

are free, of course, to adopt the reasoning contained in this Memorandum Opinion in resolving those motions, this Memorandum Opinion technically applies only to the eleven cases contained in the above caption.” *Id.* Judge Green’s Memorandum Opinion has not yet been adopted by this Court.

On February 3, 2005, Respondents filed a Motion for Certification and Stay as to all of the Guantánamo detainee cases presently filed in the United States District Court for the District of Columbia, including Mr. al-Marri’s case. That same day, Judge Green granted Respondents’ Motion for Certification and Stay (“February 3, 2005 Order”) as to the eleven cases included in her January 31, 2005 Order. Although Respondents sought to include Mr. al-Marri’s case in the scope of their requested stay, Judge Green declined to apply the stay to this case, holding that “[i]t shall be up to the individual Judges assigned to the other Guantánamo detainee cases [including Mr. al-Marri’s case] not contained in the above caption to determine whether stays should be granted in those cases.” February 3, 2005 Order at 2. Thus, Respondents’ Motion for Certification and Stay and Respondents’ Motion to Dismiss are still pending in this case.

II. PETITIONER’S POSITION AS TO THE PENDING MOTIONS

A. Respondents’ Motion For Certification And Stay

Petitioner al-Marri opposes Respondents’ Motion for Certification and Stay on the ground that it is not yet ripe for adjudication because the January 31, 2005 Order does not apply to Mr. al-Marri’s case. To the contrary, Respondents’ Motion to Dismiss is under advisement, and Mr. Al-Marri is entitled to a ruling on it. Thus, there is no order in this case to appeal, let alone to certify for an appeal. Accordingly, Respondents’ Motion for Certification and Stay should be denied.

B. Respondents' Motion To Dismiss

Petitioner al-Marri urges this Court to adopt the portion of Judge Green's decision denying the Motion to Dismiss on the grounds that the petitioners have stated valid claims under the Due Process Clause of the Fifth Amendment to the Constitution, January 31, 2005 Order at 18-38, that the Combatant Status Review Tribunal procedures are unconstitutional because they violate due process, *id.* at 38-68, and that the petitioners have stated valid claims under the Third and Fourth Geneva Conventions, to the extent petitioners were found to be Taliban fighters but were not specifically determined to be excluded from prisoner of war status by a competent Article 5 tribunal. *Id.* at 68-73. Mr. al-Marri relies on his previously filed Memorandum of Petitioners Zemerli and al-Marri in Opposition to Motion to Dismiss,² as well as Petitioners' Memorandum in Opposition to Respondents' Motion to Dismiss filed in *In re Guantánamo Detainee Cases* on November 5, 2004,³ and Al Odah Petitioners' Reply to the Government's Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss filed in *Al Odah v. United States*, No. CV 02-0828 (CKK), on October 20, 2004, both of which Mr. al-Marri has already adopted and incorporated by reference. *See* Memorandum of Petitioners Zemerli and al-Marri in Opposition to Motion to Dismiss at 1. Also, Mr. al-Marri maintains that this Court should deny Respondents' motion to dismiss his claims under the Sixth Amendment, the Administrative Procedures Act, and the Third and Fourth Geneva Conventions (to the extent those conventions do not protect members of al-Qaeda), which were dismissed by Judge Green. *See* January 31, 2005 Order at 73-74.

² This Memorandum was jointly submitted with the Petitioner in *Zemerli v. Bush*, 04-cv-2046 (CKK).

³ *See* Case Nos. 02-CV-0299 (CKK), 02-CV-0828 (CKK), 02-CV-1130 (CKK), 04-CV-1135 (ESH), 04-CV-1136 (JDB), 04-CV-1137 (RMC), 04-CV-1142 (RJL), 04-CV-1144 (RWR), 04-CV-1164 (RBW), 04-CV-1166 (RJL), 04-CV-1194 (HHK), 04-CV-1227 (RBW), 04-CV-1254 (HHK), 04-CV-1519 (JR)).

C. Subsequent Proceedings In This Court

Petitioner al-Marri further urges that, after ruling on Respondents' Motion to Dismiss, the Court invite briefing by the parties regarding how the case should proceed, including issues related to any renewed motion to stay. In the event that Respondents renew their motion for certification and stay, Mr. al-Marri will oppose the motion for a stay on the ground that Respondents have not met the requirements for a stay pending interlocutory appeal under 28 U.S.C. § 1292(b). In short, Respondents have failed to "make out a clear case of hardship or inequity in being required to go forward," where, as here, there is "even a fair possibility that the stay [they seek] will work damage to [Mr. al-Marri]," who has been unlawfully detained and interrogated for over three years. *Landis v. North American Co.*, 299 U.S. 248, 255 (1936); *see also GFL v. Advantage Fund, Ltd. v. Colkitt*, 216 F.R.D. 189, 193 (D.D.C. 2003) ("[t]he right to proceed in court should not be denied except under the most extreme circumstances") (citation omitted).

We respectfully request the opportunity to appear before your Honor should she wish to hear further from counsel about any of the above issues or any other issue in this case.

Respectfully submitted,

/s/
Mark A. Berman
Lawrence S. Lustberg
Jonathan L. Hafetz
**GIBBONS, DEL DEO, DOLAN,
GRIFFINGER & VECCHIONE**
A Professional Corporation
One Riverfront Plaza
Newark, NJ 07102
(973) 596-4500
Attorneys for Petitioner Jarallah Al-Marri

Dated: February 11, 2005