Administrative Review Boards" (borrowing the words of LTC David N. Cooper) will be lost. At a minimum, counsel needs the factual return by February 9, two weeks before the February 23 deadline.

Despite the pressing need for this basic information, counsel for Respondents has refused Petitioner's counsel's request for production of a factual return and for prior ARB documents. See E-Mail from Andrew Warden to Vinay Jolly (January 8, 2007), attached hereto as Exhibit E. Accordingly, Petitioner has no choice but to seek emergency relief from this Court.

ARGUMENT

Pursuant to 28 U.S.C. § 2243 (2006), "[a] court ... entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto." The order to show cause "*shall be returned within three days* unless for good cause additional time, not exceeding twenty days, is allowed. The person to whom the . . . order is directed shall make a return certifying the true cause of the detention." *Id.* (emphasis added).

More than one year has passed since the habeas petition was filed. During this time, Respondents have failed to provide any information regarding the purported basis for holding Petitioner at Guantanamo. Accordingly, the Court should order Respondents to satisfy their legal obligation to produce a factual return detailing the basis of Petitioner's confinement on or before February 9, 2007, so that the information can be reviewed by counsel in advance of the government-imposed February 23, 2007 ARB submission deadline.

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I. RESPONDENTS SHOULD BE ORDERED TO PRODUCE PETITIONER'S FACTUAL RETURN DESPITE RESPONDENTS' JURISDICTIONAL OBJECTIONS

Numerous judges of this Court have ordered Respondents to produce factual returns, notwithstanding the enactment of the Detainee Treatment Act of 2005 ("DTA"), Pub. L. No. 109-148, § 1005(e), 119 Stat. 2680, 2742, which Respondents have wrongly argued elsewhere prevents the courts from so doing.³ In *Al-Ghizzawi*, No. 05-CV-2378 (JDB), for example, Judge Bates concluded that the DTA could not justify the government's refusal to produce factual returns. In doing so, Judge Bates reasoned that "even if respondents' interpretation of the DTA's exclusive jurisdiction provision is correct ... completion of any ... judicial review [in the D.C. Circuit under the provisions of the DTA] would necessitate that petitioner's counsel have access to the CSRT records." *Al-Ghizzawi* slip op., at 3-4. In that case, Respondents conceded that they "do not anticipate objecting to production of [the] petitioners' CSRT records for review in Court of Appeals' proceedings pursuant to [the DTA]." *Al-Ghizzawi* (dkt no. 22), at 2. Similarly, in *Kahn*, No. 05-CV-1001 (ESH), Judge Huvelle rejected Respondents' jurisdictional objection as "an inadequate justification to further delay the relief sought by petitioner." *See Kahn* slip op., at 2 ("[Factual returns] will obviously be needed regardless of the resolution of the jurisdictional question"); *see also Said*, No. 05-CV-2384 (RWR), slip op. at 4 ("Whatever forum is ultimately held to be the proper one to rule on a pre-DTA habeas petition, it is hardly sensible to withhold

³ *See, e.g., Feghoul v. Bush*, No. 06-CV-618 (RWR), 2006 WL 3096856 (D.D.C. Oct. 31, 2006); *Al-Asadi v. Bush*, No. 05-CV-2197 (HIK) (D.D.C. Oct. 10, 2006); *Amin v. Bush*, No. 05-CV-2336 (PLF) (order requiring factual returns entered by Robertson, J.) (D.D.C. Sept. 18, 2006); *Thabid v. Bush*, No. 05-CV-2398 (ESH) (D.D.C. Aug. 18, 2006); *Alsaaei v. Bush*, No. 05-CV-2369 (RWR) (D.D.C. Aug. 14, 2006); *Amin Ullah v. Bush*, No. 05-CV-1237 (ESH) (D.D.C. Aug. 10, 2006); *Kahn v. Bush*, No. 05-CV-1001 (ESH) (D.D.C. Aug. 10, 2006); *Al-Ghizzawi v. Bush*, No. 05-CV-2378 (JDB) (D.D.C. Aug. 9, 2006); *Zadran v. Bush*, No. 05-CV-2367 (RWR) (D.D.C. July 19, 2006); *Rabbani v. Bush*, No. 05-CV-1607 (RMU) (D.D.C. June 16, 2006); *Said v. Bush*, No. 05-CV-2384 (RWR) (D.D.C. May 23, 2006); *Almerfeddi v. Bush*, No. 05-CV-1645 (PLF) (D.D.C. Mar. 6, 2006)

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what no one disputes petitioners will ultimately be likely to receive."); *Feghoul*, No. 06-CV-618 (RWR), slip op. at 2-3 ("Despite the lack of finality regarding the issues on appeal ... it is hardly sensible to withhold or frustrate something that no one doubts is petitioner's right – a meaningful communication with counsel regarding the factual basis of petitioner's detention.").

In accordance with these other decisions, this Court should grant Petitioner's motion. Even under the review process prescribed by the DTA (which Respondent contends applies here), Petitioner would be entitled to the information contained in the requested factual returns. *See Al-Ghizzawi*, slip op. at 3 ("[T]he outcome sought by petitioners through the present motion would ultimately be achieved regardless of the disposition of the jurisdictional question").⁴

II. RESPONDENTS' REFUSAL TO PROVIDE FACTUAL RETURNS DENIES PETITIONER MEANINGFUL ACCESS TO AND REPRESENTATION BY COUNSEL, PARTICULARLY AS TO THE UPCOMING ARB PROCEEDINGS

Respondents' refusal to produce factual returns severely prejudices Petitioner's ability to meaningfully communicate with counsel. *See Al-Ghizzawi*, slip op. at 3; *Al-Anazi v. Bush*, 370 F. Supp. 2d 188, 200 (D.D.C. 2005) ("[T]he factual returns appear necessary for petitioners' counsel effectively to represent petitioners. ... even initial conversations by counsel with their clients may be very difficult without access to that basic factual information"); *Kahn*, slip op. at

⁴ Similarly, the Military Commissions Act of 2006 ("MCA"), Pub. L. No. 109-366, 120 Stat. 2600, does not preclude the limited form of relief sought in the instant motion. Indeed, two weeks after the MCA was enacted, Judges Roberts and Kollar-Kotelly entered orders directing Respondents to produce factual returns. *See Feghoul v. Bush*, No. 06-CV-618, 2006 WL 3096856 (RWR) (D.D.C. Oct. 31, 2006); *Lal v. Bush*, No. 06-CV-1763 (CKK) (D.D.C. Oct. 29, 2006) (*sua sponte* ordering returns post-MCA); *see also Al-Asadi v. Bush*, No. 05-CV-2197, slip op. (HHK) (D.D.C. Oct. 10, 2006) (ordering factual return over Respondents' objection, *see* dkt. no. 39, at 3 n.1, that the MCA, which had been passed by Congress but not yet signed by the President, divested the court of jurisdiction). In addition, Respondents have produced factual returns post-MCA in compliance with a pre-MCA order directing the submission of such returns. *See Thabid v. Bush*, No. 05-CV-2398 (ESH) (D.D.C.) (dkt. nos. 27, 28), at I n.1 (noting their objection that the MCA divests the district court of jurisdiction over the habeas petition but simultaneously submitting factual returns on October 17, 2006); *see also Amin v. Bush*, No. 05-CV-2336 (PLP) (D.D.C.) (dkt. no. 29) (submitting returns on October 18, 2006).

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2 ("Without access to the information contained within a factual return, petitioner's counsel cannot offer anything approaching effective representation in these proceedings."); *Rabbani*, slip op. at 2-3 ("[P]etitioners' counsel should be able to review the returns now so that they can develop their case and prepare for any consultation with their clients."). This prejudice is particularly grave in the present circumstances given the already-stringent limitations associated with attorney-client communications at Guantanamo. *See Al-Ghizzawi*, slip op. at 3.

Petitioner's counsel seek basic information regarding the legal justification for his detention. Without this information, counsel cannot intelligently interview family members, investigate the facts of this case, or effectively interview, consult with, advise, or otherwise assist Petitioner in connection with any future proceedings (under the DTA or otherwise). In short, and as recognized on numerous other occasions by this Court, the information is vital to the effective representation of Petitioner.

Respondent's non-production of information, if not remedied, will soon have a very tangible and direct impact on Petitioner, because submissions for the 2007 ARB proceeding must be received by the government by February 23, 2007. As noted above, the ARB is a review process conducted annually to determine whether a detainee should be released, transferred, or further detained. It is stating the obvious to say that preparation of a meaningful submission requires an understanding of the evidence presented at Petitioner's CSRT proceeding (to justify his initial detention) as well as the evidence (if any) presented at Petitioner's prior ARB proceedings (to justify his continued detention). Without reviewing this evidence, Petitioner's counsel cannot possibly be expected to develop and prepare responsive materials for submission in connection with Petitioner's 2007 ARB proceeding. Accordingly, Respondents should be ordered to provide a factual return no later than February 9, two weeks before the deadline.

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III. RESPONDENTS SHOULD NOT BE ALLOWED TO RESIST PRODUCTION OF FACTUAL RETURNS ON GROUNDS OF BURDENSOMENESS OR BECAUSE THE RETURNS MAY CONTAIN CLASSIFIED INFORMATION

In other detainee cases, Respondents have objected to the production of factual returns on the grounds that the submission of these returns burdens the government's resources and risks the inadvertent disclosure of classified information. Courts have appropriately rejected these objections. *See, e.g., Rabbani v. Bush*, No. 05-CV-1607 (RMU), at 3 (D.D.C. June 16, 2006).

Respondents have provided factual returns in many other detainee cases, and they have produced thousands of pages of tribunal transcripts to the media as a result of FOIA litigation. If Respondents can make factual returns readily available to the press – and allow members of the press to attend those hearings – they can certainly provide returns to habeas counsel. *See, e.g., Kathleen T. Rhem, Reporters Offered Look Inside Combatant Status Review Tribunals*, Aug. 29, 2004, available at http://www.defenselink.mil/news/Aug2004/n08292004_2004082902.html (describing opportunities for media to observe a CSRT first-hand). In fact, audio recordings of certain detainee hearings were recently broadcast on National Public Radio. *See Jackie Northam, Listening in on Detainee Hearings*, National Public Radio, Dec. 2, 2006, available at <http://www.npr.org/templates/story/story.php?storyid=6520816>; Jackie Northam, *Tapes Provide First Glimpse of Secret Gitmo Panels*, Dec. 2, 2006, National Public Radio, available at <http://www.npr.org/templates/story/story.php?storyId=6514923>.

The information sought is already in Respondents' possession, the CSRT hearings have all been completed, and all Respondents need to do is disclose copies of the returns. *See Said v. Bush*, No. 05-CV-2384 (RWR) (D.D.C.) (dkt. no 10, Ex. A) (Second Declaration of Frank Sweigart, Deputy Director of the Office for the Administrative Review of the Detention of Enemy Combatants at Guantanamo) ¶ 3 ("CSRT proceedings concluded in March 2005."); Update to Annex One of the Second Periodic Report of the United States of America to the

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Committee Against Torture § II.C (Oct. 21, 2005) ("As of March 29, 2005, the CSRT Director had taken final action in all 558 cases."), *available at* <http://www.state.gov/g/drl/rls/55712.htm>.

Respondents are well aware of the basis of Petitioner's confinement and can easily and expeditiously produce the information, as evidenced by their prompt release of tribunal transcripts to the media.

Respondents have had almost five years to interrogate Petitioner, to review the evidence relating to his continued detention, and to evaluate his status as an alleged "enemy combatant." Respondents merely have to photocopy the previously-prepared documents and put them through the routine classification process. This marginal effort does not remotely offset Petitioner's compelling interest in knowing the legal and factual basis of his indefinite detention.

Any purported concern by Respondents about the inadvertent disclosure of classified material is without merit. As recently explained by another judge of this Court, classified materials will only be provided to counsel who have obtained the required security clearances and who are subject to a comprehensive protective order, which "will guard against any inadvertent disclosures." *Rabbani v. Bush*, No. 05-CV-1607, Order, at 3 (RMU) (D.D.C. June 16, 2006). As stated in a related case, "the Government's decision to grant an individual attorney a security clearance amounts to a determination that the attorney can be trusted with information at that level of clearance." *Al Odah v. United States*, 346 F. Supp. 2d 1, 14 (D.D.C. 2004).

Accordingly, Respondents have no meaningful basis for objecting to the production of a complete set of factual returns, including but not limited to the full evidentiary record explaining the basis for Petitioner's initial confinement (such as the CSRT record) and the basis for his continued detention at Guantánamo (such as the records from prior ARB proceedings), as well as any information tending to show that Petitioner is *not* an enemy combatant.

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IV. RESPONDENTS SHOULD BE ORDERED TO PROVIDE THE FACTUAL RETURN IMMEDIATELY, BUT IN ANY EVENT NO LATER THAN FEBRUARY 9, 2007 (TEN BUSINESS DAYS BEFORE THE GOVERNMENT'S FEBRUARY 23, 2007 DEADLINE FOR SUBMISSIONS IN CONNECTION WITH PETITIONER'S 2007 ARB PROCEEDING)

Respondents repeatedly have pointed to the military-run CSRT and ARB procedures as providing a Constitutionally-viable *habeas* alternative. Although Petitioner vigorously disagrees with this contention (because of, *inter alia*, the infirmities discussed in the Seton Hall Report on CSRTs, *see supra* n.1), basic due process mandates that Respondents provide a copy of the evidence against Petitioner so that his counsel can prepare a responsive ARB submission.

The essential requirement of due process is "the right to notice and an opportunity to be heard." *Cleveland Board of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985). Here, as shown by the CSRT Summary of Evidence and the Summarized Detainee Statement, Petitioner has never been given notice of *any* evidence supporting *any* incarceration, much less a five-year detention in Guantánamo. Indeed, and even assuming the truth of the statements in the Summary of Evidence, Respondents have failed to state a claim that Petitioner constitutes an "enemy combatant." Given the Kafkaesque predicament of being detained based on allegations of perfectly legal activities, it is not surprising that Petitioner acknowledged many of the facts alleged but then implored the tribunal for an explanation as to how such acts possibly justified detention. Respondents should be ordered to explain Petitioner's detention to Petitioner, to counsel, and to the Court immediately.

Accordingly, Petitioner requests that the factual return be provided no later than February 9, ten working days before the government's deadline for submissions in connection with Petitioner's 2007 ARB proceeding. Judges in this district routinely have set short deadlines for the production of factual returns. *See, e.g., Hatim v. Bush*, No. 05-CV-1429 (RMU) (D.D.C. Aug. 22, 2005) (ordering production of returns within seven days); *Errachidi v. Bush*, No. 05-

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CV-640 (EGS) (D.D.C. Apr. 21, 2005) (five days); *Abdullah v. Bush*, No. 05-CV-23 (RWR) (D.D.C. Apr. 8, 2005) (eight days); *Said v. Bush*, No. 05-CV-2384 (RWR) (D.D.C. May 26, 2006) (ordering submission of four classified returns within one week); *Errachidi v. Bush*, 05-CV-0640 (D.D.C. Apr. 21, 2005) (factual returns produced five days after docket entry requiring Respondents to show cause); *Abdullah v. Bush*, 05-CV-0023 (D.D.C. Apr. 8, 2005) (requiring factual returns within six days of order). Given Respondents' failure to provide any explanation for Petitioner's five-year detention, and given the extremely abbreviated period for counsel to prepare submissions in connection with the 2007 ARB proceedings, requiring immediate production of a factual return is both reasonable and appropriate.

Consistent with the normal one-week period for Respondents to provide a factual return, Petitioner respectfully requests that this Court enter an Order granting this motion for factual return no later than February 2, 2007, five business days (seven calendar days) before February 9, 2007.

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CONCLUSION

For the foregoing reasons, Petitioner's Motion for Factual Returns should be granted, and Respondents should be ordered to produce a complete factual return no later than February 9, 2007, to be supplemented should the information therein change.

Dated: Atlanta, Georgia
January 19, 2007

Respectfully submitted,

Counsel for Petitioner:

/s/ Vinay J. Jolly

A. Stephens Clay IV (Pursuant to LCvR 83.2(g))
James F. Bogan III (Pursuant to LCvR 83.2(g))
C. Allen Garrett Jr. (Pursuant to LCvR 83.2(g))
Vinay J. Jolly (Pursuant to LCvR 83.2(g))
Leslie J. Abrams (Pursuant to LCvR 83.2(g))
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CERTIFICATE OF SERVICE

This is to certify that I have this day served the foregoing **EMERGENCY MOTION OF PETITIONER SHARAF AL SANANI FOR FACTUAL RETURN** by serving electronically all attorneys of record for each party via the Court's Electronic Case Filing system.

Respectfully submitted,

Counsel for Petitioner:

/s/ Vinay J. Jolly

A. Stephens Clay IV (Pursuant to LCvR 83.2(g))

James F. Bogan III (Pursuant to LCvR 83.2(g))

C. Allen Garrett Jr. (Pursuant to LCvR 83.2(g))

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IT IS FURTHER ORDERED that Respondents shall promptly supplement their factual return should any of the information above be supplemented or otherwise change.

Dated: _____, 2007

UNITED STATES DISTRICT JUDGE
REGGIE B. WALTON

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Combatant Status Review Board

TO: Personal Representative

FROM: OIC, CSRT (06 October 2004)

Subject: Summary of Evidence for Combatant Status Review Tribunal [(b)(6)]
[(b)(6)]

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 and supported forces engaged in hostilities against the United States or its coalition partners.
 - a. The detainee is associated with al Qaida.
 1. In June 2001, detainee left Sana'a, Yemem, and traveled to Kandahar, Afghanistan with the help of an Arabic speaking guide.
 2. Detainee spent two months in various Arab houses in Afghanistan for religious training.
 3. Detainee in September 2001 went to Kabul, Afghanistan for two weeks and then traveled to Jalalabad, Afghanistan.
 4. In late December 2001, detainee and a group of Arabs fled Jalalabad with the help of an Afghan guide, reaching a small Pakastani village where he surrendered to the Pakastani Army.
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.

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Exhibit RI

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Summarized Detainee Statement

The Detainee elected not to attend the Tribunal proceeding, but requested the Personal Representative make a statement on his behalf. The Personal Representative made the following statement:

- Regarding 3.a, I am not associated with al Qaida.
- Paragraph 3.a.1, I went there for religious purposes to visit because it was an Islamic country. I went before 11 September 2001. I was new so I went to two to three places where there were Arab people.
- Paragraph 3.a.2, true. In Kandahar, I spent two months in one place. I did not go there for religious training; I went there for a visit.
- Paragraph 3.a.3, yes, I went to Kabul but I don't remember the month. I spent two weeks in Kabul. I wanted to visit different places while I was in Afghanistan. I wanted to see how they did Islamic practices in different places in Afghanistan. I left Kabul because the Afghans were trying to kill Arabs at the market. I got scared and left to go to Jalalabad. Then, I wanted to go to Yemen. There was an Afghani person who spoke some Arabic and he had a taxi. He took me from Kabul to Jalalabad.
- Paragraph 3.a.4, there was a group of people who told me I couldn't travel by myself. I went with those people and we walked for days. We reached the Pakistani village and I surrendered to the Pakistani forces so they would take me to the Yemen Embassy in Pakistan. But, they put me in jail, then transferred me to the Americans. I did have a passport, but I had to leave it behind during my travels in the snow and the mountains. I thought I was dying. I was weak and could no longer carry my bag because it was really heavy. All of my belongings, including my passport, were in the bag.
- All the rules in the United States and in the world, the person is innocent until you prove he is guilty not innocent. But, here with Americans, the Detainees are guilty until proven innocent.

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Enclosure (3)
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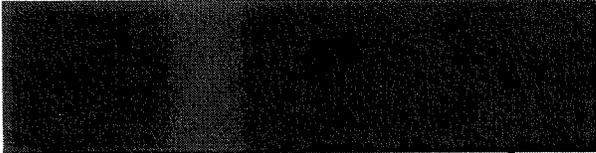
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002642

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AUTHENTICATION

I certify the material contained in this transcript is a true and accurate summary of the testimony given during the proceedings.



Colonel, U.S. Marine Corps
Tribunal President

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Enclosure (3)
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002643

From: Cooper, David N LtCol OARDEC, CYTW [mailto:david.n.cooper@navy.mil]
Sent: Friday, December 22, 2006 10:11 AM
To: [redacted]

Cc: Cooper, David N LtCol OARDEC, CYTW
Subject: COUNSEL SUBMISSION FOR ARB 3
Importance: High

Ladies and Gentlemen,

The Office for the Administrative Review of the Detention of Enemy Combatants (OARDEC) informs you at this time of your opportunity to provide input regarding your client for review and consideration by the 2007 Administrative Review Boards (ARBs).

If you submitted matters to the ARB process last year on behalf of your client, those matters are already part of your client's records and will be considered by the 2007 ARB. There is no need for you to resubmit the same or similar documents.

If you have new information that will aid the ARBs in assessing the threat your client may continue to pose to the United States or its allies, you can submit that information through the process described in the attached fact sheet.

Please note, The Privilege Review Team must receive your submission no later than **Friday, February 23, 2007**. OARDEC cannot guarantee that materials received after that date will be included in the ARB hearings.

Please note also that the OARDEC Legal Advisor will acknowledge receipt of your submission, but will not be able to answer any substantive or procedural questions about your client's ARB of prior years or this year.

Sincerely,

DAVID N. COOPER, Lt Col, USAFR
Staff Judge Advocate
Legal Advisor
DoD, HQ OARDEC
Washington, DC

<<ARB3factsheet.doc>>

Fact Sheet for Habeas Counsel Regarding Administrative Review Boards (ARBs)

THE ADMINISTRATIVE REVIEW BOARD PROCESS

The ARBs are an administrative review process to annually assess whether there is reason to believe that an enemy combatant might pose a continuing threat to the United States or its allies in the ongoing conflict against al Qaeda and its affiliates and supporters, and whether there are other factors warranting the enemy combatant's continued detention. The ARBs began in December 2004. Information on the ARB procedures can be obtained through the Department of Defense website at:

<http://www.defenselink.mil/releases/2004/nr20040915-1253.html>.

TIMING OF ARBS

The Office for the Administrative Review of the Detention of Enemy Combatants (OARDEC) schedules and conducts all annual ARB hearings. OARDEC will not be providing information to counsel on the scheduling or outcomes of the ARBs.

COUNSEL INVOLVEMENT

Counsel are not permitted to represent the detainee in the ARB hearing. However, as discussed below, counsel are provided the opportunity to submit information to the ARBs if counsel believes that information is relevant to the assessment that his/her client is no longer a threat to the United States or its allies.

TIMING FOR SUBMISSION OF COUNSEL MATERIALS

- **Friday, February 23, 2007**, is the deadline for counsel submissions for the 2007 ARB hearings. All submissions received by the Privilege Review Team by that deadline will be provided to the ARBs. Submissions received after that deadline will be provided to the ARB if it has not occurred prior to receipt. If your client's ARB occurs before the Privilege Review Team receives your submission, the information will be retained for consideration at your client's next annual review if he remains in detention.
- Any materials submitted last year will be provided to the 2007 ARBs so there is no need for you to resubmit the same or similar documents.

CLASSIFICATION REVIEW AND MARKING

In order for OARDEC to conduct a proper classification review of your submissions, information submitted by counsel for consideration in an ARB hearing must clearly annotate the sources for any portions that include references to classified, protected, or "For Official Use Only" (FOUO) information. Without the source information, we cannot properly label the documents with the appropriate classification markings; without proper markings, the documents will not be used in the ARB process.

Therefore, you should annotate your submission by indicating what information is derived from classified, protected, or FOUO sources, and indicate what document(s) that information came from (e.g., "classified exhibit R-17 to the CSRT"). This will enable us to go to the source document and then determine the proper classification level of that portion of your submission.

It is the responsibility of counsel to follow all applicable information security regulations with respect to the handling of classified, protected, or FOUO information. Counsel should work closely with the designated Court Security Officers to ensure compliance with security regulations.

HOW TO SUBMIT INFORMATION FOR ARB CONSIDERATION

If you have information to submit that does not refer to classified or protected information, you must mail it to the Privilege Review Team. The Team will ensure that your submission is delivered to the OARDEC Legal Advisor. If your submission includes references to classified or protected information, you must provide that document to the Privilege Review Team at the secure facility. A member of the Team will ensure it is properly marked and transmit it to the OARDEC Legal Advisor. The Legal Advisor will contact you to confirm receipt of your classified and unclassified submissions but will not provide any further details regarding the processing of your submission.

Unclassified material should be mailed to:

Privilege Review Team - REF - ARB Submissions
U.S. Department of Justice
Litigation Security Section
20 Massachusetts Avenue, NW
Suite 5300
Washington, DC 20530

This information is provided to you solely to identify points of contact to facilitate the transmission of your submissions to the ARB. Neither the Privilege Review Team nor the OARDEC Legal Advisor is permitted to discuss other matters with you regarding your client's ARB.

From: Warden, Andrew (CIV) [mailto:Andrew.Warden@usdoj.gov]
Sent: Monday, January 08, 2007 11:24 AM
To: Jolly, Vinay
Subject: GTMO -- Factual Returns

Vinay,

I received your voicemail on Friday. The government will oppose your motion for a factual return and ARB documents.

Best regards,

Andrew

Andrew I. Warden
Trial Attorney
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., NW, Room 6120
Washington, DC 20530
Tel: 202.616.5084
Fax: 202.616.8470

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

<hr/>		
SHARAF AL SANANI, <i>et al.</i> ,)	
Detainee,)	
Guantánamo Bay Naval Station,)	
Guantánamo Bay, Cuba,)	
)	No. 05-CV-2386 (RBW) (AK)
Sami Muhyedin al Hajj,)	
as Next Friend of)	
Mr. Sharaf Al Sanani,)	
)	
Petitioners,)	
)	
v.)	
)	
GEORGE W. BUSH, <i>et al.</i> ,)	
)	
Respondents.)	
<hr/>		

**REPLY MEMORANDUM IN SUPPORT OF EMERGENCY MOTION OF
PETITIONER SHARAF AL SANANI FOR FACTUAL RETURN**

Petitioner Sharaf Al Sanani a/k/a Sharaf Ahmad Muhammad Masud (ISN 170) ("Petitioner") respectfully submits this reply memorandum in response to Respondent's Opposition (Dkt. no. 297) ("Opposition" or "Opp.") to Petitioner's Emergency Motion for Factual Return (Dkt. no. 296) ("Motion" or "Mot.").

INTRODUCTION

Within hours of Petitioner's CSO-approved filing of his Motion on January 23, 2007, Respondents filed a boilerplate opposition brief, advancing the same arguments previously rejected in numerous other detainee cases in this district. In the face of these cases – which, as Petitioner noted in his opening brief, ordered the production of factual returns notwithstanding the jurisdictional provisions of the Detainee Treatment Act ("DTA") and Military Commissions

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Act ("MCA") – Respondents continue to assert that this Court lacks the power to grant the requested relief. The Court should reject Respondents' arguments and order the production of a factual return on or before February 9, 2007, because, among other reasons, a factual return is required no matter how the pending jurisdictional questions are resolved (including to enable Petitioner to prepare a meaningful submission for his 2007 Administrative Review Board ("ARB") proceedings by the deadline of February 23, 2007).

ARGUMENT

I. RESPONDENTS' OPPOSITION IGNORES THE MANY DECISIONS IN THIS DISTRICT GRANTING THE REQUESTED RELIEF OVER RESPONDENTS' JURISDICTIONAL OBJECTIONS

Respondents contend that by granting Petitioner's motion, the Court would be asserting "jurisdiction and authority in this case inconsistent with the DTA's investment of exclusive jurisdiction in the Court of Appeals and the MCA's withdrawal of other forms of jurisdiction." *Opp.*, at 3-4. Respondents ignore the many cases cited by Petitioner (*see Mot.*, at 8-9 & nn.3-4) ordering Respondents to produce factual information notwithstanding the DTA and the MCA.¹ Indeed, on the very date on which the Motion and Opposition were filed, Judge Sullivan entered yet another order granting the relief requested by Petitioner, rejecting Respondents' reliance on the DTA and MCA because "a factual return 'will obviously be needed regardless of the resolution of the jurisdictional question.'" *Razakah v. Bush*, Civ. A. No. 05-2370 (EGS), Mem. Op. and Order, at 2 (D.D.C. Jan. 23, 2007) (copy attached as Exhibit A) (quoting *Kahn v. Bush*, Civ. A. No. 05-1001 (ESH), Mem. Op. and Order (D.D.C. Aug. 10, 2006)).

¹ *See also, e.g., Abdessalam v. Bush*, No. 06-CV-1761 (ESH), Order (Dkt. No. 11) (D.D.C. Dec. 12, 2006) (entering protective order in case filed *after* enactment of the DTA, over Respondents' DTA and MCA jurisdictional arguments).

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Respondents fail to cite a single detainee case where the relief requested by Petitioner has been denied. Instead, they argue that the Motion should be denied because the DTA and MCA authorize Petitioner to challenge the "validity of [his] detention" before the D.C. Circuit. *Opp.*, at 2-3. Obviously, for Petitioner to challenge the validity of his detention in *any* forum, he must have notice of Respondents' purported basis for detaining him. That the DTA and MCA may authorize a challenge before the D.C. Circuit is a reason to grant the Motion, not deny it.

II. A FACTUAL RETURN IS NECESSARY TO CONTEST RESPONDENTS' ASSERTION THAT PETITIONER IS AN "ENEMY COMBATANT"

In his Motion, Petitioner demonstrated that the none of the publicly-available information about him remotely justified any detention at Guantánamo, much less the five years he has spent there. *See Mot.*, at 3-6. In response, Respondents simply assert that Petitioner has been deemed an "enemy combatant."²

Under the definition of "enemy combatant" accepted by the Supreme Court in *Hamdi v. Rumsfeld*, Petitioner must be both "'part of or supporting forces hostile to the United States or coalition partners' *and* 'engaged in an armed conflict against the United States.'" 542 U.S. 507, 526 (2004) (emphasis added). Here, the allegations against Petitioner set forth in the CSRT summary of evidence fail to satisfy *either* prong. In support of the incredibly broad general allegation in paragraph 3(a) that Petitioner is "associated with" al Qaeda, Respondents offer no facts remotely establishing that he was "part of or supporting forces hostile to" the United States (and they do not explain how he was "associated with" al Qaeda, either). Petitioner is alleged

² In support of this assertion, Respondents rely on the Declaration of Karen Heckler, which states without further explanation that all but thirty-eight detainees went through the Combat Status Review Tribunal (CSRT) process and were deemed enemy combatants. *Opp.*, at 2 n.1 & Ex. A; *see also id.* Ex. A, at page 3 of Ex. 1 (listing Petitioner as a detainee "who went through complete CSRT process"). This does not establish that Petitioner has been charged with the commission of (let alone committed) any crime against the United States.

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merely to have been in Afghanistan in the months prior to and following September 11. *Cf. id.* at 527 (rejecting the argument that mere residence in a country in which combat operations were taking place satisfies the definition of "enemy combatant"). Moreover, as with some 55% of the detainees for which information is available, Petitioner is not even alleged to have been "engaged in armed conflict against the United States." To the contrary, the paragraph in which the evidence supporting such an allegation would have been set forth (paragraph 3(b)) is *omitted entirely* from Petitioner's CSRT summary of evidence. *See Mot.*, at 3.

Thus, Petitioner's counsel is at a complete and total loss to formulate any defense to Respondents' "enemy combatant" designation, because the "evidence" allegedly offered to support the designation does not state an "enemy combatant" claim. Indeed, the most basic requirement of due process – "notice and an opportunity to be heard," *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985) – has not been satisfied, because Petitioner has received no "notice" of any charges or evidence against him. It is not surprising that the "Summarized Detainee Statement" attributed to Petitioner's ISN (170) ends with the plea that the CSRT provide some facts, rather than simply presuming that Petitioner is "guilty until proven innocent." *Mot.*, at 5.

In these circumstances, a full factual return, including materials relating to all prior ARB proceedings,³ is necessary for Petitioner to have meaningful access to counsel, to prepare a

³ Respondents assert (without any citation to relevant authority) that the ARB proceedings are "not properly before this Court." *See Opp.*, at 8. As Respondents concede, however, the ARB proceedings were purportedly set up to determine whether Respondents will "continue to detain an enemy combatant whose detention has already been determined by the Department of Defense to be proper." *Id.* Particularly where, as here, Respondents have offered absolutely no justification for Petitioner's initial "enemy combatant" designation, Petitioner is entitled to full production of any information purportedly justifying his continued detention in Guantánamo for over five years, whether from the ARB proceedings or otherwise.

In at least one case, moreover, an ARB panel has apparently charged a detainee with acts

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defense to Respondents' "enemy combatant" designation in any forum, and to prepare an appropriate submission for Petitioner's upcoming ARB proceeding. Accordingly, Respondents should be ordered to provide a full factual return no later than February 9, 2007, two weeks prior to the February 23, 2007 deadline for ARB submissions.

III. PETITIONER'S MOTION DOES NOT IMPLICATE THE STAY ORDER

Respondents argue that Petitioners' motion should be denied because the Court has stayed this case, "especially with respect to merits-related matters." *Opp.*, at 6. Petitioner's Motion, however, is not "merits-related" but rather seeks the most basic information to which Petitioner is entitled even if his petition ultimately is deemed meritless. 28 U.S.C. § 2243 (2006); *see also Al-Ghizzawi v. Bush*, No. 05-CV-2378 (JDB), slip op. at 3 (D.D.C. Aug. 9, 2006) (finding that petitioner's motion for a factual return "does not approach the merits [of his habeas petition]").

Moreover, as this Court itself previously has recognized, matters related to access to counsel are not subject to the stay. *See* Order (dkt. no. 66), at 2-4. In entering the protective order as to all Petitioners not subject to identification or duplication disputes,⁴ this Court ruled that denying detainees access to counsel during the pendency of the stay could "undermine the efficacy of the Great Writ of habeas corpus ... this Court is unwilling to take action that might

purportedly justifying his detention that were not presented at his CSRT review. *See* Petitioner El Falesteny's Motion for Order Requiring Respondents to Provide Counsel for Petitioner with Factual Returns, at 2 (dkt. no. 204) ("Mr. El Falesteny wrote his counsel a letter in which he indicated that an ARB had been held that had charges with significant differences from those leveled during his CSRT.") Petitioner thus will not be assured that he has a complete and accurate record of why he is being detained unless Respondents are ordered to produce documents relating to both their CSRT and ARB proceedings. Respondents do not claim that any prejudice will arise from disclosing these records.

⁴ There is no such dispute regarding Petitioner, because Respondents have agreed that Petitioner Sharaf Al Sanani is Sharaf Ahman Muhammad Masud (ISN 170). *See* Mot. for Order Requiring Resp. to Provide Counsel for Pet. Sharaf Al Sanani and the Court with 30 Days' Advance Notice of Removal, etc. (dkt. no. 220), at 1 n.1.

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conceivably dilute the Great Writ itself or impair its exercise." *Id.* at 3-4. Refusing to require Respondents to provide a factual return similarly would undermine the efficacy of the Great Writ, because meaningful access to counsel requires an awareness of the factual basis for Petitioner's detention. Thus, notwithstanding the continued pendency of the D.C. Circuit proceedings (which proceedings provide the basis for the stay of this and other detainee cases), other judges of this Court have ordered Respondents to provide factual returns. *See, e.g., Feghoul v. Bush*, No. 06-CV-618 (RWR), slip op. at 2-3 (D.D.C. Oct. 31, 2006) ("Despite the lack of finality regarding the issues on appeal . . . it is hardly sensible to withhold or frustrate something that no one doubts is petitioner's right – a meaningful communication with counsel regarding the factual basis of petitioner's detention.").

Numerous other judges similarly have required factual returns to be produced despite the stay.⁵ Staying legal proceedings does not mean that investigative measures should be curtailed. To the contrary, in order to avoid being prejudiced by the stay, counsel must "begin preparing their defense well in advance of any ruling by the Court of Appeals." *Al-Adahi v. Bush*, 05 CV-0280 (GK), Order (dkt no. 35), at 2 n.1 (D.D.C. Apr. 29, 2005); *see also Al-Subaiy et al v. Bush*, No. 05-1453 (RMU), Order (dkt. no. 14), at 3 (D.D.C. Sept. 9, 2005). Timely production of factual returns, moreover, is critical "to ensure that the proceedings can continue in an orderly fashion in the event that the detainees prevail on appeal." *Kurnaz v. Bush*, 04-CV-1135 (ESN), (D.D.C. Apr. 12, 2005) (dkt. no. 96) at 2.

Accordingly, the pendency of the stay is no basis for denying Petitioner's Motion.

⁵ *See, e.g., Kahn v. Bush*, No. 05-CV-1001 (ESH) (D.D.C. Aug. 10, 2006) (dkt no. 20); *Zadran v. Bush*, No. 05-CV-2367 (RWR) (D.D.C. July 19, 2006) (dkt no. 36); *Said v. Bush*, No. 05-CV-2384 (RWR) (D.D.C. May 23, 2006) (dkt. no. 24); *Almerfed v. Bush*, No. 05-CV-1645 (PLF) (D.D.C. Mar. 6, 2006) (dkt. no. 15).

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IV. RESPONDENTS' REMAINING ARGUMENTS FOR REFUSING TO PRODUCE A FACTUAL RETURN ARE MERITLESS

As they have tried, unsuccessfully, in numerous other cases, Respondents seek here to avoid providing counsel with basic information regarding the five-year detention of Petitioner on the ground that "the preparation of returns is not an inconsequential task," and would impose "logistical burdens." *Opp.*, at 7. This assertion – as well as Respondents' request for a full 90-day response period – borders on the frivolous, given Respondents' established ability to assemble the requested information in other habeas cases in mere days. *See Mot.*, at 13-14.

Similarly meritless is Respondents' reliance on the fact that the returns may contain classified information. *Opp.*, at 7. Counsel endured a rigorous security clearance process for the very purpose of obtaining the kind of information sought by this motion.

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CONCLUSION

For the foregoing reasons and the reasons stated in the Motion, Petitioner respectfully requests that the Court order Respondents to produce a complete factual return, including all records relating to his CSRT and ARB proceedings, on or before February 9, 2007.

Dated: Atlanta, Georgia
January 25, 2007

Respectfully submitted,

Counsel for Petitioner:

/s/ Vinay Jolly

A. Stephens Clay IV (Pursuant to LCvR 83.2(g))
James F. Bogan III (Pursuant to LCvR 83.2(g))
C. Allen Garrett Jr. (Pursuant to LCvR 83.2(g))
Vinay J. Jolly (Pursuant to LCvR 83.2(g))
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CERTIFICATE OF SERVICE

This is to certify that I have this day served the foregoing REPLY MEMORANDUM IN SUPPORT OF EMERGENCY MOTION OF PETITIONER SHARAF AL SANANI FOR FACTUAL RETURN by serving electronically all attorneys of record for each party via the Court's Electronic Case Filing system.

Respectfully submitted,

Counsel for Petitioner:

/s/ Vinay J. Jolly

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James F. Bogan III (Pursuant to LCvR 83.2(g))

C. Allen Garrett Jr. (Pursuant to LCvR 83.2(g))

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EXHIBIT A

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

_____)	
ABDUR RAZAKAH, <i>et al.</i> ,)	
)	
Petitioners,)	
)	
v.)	Civil Action No. 05-2370 (EGS)
)	
GEORGE W. BUSH, <i>et al.</i>)	
)	
Respondents.)	
_____)	

MEMORANDUM OPINION AND ORDER

On December 19, 2006, Petitioners Abdur Razakah and Ahmad Doe [Tourson] -- citizens of the Xinjiang Autonomous Region of China -- requested that the Court issue an order requiring respondents to provide a factual return setting forth the basis for their detention. Petitioners have been detained at the United States Naval Station in Guantanamo Bay ("Guantanamo") since 2002. In December 2005, petitioners filed a petition for habeas corpus challenging the legality of their confinement. Petitioners claim that respondents have refused to produce a factual return or any other information justifying their detention since petitioners filed their habeas petition. For the reasons stated by the Court in *Al-Ghizzawi v. Bush*, Civil No. 05-2378 (D.D.C. Aug. 9, 2006) (Mem. Op. and Order) and *Kahn v. Bush*, Civil No. 05-1001 (D.D.C. Aug. 10, 2006) (Mem. Op. and Order), the Court grants the Motion for Production of Factual Return.

Respondents do not dispute petitioners' right to notice of the factual basis for their detention or to be represented by

counsel to challenge the legality of their detention. Rather, respondents argue that this Court should deny the request for an order requiring a factual return because the Court lacks jurisdiction over the habeas petition under the Military Commissions Act of 2006 ("MCA"), Pub. L. No. 109-366, 120 Stat. 2600, and the Detainee Treatment Act of 2005 ("DTA"), Pub. L. No. 109-148, 119 Stat. 2680. The D.C. Circuit is currently considering challenges to the MCA and DTA and has not yet determined whether this Court has in fact been stripped of jurisdiction over the habeas claims of Guantanamo detainees. This is not an adequate reason to deny petitioners' motion because a factual return "will obviously be needed regardless of the resolution of the jurisdictional question." *Kahn*, Civil No. 05-1001 (D.D.C. Aug. 10, 2006) (Mem. Op. and Order) ("Without access to the information contained within a factual return, petitioner's counsel cannot offer anything approaching effective representation in these proceedings."); see also *Feghoul v. Bush*, Civil No. 06-618 (D.D.C. Oct. 31, 2006) (Mem. Order) ("Despite the lack of finality regarding the issues on appeal, . . . it is hardly sensible to withhold or frustrate something that no one doubts is petitioner's right -- a meaningful communication with counsel regarding the factual basis of petitioner's detention.").

Accordingly, it is hereby **ORDERED** that petitioners' Motion for Production of Factual Return is **GRANTED**; and it is

FURTHER ORDERED that respondents shall provide factual returns to the Court and petitioners' counsel by **March 30, 2007**. The factual returns shall provide all information necessary for a determination of whether Abdur Razakah and Ahmad Doe [Tourson] are properly subject to detention by the United States.

IT IS SO ORDERED.

Signed: **Emmet G. Sullivan**
United States District Judge
January 23, 2007