

Nos. 05-5062, 05-5064, 05-5095 through 05-5116

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

KHALED A. F. AL ODAH, Next Friend of FAWZI KHALID,
ABDULLAH FAHAD AL ODAH, et al.,
LAKHDAR BOUMEDIENE, Detainee, Camp Delta, et al.,

Petitioners/Appellants

v.

GEORGE W. BUSH, President of the United States of America, et al.,
UNITED STATES OF AMERICA, et al.,

Respondents/Appellees

SUPPLEMENTAL AMICUS CURIAE BRIEF OF
THE OREGON FEDERAL PUBLIC DEFENDER
HABEAS CORPUS COUNSEL
IN SUPPORT OF PETITIONERS'/APPELLANTS'
POSITION ON THE SIGNIFICANCE OF THE
MILITARY COMMISSIONS ACT OF 2006

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Identity Of Amicus Curiae And Statement Of Interest

The Oregon Federal Public Defender represents seven Guantánamo detainees, three of whom have filed summary judgment motions in the District Court based on extensive investigation establishing that they are not enemy combatants under any definition of the term. Those cases are presently stayed – as they have been for more than one year. In pending litigation in the District Court, the three who have filed for summary judgment – Adel Hamad, Abdul Rahim Al Ginco, and Nazar “Chaman” Gul – assert that the stay should be lifted and that the Military Commissions Act of 2006 does not apply to them because no military body can constitute a competent tribunal where the affirmatively established facts demonstrate no basis for an enemy combatant designation.

The interest of the Oregon Federal Defender as amicus curiae is to provide the Court with concrete examples of the need for genuine habeas corpus procedures to accomplish the historic and constitutional purposes of the Great Writ. After the Supreme Court found that the United States exercised “complete jurisdiction and control” over Guantánamo Bay in *Rasul v. Bush*, 542 U.S. 466, 480-81(2004), the District Court appointed counsel in approximately 51 cases pursuant to its discretionary authority in 18 U.S.C. § 3006A(a)(2)(B). The District Court specifically identified the purpose of representation of individuals who claimed they were not enemy combatants or dangers to the United States as “to present the facts surrounding their confinement to the Court.” *Al-Odah v. United States*, 346 F. Supp. 2d 1, 7 (D.D.C. 2004). The three cases in which the initial factual investigation has been completed illustrate the need for traditional habeas corpus procedures to be available to accomplish the core function of habeas corpus: to

ensure that no innocent person is wrongfully detained.¹

The source of the amicus authority to file pursuant to Rule 29(a) of the Circuit Rules for the United States Court of Appeals for the District of Columbia is the consent of all of the parties.

Summary Of Argument

The writ of habeas corpus is an indispensable characteristic of Anglo-American justice. The Constitution explicitly enshrines the writ as always extant, never to be eliminated, and only subject to the temporal limitation of suspension during invasion or insurrection. The essence of the writ is to provide a remedy against Executive detention, whether by a king, a committee, or a president. The existence of the writ presupposes a determining body – the Judiciary – independent of the Executive and capable of gathering facts predicate to a determination of the lawfulness of detention.

The cases of Hamad, Al Ginco, and Gul demonstrate that, in the context of the global war on terror, the essential function of the Great Writ remains as relevant and necessary as it has from Runnymede through the cyclical eras of crisis and alarm to which governments are prey. By providing a forum for simple fact development – interviewing and taking testimony from

¹Investigation on behalf of a fourth client (*Chaman v. Bush, et al.*, CV 05-887 RWR) is not yet complete but has developed significant exculpatory information. A Return has just been received from Respondents on a fifth client (*Amin Ullah v. Bush, et al.*, CV 05-1237 ESH) that will permit overseas factual investigation. The cases of our sixth and seventh clients present different issues.

witnesses and marshaling public documents – the Judiciary is able to check the chronic danger of wrongful and indefinite detention of innocent persons. The Great Writ is essential to assure the liberty of the innocent and to provide a counterbalance that is necessary both to the constitutional separation of powers and the international perception of the United States as a beacon of liberty.

ARGUMENT

A. The Core Function Of Habeas Corpus Requires Factual Development Of The Basis For Executive Detention Independent Of The Executive Branch.

The wisdom of 800 years of Anglo-American jurisprudence demands that the writ of habeas corpus, in all its essentials, provide a check against arbitrary and unjust Executive detention. Habeas corpus is a writ antecedent to statute. *Rasul v. Bush*, 542 U.S. 466, 473 (2004) (“Habeas corpus is, however, ‘a writ antecedent to statute, . . . throwing its root deep into the genius of our criminal law.’”) (quoting *Williams v. Kaiser*, 323 U.S. 471, 484 n.2 (1945)). “[A]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention and it is in that context that its protections are the strongest.” *Rasul*, 542 U.S. at 474 (quoting *INS v. St. Cyr*, 533 U.S. 289, 301 (2001)).

The most fundamental aspect of the writ is as a vehicle for the Judiciary to exercise jurisdiction over the person the Executive seeks to detain. *Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004) (habeas corpus “has remained a critical check on the Executive, ensuring that it does not detain individuals except in accordance with law.”); *Rasul*, 542 U.S. at 474. A minimum requirement for the writ to exist in its constitutionally immutable form is to provide an independent review of facts marshaled by the detainee demonstrating that no law authorizes continued confinement. See *Harris v. Nelson*, 394 U.S. 286, 298 (1969) (discussing fact

development in habeas corpus). *See also Mathews v. Eldredge*, 424 U.S. 319, 333 (1976) (discussing due process). In the absence of meaningful proceedings providing the historic protections of the Great Writ, no procedure that purports to substitute for the writ of habeas corpus is constitutionally adequate.

B. The Cases Of Hamad, Al Ginco, And Gul Demonstrate That There Is No Substitute For Independent Factual Development And Consideration By An Independent Judiciary.

In any habeas corpus case, counsel takes certain steps to effectuate the purposes of the writ: interview the prisoner; investigate the facts; and present the facts and law to the judicial officer. In each of the cases discussed in this brief, the initial stages of the litigation demonstrate that, without some adversarial process before a neutral decision-maker, a substantial danger arises that an innocent person will be subjected to the ordeal of indefinite detention. In each case, the District Court has pending the question of whether to lift the stay or, in the alternative for Mr. Al Ginco and Mr. Gul, whether to order the Executive to show cause why continued detention is lawful. The exhibits set forth in the pending matters sharply illustrate the need for adversarial advocacy, investigation, and independent habeas review of indefinite detention.

1. Adel Hamad Provided Hospital Administration Services For Charity Hospitals And Did Not Give Sympathy Or Support To This Country's Enemies.

Adel Hamad is a 46-year-old Sudanese with a seventeen-year history of being a hospital administrator and charity worker. Within six weeks of the Executive's factual return upon Mr. Hamad's petition for habeas corpus, counsel for Mr. Hamad had confirmed through telephone contacts with the surgeon and director of the hospital in Chamkani, Afghanistan, where Mr.

Hamad was employed from 2000 through 2001, that Mr. Hamad was a hardworking, apolitical, administrator of the hospital. Within that same period, counsel also heard from Mr. Hamad's supervisor in Pakistan at the World Assembly for Muslim Youth – the charity that employed Mr. Hamad from 2000 through 2002 – that he was an excellent employee. The charity is not on the official list of bodies designated as terrorist groups or organizations.²

Counsel's traditional approach to habeas corpus litigation continued with telephonic investigation in Sudan and the production of sworn statements corroborating Mr. Hamad's employment as an innocent and compassionate charity worker and his good character. Counsel then sent an investigation team to Afghanistan and Pakistan. The defense team obtained videotaped sworn statements from Mr. Hamad's employer, the director of the WAMY Hospital in Chamkani, doctors from the hospital, Afghan government officials who regulate and work with WAMY, and Mr. Hamad's landlord. All of the witnesses confirmed Mr. Hamad's sworn statements and described the hospital as apolitical; at least one witness had fled the Taliban. The witnesses also described the regular involvement of the hospital with the Afghan government, the World Health Organization, and the World Food Program. They described Mr. Hamad as apolitical, a devoted family man, and an excellent employee.

²Executive Order 13224 identifies the official list of designated terrorist groups or organizations at the following address: www.treasury.gov/offices/enforcement/ofac/programs/terror/terror.pdf.

The factual investigation counsel has undertaken for Mr. Hamad has been incorporated into exhibits in support of the contention that no basis existed for the exercise of military jurisdiction over Mr. Hamad at the time of his seizure in Pakistan in 2002 and no basis exists for his continued imprisonment.³ Without normal habeas corpus procedures, the ability to challenge his unjustified indefinite detention, which the United States Army Major who dissented from the decision of the Combatant Status Review Tribunal (CSRT) characterized as “unconscionable,” would be fatally impaired.

2. Mr. Abdul Rahim Al Gincio Committed No Belligerent Acts And Was A Taliban Torture Victim And Political Prisoner Before And After The Authorization For The Use Of Military Force.

Following *Rasul*, Abdul Rahim sent a short and simple plea to the court: set me free because I am not an enemy combatant but a former prisoner of the Taliban who was accused of being an American spy. He also told the court that he was a university student and that he had been in Taliban custody for two years prior to being seized by the United States. On April 11, 2006, counsel appeared on his behalf pursuant to court order.

Factual development proceeded from readily available sources. In numerous public news articles, the Taliban had trumpeted the capture in May 2000 of Abdul Rahim as a confessed American spy. Other news stories starting in December 2001, documented Abdul Rahim’s torture by the Taliban and brief period of relative freedom following his liberation from the Taliban prison in Kandahar. Following litigation by the Associated Press, the military

³The referenced investigation and fact development are incorporated in the exhibits in support of the summary judgment motion. *Hamad v. Bush*, Civil No. 05-1009-JDB (document

proceedings became public, which included Abdul Rahim's statements regarding his torture at the hands of the Taliban, including beating and electric shock. Abdul Rahim also stated that he was trying to reach Europe or Canada through Afghanistan, was first conscripted, then 18 days later, imprisoned by the Taliban.

59)(filed October 17, 2006).

Following the initial interview with the client, counsel contacted family members as well as former detainees who had been incarcerated by the Taliban along with Abdul Rahim. In traveling to Abdul Rahim's former home in the United Arab Emirates, his defense team secured sworn statements from family members and supporting documents that corroborated Abdul Rahim's account of himself as a nonviolent apolitical student who ran away from home. Freed Guantánamo detainees from Russia and Great Britain, who had been imprisoned with Abdul Rahim by the Taliban, provided sworn statements corroborating Abdul Rahim's testimony. The evidence obtained in the UAE included a taped interview in which Abdul Rahim, confessed falsely to having been an American spy and made statements to placate his torturers. The propaganda tape was broadcast on Abu Dhabi television in May 2000. The content and circumstances of the tape confirms Abdul Rahim's account that it was the product of torture. Video images from another taped product of torture were broadcast in the United States in January 2002.⁴

The affirmative evidence establishes lack of military jurisdiction: no relevant act occurred during the time of war; a tortured political prisoner of the enemy is not an enemy combatant under any definition; and products of brutal and prolonged torture cannot be used to assert military jurisdiction. Habeas corpus is necessary to challenge Abdul Rahim's imprisonment which – when added to the two years of Taliban torture and imprisonment – is approaching its seventh year.

⁴The referenced investigation and fact development are incorporated in the exhibits in support of the summary judgment motion. *Al-Ginco v. Bush*, Civil No. 05-1310-RJL (document 37) (filed Sept. 21, 2006).

3. Nazar “Chaman” Gul Returned To Afghanistan In 2003 After 25 Years In Exile, Worked For The Karzai Government, And Was Arrested Upon Being Mistaken For Another Man With The Same Name.

The habeas investigation conducted on Mr. Gul’s behalf has established that he is an innocent exile who fled his native country, Afghanistan, as a child during the Soviet occupation in the 1980's. Mr. Gul remained in Pakistan with his family as a refugee for approximately 25 years. Nazar “Chaman” Gul was never on a battlefield; he was never an enemy fighter; and he never provided support to any enemy of the United States.

While a refugee, Mr. Gul helped operate the family bakery and sold fruit and vegetables in the local market. Only after the defeat of the Taliban government did Mr. Gul decide to return to Afghanistan. He returned in April 2003 with three friends to find work and to help in the reconstruction of their country.

Within days of their arrival in Gardez, Afghanistan, Mr. Gul and his friends obtained work with the Karzai government. They were assigned to guard a fuel depot outside town. Within only days, however, as he slept in the house of an acquaintance, Mr. Gul was awakened by the sound of gunfire and military personnel entering the house by force. Although he was unarmed and cooperative, when Mr. Gul identified himself by his full name, Nazar “Chaman” Gul, he was apparently mistaken for another man, a former mujahedeen commander with the same name. As a result, he was arrested and eventually transferred to Guantánamo.

For almost three-and-a-half years, Mr. Gul has repeatedly and consistently explained the innocent circumstances surrounding his arrest. In March 2006, after counsel was finally cleared to visit Mr. Gul at Guantánamo, he explained the circumstances to his attorneys. Mr. Gul

provided counsel with the names of those persons in Afghanistan and Pakistan who could confirm his story and background. Investigation commenced immediately. Within one month of the initial interview, counsel was able to contact Mr. Gul's family in Pakistan by telephone. With their assistance, counsel was then able to locate and interview by telephone witnesses identified by Mr. Gul.

Although Mr. Gul had been held incommunicado for several years, each witness – including his supervisor, a pharmacist, and a taxi driver – corroborated the details provided by Mr. Gul. After completing investigation capable of being performed from the United States, in August 2006, counsel traveled to Afghanistan and Pakistan with two investigators for two weeks. Nine witnesses were interviewed. Their sworn testimony was recorded on video and audio tape.

The investigation conducted on behalf of Mr. Gul was completed in less than six months. With the exception of the foreign travel, the majority of the investigation was performed via telephone. Although all evidence has since been submitted to the District Court in support of Mr. Gul's motion for summary judgment, the court has yet to rule on his motion.⁵ Mr. Gul's case is another example of the necessity for habeas corpus to guard against the wrongful detention of innocent persons arrested in the fog of war.

CONCLUSION

If the MCA is construed to eliminate the writ of habeas corpus for aliens detained within the "complete jurisdiction and control" of the United States, the Legislature has stepped beyond

⁵The referenced investigation and fact development are incorporated in the exhibits in support of the summary judgment motion. *Gul v. Bush*, Civil No. 05-888-CKK (document 51)(filed October 16, 2006). To date, Respondents have not filed a factual return.

its constitutional authority.⁶ These pending cases, whose full merits have not yet been determined, vindicate the wisdom of the Founding Fathers in incorporating the writ of habeas corpus as an essential and ineradicable part of the Constitution.

⁶Under the rules of statutory construction, the Court should conclude that the MCA has no application to pending cases.

Neither the CSRT procedures nor the limited review the Respondents assert the Detainee Treatment Act (DTA) leaves to this Court are adequate to vindicate the detainees' liberty interests. Petitioners who are held in the prison in Guantánamo without access to counsel, investigators, or the outside world have no opportunity or ability to gather and present the true facts of their lives and rebut Respondents' often completely erroneous assertions. Habeas corpus is necessary to prevent the lengthy, and perhaps indefinite, imprisonment based on the skewed and incomplete record that the CSRT process has generated. The Respondents' position regarding the scope of the Circuit's review under the DTA would preclude its consideration of the facts presented herein. Habeas corpus review is necessary to prevent the continued imprisonment by the Executive of innocent men.

Respectfully submitted this ____ day of October, 2006.

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CERTIFICATE OF COMPLIANCE UNDER FED. R. APP. 32(a)(7)

I, Steven T. Wax, hereby certify that, based upon the word and line count of the word processing system used to prepare this brief, the brief contains 2,772 words.

Steven T. Wax

CERTIFICATE OF SERVICE

I certify that on this 31st day of October 2006, I served the following SUPPLEMENTAL AMICUS CURIAE BRIEF OF THE OREGON FEDERAL PUBLIC DEFENDER HABEAS CORPUS COUNSEL IN SUPPORT OF PETITIONERS’/APPELLANTS’ POSITION ON THE SIGNIFICANCE OF THE MILITARY COMMISSIONS ACT OF 2006 on the below listed counsel via email and by causing copies to be sent by U.S. Postal Service, first class mail, to:

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