IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FALEN GHEREBI, *et al.*, )
)
Petitioners )
)
v. ) Civil Action No. 04-CV-1164 (RBW)
)
GEORGE WALKER BUSH, *et al.*, )
)
Respondents )

PETITIONER'S OPPOSITION TO RESPONDENTS' MOTION TO DISMISS AND FOR JUDGMENT AS A MATTER OF LAW AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

For over two years, Salim Gherebi, along with over 600 other human beings, has been held in a military prison in Guantanamo Bay, Cuba. Belaid Gherebi filed this next-friend action on behalf of his brother, Salim, seeking a writ of habeas corpus. In December 2003, the United States Court of Appeals for the Ninth Circuit held that the federal court has jurisdiction to hear this petition for a writ of habeas corpus. *Gherebi v. Bush,* 352 F.3d 1278 (9th Cir. 2003), *cert. granted, vacated, and remanded,* 124 S.Ct. 2932 (2004). On June 28, 2003, in *Rasul v. Bush*, 124 S.Ct. 2686 (2004), the United States Supreme Court ruled that federal courts have habeas corpus jurisdiction to hear petitions brought by those

being imprisoned in Guantanamo.

On June 30, the United States Supreme Court granted certiorari in this case, vacated the Ninth Circuit's decision, and remanded for reconsideration in light of the decision in *Rumsfeld v. Padilla.* 124 S.Ct. 2711 (2004). On July 8, 2004, the United States Court of Appeals for the Ninth Circuit ruled that "proper venue" is in the United States District Court for the District of Columbia and ordered "the case transferred" to this court. *Gherebi v. Bush*, 374 F.3d 727, 739 (9th Cir. 2004).

Petitioner Gherebi, pursuant to 28 U.S.C. §2243, filed in this court a motion for the government to show cause as to why he should not be released. On July 29, 2004, this court issued such an order and gave the government until August 3, 2004, to show cause for why Gherebi should continue to be detained. However, at the government's request, the court accorded the government the alternative of filing a motion to dismiss for lack of jurisdiction. On July 29, 2004, and again at a hearing on August 3, 2004, the government said that it would move to dismiss for lack of jurisdiction.

On August 6, 2004, the government filed its motion to dismiss. The motion presents two grounds for dismissal – lack of venue and failure to state a claim upon which relief can be granted – neither of which has anything to do with a lack of jurisdiction. Indeed, there is no issue of this court's jurisdiction because that

was clearly and decisively resolved in *Rasul v. Bush*: federal courts have jurisdiction to hear the habeas corpus petitions for those held in Guantanamo.

Thus, neither of the government's contentions are properly before this court which delayed requiring the government to respond to the order to show cause solely to object to jurisdiction. Moreover, neither of the government's arguments have merit. As to the government's objection to venue, the decision of the United States Court of Appeals for the Ninth Circuit to transfer the case to this court cannot be reviewed in this District Court. As the United States Court of Appeals for the District of Columbia Circuit has held, "it is well established that a transferee court cannot directly review the transfer order itself." *Starnes v. McGuire*, 512 F.2d 918, 924 (D.C. Cir. 1974) (en banc).

As to the government's motion to dismiss for failure to state a claim, the position of the United States is that the indefinite detention of a person, with no judicial review, violates neither the Constitution nor international law. The government contends that there is no claim under *any* law to challenge the wrongful imprisonment of a human being in Guantanamo. This just cannot be right; indeed, the Supreme Court's decision in *Rasul v. Bush* clearly rejects this proposition. Those in Guantanamo are being held within American territory where the Constitution applies and also treaties ratified by the United States

provide a basis for habeas corpus relief, even if there would not be a private right of action to sue directly under the treaties.

This case is of profound importance. Long ago, in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), the Supreme Court stressed that we are a nation of laws and that no one, not even the President, is above the law. *Marbury* unequivocally held that it is the power and duty of the federal judiciary to provide a remedy, even against the executive, when rights of individuals are violated. Chief Justice John Marshall emphatically declared that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Id.* at 163. The government's position that it can indefinitely imprison human beings with no accountability in any court is at odds with the most fundamental precepts of the American system.

The importance of this issue for the United States cannot be overstated. How can this country expect foreign nations to follow international law in treating our citizens and soldiers if the United States feels free to ignore it in treating those from foreign countries? How can this country purport to be a nation of laws if it simply disregards the law when that suits its purposes?

The United States government's position is that it is entitled to round-up people in a foreign country who may be guilty or may be innocent of being

terrorists, forcibly bring them to American territory, and hold them indefinitely without hearing or trial because no law limits the ability of the government to do this. This cannot be correct and this court should deny the government's motion to dismiss and order the government to show cause why Salim Gherebi should continue to be imprisoned.

## I. VENUE IS PROPER IN THIS COURT

The government argues that venue should be transferred to the United States District Court for the Eastern District of Virginia because that is where respondent Rumsfeld "resides." First, this court is bound by the Ninth Circuit's ruling in this case and does not have the authority to overturn the Court of Appeal's determination that venue is proper in this court. The law is clearly established that the Ninth Circuit's ruling that venue rests in the United States District Court for the District of Columbia is the law of the case in this action and is binding upon this court.

In *Starnes v. McGuire*, 512 F.2d 918, 923 (D.C. Cir. 1974) (en banc), the court expressly held that when there is a change of venue, the transferee court cannot review the transfer order itself. In *Hayman Cash Register Co. v. Sarokin*, 669 F.2d 162, 168-169 (3rd Cir. 1982), the court explained the rationale for this well-settled principle: "Once the transferor court has decided the issue of whether

suit could have been brought in the transferee court, this becomes the law of the case. If the party opposing the transfer believes the decision is erroneous, it can either seek reconsideration in the transferor court, or else petition for a writ of mandamus. . . . A disappointed litigant should not be given a second opportunity to litigate a matter that has been fully considered by a court of coordinate jurisdiction, absent unusual circumstances."

The United States Supreme Court has expressly held that the law of the case doctrine applies when one federal court transfers a case to another court. In *Christianson v. Colt Industries Operating Corp.,* 446 U.S. 800, 816 (1988), the Court explained that the law of the case "doctrine applies as much to the decisions of a coordinate court in the same case as to a court's own decisions. Federal courts routinely apply law-of-the-case principles to transfer decisions of coordinate courts. Indeed, the policies supporting the doctrine apply with even greater force to transfer decisions than to decisions of substantive law." Obviously, if the issue is subject matter jurisdiction, as it was in *Christianson*, that can be challenged at any time. But the issue here is venue and the law is clear that this court has no authority to revisit and overturn a decision of the United States Court of Appeals for the Ninth Circuit. If the government believed that the Ninth Circuit erred in transferring venue to this court, the government should have

moved for reconsideration or sought *en banc* review or mandamus in the Supreme Court. It cannot now ask this court to reconsider and overturn the decision of the United States Court of Appeals for the Ninth Circuit.

Second, if this court were to engage in such reconsideration, which it should not, it should come to the same conclusion as the Ninth Circuit: venue is proper in this court. The Supreme Court remanded this case to the Ninth Circuit for reconsideration in light of its ruling in *Padilla v. Rumsfeld.* The remand apparently was based on a footnote in the *Padilla* decision, where the Court stated that it relaxed the requirement that a habeas corpus petition be brought against the immediate custodian where a person is being held "overseas and thus outside the territory of any district court." 124 S.Ct. at 2725 n.16. The Court stated: "In such cases, we have allowed the petitioner to name as respondent a supervisory official and file the petition in the district where the respondent resides." *Id.* The Court then cited two cases – *Burns v. Wilson,* 346 U.S. 137 (1953) and *United States ex rel. Toth v. Quarles,* 350 U.S. 11 (1955) – where habeas petitions by individuals being held outside the United States were deemed proper in the District of Columbia. 124 S.Ct. at 2725 n.16.

Based on this discussion in *Padilla,* and especially the two cases where venue was deemed proper in the District of Columbia, the Ninth Circuit correctly

transferred venue to this court Moreover, this is proper because this is where the respondents "reside." Respondent George W. Bush resides at 1600 Pennsylvania Avenue in the District of Columbia at least until January 20, 2005. The government contends that a suit for injunctive relief cannot be brought against the President. But Petitioner is not seeking an injunction and thus the cases relied upon by the government are inapposite. Not a single decision cited by the government involves a habeas corpus petition or the ability to name the President as a respondent in an action seeking habeas corpus relief. In *Padilla*, the Supreme Court said that when a person is being held outside the United States, it is appropriate to name as a respondent in a habeas corpus action a person in a "supervisory position." Surely, the government does not deny that as Commander-in-Chief, the President is ultimately the supervisor of the military action that has caused Gherebi to be imprisoned.

Also, venue is proper in this court over Secretary of Defense Rumsfeld. The government does not deny that he "resides" in the District of Columbia. Petitioner's research has indicated that he "resides" in the DuPont Circle area of the District of Columbia, obviously within the venue of this court. The government seeks to interpret the Supreme Court's ruling in *Padilla* as referring to the place where the Pentagon is located. But that is not what the Court said; it

expressly chose the word "resides."

This court lacks authority to review the United States Court of Appeal's decision in this case that venue lies in the District of Columbia. But if it were to do so, it should come to the same conclusion.

## II. PETITIONER STATES A CLAIM UPON WHICH RELIEF CAN BE GRANTED

The United States contends that the case should be dismissed because those held in Guantanamo, even if held wrongly and indefinitely, have no claim under the Constitution or international law. Simply put, the government maintains that the indefinite imprisonment of a human being, without any semblance of due process, in Guantanamo violates no law and provides no basis for a habeas corpus petition.

As expressed earlier, this argument by the government is untimely; this court gave the government the opportunity to dismiss for lack of jurisdiction. The government's claim, that there is no violation of the Constitution or international law, has nothing to do with jurisdiction. Moreover, the government surely is wrong; the indefinite, wrongful detention of a person does violate the Constitution and international law and thus provides a basis for a habeas corpus petition.

First, the Supreme Court expressly held that those imprisoned in

Guantanamo state a claim for relief under the federal habeas corpus statute. In *Rasul v. Bush*, the Court declared: "Petitioners' allegations – that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing – *unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.' 28 U.S.C. §2241©)(3)."* 124 S.Ct. 2698 n.15 (emphasis added).

The Supreme Court thus explicitly ruled that those in Guantanamo do state a claim that is cognizable under the habeas corpus statute. The government's motion to dismiss for failure to state a claim must be denied based on the Supreme Court's holding in *Rasul v. Bush.* In fact, the Court also expressly stated that the government must respond to habeas corpus petitions brought by those held in Guantanamo. The Court concluded: "Whether and what further proceedings may become necessary *after respondents make their response to the merits of petitioners' claims* are matters that we need not address now." *Id.* at 2699 (emphasis added). This could not be clearer that the government must respond "to the merits of petitioners' claims." The government, in essence, is seeking to

negate the Supreme Court's holding in *Rasul v. Bush* by claiming that no court can give relief to those held in Guantanamo because neither the Constitution nor international law apply. The Supreme Court was explicit that federal courts do have authority to grant relief and that those in Guantanamo state a claim for relief under the Constitution and laws of the United States.

Second, the Constitution applies to those in Guantanamo because of *Rasul v. Bush*'s express holding that Guantanamo is under American control and sovereignty. The government argues that aliens held outside the sovereign territory of the United States are entitled to no constitutional protection and that "it is clear that the Guantanamo Bay Navy Base is outside the sovereign territory of the United States." *Respondent's Motion to Dismiss,* at 12. The government relies on *Johnson v. Eisentrager,* 339 U.S. 763 (1950), as its primary authority that the Constitution accords no protection to those being held in Guantanamo.

These are exactly the same arguments that the government made before the Supreme Court in *Rasul v. Bush* and that were expressly rejected. The Court declared: "Whatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application to the operation of the habeas statute with respect to persons detained within the 'territorial jurisdiction' of the United States. By the express terms of its agreements with Cuba, the United

States exercises 'complete jurisdiction and control' over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses." 124 S.Ct. at 2696. Justice Kennedy, in an opinion concurring in the judgment, echoed this view: "Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities. . . . From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the 'implied protection' of the United States to it." *Id.* at 2700 (Kennedy, J., concurring in the judgment).

As authority, the government relies heavily on Eleventh Circuit decisions prior to *Rasul v. Bush* which held that Guantanamo is outside United States sovereign territory and the Constitution thus does not apply. *Cuban American Bar Ass'n, Inc. v. Christopher*, 43 F.3d 1412, 1428-29 (11th Cir. 1995); *Haitian Refugee Center, Inc. v. Baker*, 953 F.2d1498, 1513 (11th Cir. 1992). But the Supreme Court's opposite conclusion to that of the Eleventh Circuit regarding the status of Guantanamo undermines these decisions. Moreover, the Ninth Circuit in this case expressly disagreed with the Eleventh Circuit and agreed with a contrary ruling of the Second Circuit that the Constitution applies to those held in Guantanamo. 374 F.3d at 737 n.14. The court explained: "The Second Circuit, however, expressed a contrary view [to the Eleventh Circuit] three years before

*Cuban American*. In *Haitian Centers [Council, Inc. v. McNary*, 969 F.2d 1326 (2d Cir. 1992), *vacated as moot sub. nom., Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S.918 (1991)], . . . the court expressly distinguished *Johnson [v. Eisentrager]*, noting that *Johnson* 'which involved convicted, enemy aliens in occupied territories outside the United States' does not resolve the question of whether 'the fifth amendment applies to non-accused, non-hostile aliens held incommunicado on a military base within the exclusive control of the United States, namely Guantanamo Bay.'" 374 F.3d at 737 n.14.

The Ninth Circuit then quoted, approvingly, at length the Second Circuit's holding that the Constitution applies to those held in Guantanamo: "It does not appear to us to be incongruous or overreaching to conclude that the United States Constitution limits the conduct of United States personnel with respect to officially authorized interactions with aliens brought to and detained by such personnel on a land mass exclusively controlled by the United States . . . given the undisputed applicability of federal criminal laws to incidents that occur there and the apparent familiarity of the governmental personnel at the base with the guarantees of due process, fundamental fairness and human treatment which this country purports to afford to all persons." *Id.* quoting 969 F.2d at 1343.

The Ninth Circuit then declared: "We find the Second Circuit's view to be

persuasive." 374 F.3d at 737 n.14. This conclusion – that the Constitution and especially the Fifth Amendment apply to those in Guantanamo – thus is the law of the case in this matter and cannot now be relitigated by the government.

The authority cited by the government to the contrary is thus distinguishable and irrelevant. *Johnson v. Eisentrager*, the government's primary authority, was expressly distinguished from the Guantanamo situation by the Supreme Court in *Rasul v. Bush.* Justice Kennedy explained: "The facts here are distinguishable from those in *Eisentrager* in two critical ways. First, Guantanamo Bay is in every practical respect a United States territory. . . . The second critical set of facts is that the detainees at Guantanamo Bay are being held indefinitely, and without benefit of any legal proceeding to determine their status. In *Eisentrager*, the prisoners were tried and convicted by a military commission of violating the laws of war and sentenced to prison terms." 124 S.Ct. at 2701 (Kennedy, J. concurring in the judgment). In other words, *Johnson*, which involved non-citizens held outside the sovereign territory of the United States and who had been accorded a trial, has no relevance to those in Guantanamo who are being imprisoned in the sovereign territory of the United States and who have been accorded no due process whatsoever.

Nor is the government's other case authority relevant. For example, *United*

*States v. Verdugo-Urquidez*, 494 U.S. 259, 266 (1990), held that the Fourth Amendment does not apply "outside of the United States territory." *Rasul v. Bush*, and the Ninth Circuit in this case, expressly held that Guantanamo is United States territory. The issue of what specific rights must be accorded to Gherebi is beyond the scope of this motion to dismiss and is besides the point at this stage since no rights whatsoever have been accorded to him. At a minimum, the Fifth Amendment and its guarantee of due process apply to those in Guantanamo. Ultimately, a key issue to be litigated before this court will be what due process requires for Gherebi. *Cf., Hamdi v. Rumsfeld*, 2633, 2646-47 (2004) (United States citizen apprehended in a foreign country and held is entitled to due process and the procedures required are to be determined by applying the balancing test set forth in *Mathews v. Elddrige,* 424 U.S. 319 (1976).) But at this stage, all that matters is that Petitioner clearly states a claim under the Constitution and that the government's motion to dismiss should be denied.

Third, Petitioner states a claim under the treaties of the United States. The government, of course, does not deny that habeas corpus relief can be based on violations of provisions of treaties properly ratified by the United States government. Nor does the government deny that the Third Geneva Accords indicate that a "competent tribunal" be convened to determine the status of those

who are held and that no such tribunal has been convened as to Gherebi even though he has been imprisoned for over two years.

Nor does the government deny that its actions violate the International Covenant of Civil and Political Rights, ratified by the United States in 1992, which states: "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention." Art. (4); 999 U.N.T.S. 171, 176. Also, the treaty provides that "[n]o one shall be subjected to arbitrary arrest and detention." Art. 9(1), 999 U.N.T.S. 171. The United States approved these provisions without reservation. United States Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights. 31 I.L.M. 645 (January 10, 1992).

Instead, the government's claim is that "international treaties do not create rights that are privately enforceable in federal courts." *Respondent's Motion to Dismiss,* at 21. Petitioner Gherebi does not challenge this proposition and agrees that he cannot bring a lawsuit to enforce these treaties. But that is not this situation. The habeas corpus statute specifically authorizes petitions by aliens who are held in violation of treaties. 28 U.S.C. §2241©)(3) (the writ of habeas corpus shall extend to a prisoner who "is in custody in violation of the constitution

or laws or treaties of the United States"). Gherebi seeks relief under this explicit statutory authority which provides that federal courts shall grant habeas corpus to those held in violations of the treaty obligations of the United States. Whether treaties are otherwise enforceable is completely irrelevant to this action.

## Conclusion

The government's motion to dismiss seeks to relitigate issues that it lost in both the United States Supreme Court and in the Ninth Circuit. These decisions are binding on this court and clearly hold that venue is proper in this court and that plaintiff states a claim for relief under both the Constitution and under international law. The government's motion to dismiss should be denied and in accord with 28 U.S.C. §2243, the government should be given 72 hours to show cause why Salim Gherebi should continue to be detained.

August 13, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to the Court's Scheduling Order, I hereby certify that on August 13, 2004, a copy of this document was sent by electronic facsimile to Terry M. Henry and Andrew Warden at (202) 616-8470.

Erwin Chemerinsky