[ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 11, 2006]
Case Nos. 05-5487, 05-5488, 05-5489, 05-5490, 05-5491, 05-5492 and 06-5042

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

JAMAL KIYEMBA, Next Friend, et al.,
Appellees/Cross-Appellants,
v.
GEORGE W. BUSH, President of the United States, et al.,
Appellants/Cross-Appellees.

EDHAM MAMET, Detainee, et al.,
Appellees/Cross-Appellants,
v.
GEORGE W. BUSH, President of the United States, et al.,
Appellants/Cross-Appellees.

ALLADEEN & EL-MASHAD, Detainees, et al.,
Appellees,
v.
GEORGE W. BUSH, President of the United States, et al.,
Appellants.

ZAKIRJAN, Detainee,
Appellee,
v.
GEORGE W. BUSH, President of the United States, et al.,
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

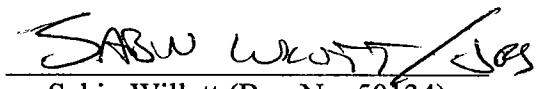
All parties, intervenors, and amici appearing before the district court and in this court are listed in the Brief for Appellants and the Reply Brief for Appellants and Brief for Cross-Appellees.

B. Rulings Under Review

References to the rulings under review appear in the Brief for Appellants, the Brief for Appellees/Cross-Appellants and the Reply Brief for Appellants and Brief for Cross-Appellees.

C. Related Cases

All related cases of which Appellees/Cross-Appellants are aware are listed in the Brief for Appellants.



Sabin Willett (Bar. No. 50134)

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TABLE OF AUTHORITIES[1]

[1] Authorities upon which we chiefly rely are marked with asterisks.

Federal Statutes, Acts and Rules

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GLOSSARY

App. ..... Appendix

CSRT ..... Combat Status Review Tribunal

dkt. ..... Docket

SA ..... Supplemental Appendix

SUMMARY OF ARGUMENT[2]

Petitioners mean to prove that they are not, and never were, enemy soldiers; that they are not, and never were, enemies of this nation; that they engaged in no combat, consorted with no warriors, and participated in no war; that they never contemplated, plotted or carried out a terrorist act; and that they fall within no "enemy combatant" definition, however broad. In short, Petitioners intend to show that their imprisonment is a monstrous injustice.

They are blocked from making this case by the Stay Orders. The stays have prolonged their illegal imprisonment. They continue to be cut off from family and friends, from news of home and the world, from human kindness, and from freedom itself, because of the stays. They pass their days in cages because of the stays. The stays are not "case management orders." They are not "administrative." The stays are as hard as iron, and as sharp as razor wire. The stays *are* prisons.

The district courts' refusal to let Petitioners stand up in a court of law and prove their innocence was error. After *Rasul v. Bush*, 542 U.S. 466 (2004), there can be no debate as to whether a hearing is required. After nearly five years in a military prison, Petitioners can no longer be denied a fair trial. Because the Stay Orders prevent the district courts from hearing these cases, they must immediately be overturned.

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[2] Unless otherwise indicated, all capitalized terms shall have the meanings ascribed to them in Petitioners' Brief for Appellees/Cross-Appellants.

ARGUMENT

I. THE COURT HAS JURISDICTION OVER THE STAY ORDERS.

A. The Court Has Appellate Jurisdiction Pursuant To The All Writs Act And The Law Of *Habeas Corpus*.

This Court has appellate jurisdiction over the Stay Orders under 28 U.S.C. §§ 1291 and 1292(a)(1). But even if those statutes did not provide a basis for immediate appellate jurisdiction, the All Writs Act, 28 U.S.C. § 1651, surely does, especially in *habeas corpus* cases involving stay orders that unduly delay the disposition of the petition.

In *Dellinger v. Mitchell*, 442 F.2d 782 (D.C. Cir. 1971), a case that applies in full force here, this Court held that it has appellate jurisdiction over stay orders under the All Writs Act. 442 F.2d at 789. There, plaintiffs filed a civil action challenging the Government's surveillance tactics. *Id.* at 784. The district court stayed the proceedings pending resolution of a parallel criminal case involving some of the plaintiffs, *id.* at 784-85, and plaintiffs appealed the entry of a stay, *id.* at 785. On appeal, this Court rejected the Government's argument that the Court lacked jurisdiction, concluding that "[t]his contention is not supported by sound legal reasoning or precedent." *Id.* at 788. The Court reasoned:

> The Government's view, if sound, precludes any appellate rectification of error even where a district court has issued a stay of immoderate scope and duration, in contravention of the principle of *Landis*,[3] and has thereby withheld for a prolonged and indefinite period, any consideration of the claims of plaintiffs seeking injunctive relief that they are presently being denied their constitutional rights . . . .

Id. at 788.

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[3] In *Landis v. North American Co.*, 299 U.S. 248 (1936), the Supreme Court warned that a stay entered in this context cannot be "immoderate in extent" or "oppressive in its consequences." 299 U.S. at 256.

In reaching its conclusion, the *Dellinger* Court examined four possible bases for the immediate appellate review of stay orders, only three of which are relevant here:[4]

> (a) a stay order is appealable because it operates in practical effect as a "final" order under 28 U.S.C. § 1291;
>
> (b) a stay order is appealable when entered in an action for injunctive relief, as equivalent to a refusal of injunctive relief under 28 U.S.C. § 1292(a)(1); and
>
> (c) where a judge abuses his discretion in entering a stay order, an appellate court may treat the attempted appeal as an application for mandamus and grant effective relief under 28 U.S.C. § 1651.

442 F.2d at 788-89 (collecting cases). Without rejecting the applicability of the other two possible bases in certain circumstances, the Court held that it had jurisdiction over the stay at issue under the All Writs Act. *Id.* at 789. In reaching its decision, the Court recognized that if a district court judge abuses her discretionary authority, "'there is always the opportunity for corrective review by a Court of Appeals.'" *Id.* (quoting *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 185 (1952)). The same conclusion is mandated here.

As this Court held in *Dellinger*, appellate jurisdiction under the All Writs Act, incorporating the common-law writ of mandamus, is appropriate where the lower court has abused its discretion in granting a stay. 442 F.2d at 789; *see also Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988) (holding that mandamus is appropriate if a petitioner can show that the district court "overstepped its authority" in denying a stay); *Leesona Corp. v. Cotwool Mfr. Corp.*, 308 F.2d. 895, 897 (4th Cir. 1962) ("If there appeared such an abuse of discretion on the part of the District Judge as to warrant mandamus, we could treat the purported appeal as an application for [mandamus]."). In *Dellinger*, the court noted that "the

[4] The fourth possible basis -- that the underlying case included a cause of action for damages -- was rejected by the Supreme Court in *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 287-88 (1988).

writ [is] appropriate where 'supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system.'" 442 F.2d at 790 (quoting *La Buy v. Howes Leather Co.*, 352 U.S. 249, 259-60 (1957)). The Court also referenced its opinion in *North American Co. v. Landis*, 85 F.2d 398 (D.C. Cir. 1936), which reasoned that:

> Where it appears that a party whose suit is sought to be tried has no remedy against his adversary except in the court in which he has brought his action, the opposing party, not having answered or brought the case to issue, is in a poor position to plead for delay. Nor is the plea of the Department of Justice in the present case that it is not equipped to handle the numerous cases which have arisen, because it is involved in other litigation, a valid ground for a blanket stay in limine of all further proceedings in the present cases for an indefinite and protracted period.

85 F.2d at 401. Although it reversed this Court's ruling in *Landis* that stay orders are only appropriate where an identity of the parties exists, *Landis v. North American Co.*, 299 U.S. 248, 255 (1936), the Supreme Court upheld this Court's reasoning and rulings concerning the impropriety of an indefinite and protracted stay, *id.* at 256.

Nowhere is the need to monitor abuse of discretion in ordering a stay more critical than in a *habeas corpus* proceeding. As the Supreme Court has long held, "[t]here is no higher duty of a court under our constitutional system than the careful processing and adjudication of petitions for writs of *habeas corpus*." *Harris v. Nelson*, 394 U.S. 286, 292 (1969); *see also Bowen v. Johnston*, 306 U.S. 19, 26 (1939) ("It must never be forgotten that the writ of *habeas corpus* is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired."). The protections afforded by the writ of *habeas corpus* are strongest where, as here, the claims challenge the legality of Executive detention. *See Rasul*, 542 U.S. at 474 ("'[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 have been strongest.'") (quoting

INS v. St. Cyr, 533 U.S. 289, 301 (2001)). Appellate jurisdiction over the Stay Orders is thus not only appropriate but necessary to give effect to the Great Writ.

Courts have repeatedly rejected a formulaic approach to the adjudication and disposition of *habeas corpus* petitions. As Justice Black explained:

> Th[e] writ always could and still can reach behind prison walls and iron bars. But it can do more. It is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose -- the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty.

Jones v. Cunningham, 371 U.S. 236, 243 (1963). In other words, the remedy "cuts through all forms and goes to the very tissue of the structure." *Frank v. Magnum*, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting). These principles are reflected in the language of the *habeas* statute itself. *See* 28 U.S.C. § 2243 (mandating that a habeas judge "dispose of [a] matter as law and justice require"). Accordingly, this Court has, and must exercise, appellate jurisdiction in *habeas corpus* cases to overturn a wrongful stay entered below. *See Yong v. INS*, 208 F.3d 1116, 1120 (9th Cir. 2000) ("[W]e have never authorized, in the interests of judicial economy, an indefinite, potentially lengthy stay in a habeas case.").

As discussed more fully below and in Petitioners' Brief for Appellees/Cross-Appellants, the district courts abused their discretion in entering the Stay Orders. A *habeas corpus* petition "usurps the attention and displaces the calendar of the judge or justice who entertains it and receives prompt action from him within the four corners of the application." *Ruby v. United States*, 341 F.2d 585, 587 (9th Cir. 1965). In this case, however, the Stay Orders have been in place for close to a year, *see* App. 47 & 63, in direct violation of the Supreme Court's directive "*to hear* petitioners' *habeas corpus* challenges," *Rasul*, 542 U.S. at 483 (emphasis added), and to consider their cases on the merits. *Id.* at 485. Moreover, as discussed below, Petitioners' allege violations of the Constitution, and the available facts suggest that these cases in particular are

especially appropriate for judicial review. For all these reasons, the district courts abused their discretion in entering the Stay Orders.

B. This Court Has Appellate Jurisdiction Pursuant To 28 U.S.C. § 1292(a)(1).

The Court also has jurisdiction over the Stay Orders under 28 U.S.C. § 1292(a)(1), which grants appellate jurisdiction to review interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." As the Government itself recognizes, an order that does not stem from a specific request for an injunction is nonetheless immediately appealable if it has the "practical effect" of granting or denying an injunction and threatens "serious, perhaps irreparable, consequence." Brief for Appellants at 29-30 (quoting *Carson v. American Brand, Inc.*, 450 U.S. 79, 84 (1981) (internal quotations omitted); *see also Gulfstream*, 485 U.S. at 287-88 ("Section 1292(a)(1) . . . continue[s] to provide appellate jurisdiction over orders that . . . have the practical effect of granting or denying injunctions and have serious, perhaps irreparable, consequence.") (internal quotations omitted); *United States v. Cities Serv. Co.*, 410 F.2d 662, 664 (1st Cir. 1969) ("Section 1292 represents a Congressional judgment that some interlocutory orders are of such significance that appellate review is necessary in order to prevent irreparable harm to an unsuccessful litigant.").

Under this standard, the Stay Orders are immediately appealable, regardless of whether the district court or the Petitioners characterized the relief as "injunctive," because they have the "practical effect" of granting an injunction and may result in "serious, perhaps irreparable, consequence" that can only be "effectually challenged" by immediate appeal. *Carson*, 450 U.S. at 84; *see Cobell v. Norton*, 334 F.3d 1128, 1137 (D.C. Cir. 2003) (jurisdiction under section 1292(a)(1) is not limited to "an injunction so-denominated"); 16 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3922 (2d ed. 2006) ("Many

interlocutory orders that have serious, perhaps irreparable consequences clearly are not injunctions."). In stalling these *habeas corpus* proceedings and impairing Petitioners' right to challenge the legality of their detention, *see Rasul*, 542 U.S. at 484, the Stay Orders clearly have the practical effect of an injunction enjoining Petitioners' release. Petitioners have been incarcerated, virtually *incommunicado*, for over four years, and nothing has happened in these cases more than a year after the filing of Petitioners' *habeas corpus* petitions. Indeed, many Petitioners have not even been permitted to meet with counsel. There can be no question but that the Stay Orders have the practical effect of enjoining any relief to Petitioners.

Whatever word we ascribe to indefinite, unreviewable confinement, the psychological injury is profound and tantamount to that inflicted by torture. The consequences of such confinement are dire and in some cases irreversible. In June 2006, three Guantánamo detainees committed suicide. For all the record shows, these men took their lives to escape the emotional despair of endless imprisonment. The "serious" nature and potentially "irreparable" consequence of the Stay Orders cannot be overstated.

The Government attempts to label the Stay Orders as mere "case management orders." Brief of Cross-Appellees at 29. It argues that they are "order[s] by a federal court that relate[] only to the conduct or progress of litigation before the court," and are therefore unappealable. Not so. In these circumstances, the Stay Orders effectively deny Petitioners their right to challenge their unlawful detention by the Executive and secure their remedy of immediate release upon a judicial determination that their detention is without basis, thereby prolonging their confinement more than two years after the Supreme Court ordered the district courts to consider the merits of Guantánamo detainees' *habeas corpus* claims. *Rasul*, 542 U.S. at 485. In contrast to the breach of contract claim at issue in *Gulfstream*, cited by the Government, the

Petitioners' *habeas corpus* petitions require "special solicitude" because the writ is intended to be a "swift and imperative remedy in all cases of illegal restraint or confinement." *Yong*, 208 F.3d at 1120 (quoting *Faye v. Noia*, 372 U.S. 391, 400 (1963), *overruled on other grounds*, *Wainwright v. Sykes*, 433 U.S. 72, 97 (1977)). The Stay Orders further contravene the explicit mandate of the *habeas* statute which "itself directs courts to give petitions for *habeas* corpus special, preferential consideration to insure expeditious hearing and determination." *Faye*, 372 U.S. at 400 (internal citation and quotation marks omitted); *see also* 28 U.S.C. § 2243 (directing a district court to "summarily hear and determine the facts, and dispose of [a *habeas corpus* petition] as law and justice require"). Far from merely "case management orders," the Stay Orders are substantive commands that alter Petitioners' right to swift review of their Executive detention and immediate release upon a finding that the detention is unlawful. *See Yong*, 208 F.3d at 1120-21 (stating that "we have never authorized, in the interests of judicial economy, an indefinite, potentially lengthy stay in a *habeas* case," and reversing a stay order that threatened to further delay adjudication of petitioner's *habeas corpus* claims).

Immediate appeal is the only way to effectively challenge the Stay Orders. Requiring Petitioners to wait until the resolution of other pending *habeas corpus* cases contravenes the law of *habeas corpus* and could never undo the damage -- affecting body, mind, and spirit -- caused by the stays. There is no remedy for suicide, nor consolation for years of unjust incarceration. Given the "probable substantial longevity" of the Stay Orders, *Yong*, 208 F.3d at 1119, and the substantial harm attendant thereto, there can be no doubt that this Court has jurisdiction over Petitioners' appeals.

C. This Court Has Appellate Jurisdiction Pursuant To 28 U.S.C. § 1291.

Finally, contrary to the Government's contentions, this Court also has jurisdiction over this appeal under 28 U.S.C. § 1291, as the Stay Orders at issue have the practical effect of final

orders. This Court has taken a "pragmatic approach to the question of finality . . . considered essential to the achievement of the just, speedy, and inexpensive determination of every action." *McSurley v. McClellan*, 426 F.2d 664, 668 (D.C. Cir. 1970) (internal quotations omitted). The prompt resolution of a *habeas corpus* petitioner's claims merits heightened consideration where the alternative is to prolong unjust detention. *See* 28 U.S.C. § 2243 (directing district courts to "summarily hear and determine the facts, and dispose of [*habeas corpus* petitions] as law and justice require"); *Faye*, 372 U.S. at 401-02 ("[T]he office of the writ is to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints . . . . [I]f the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release."); *Yong*, 208 F.3d at 1119-21. This imperative of *habeas corpus* law requires that the Court take immediate appellate jurisdiction where, as here, the order appealed from bears "sufficient indicia of finality." *McClellan*, 426 F.2d at 668.

No substantive action has been taken on Petitioners' *habeas* petitions since they were filed more than a year ago, and no one, including the Government, can say when the Stay Orders will be lifted. In these circumstances, the Stay Orders amount to an effective denial of relief to Petitioners, as well as a prolonged delay in judicial consideration of the merits of their *habeas* petitions, in direct contravention of the law of *habeas corpus* and the mandate of *Rasul*. *See* 28 U.S.C. § 2243 (imposing strict temporal deadlines for *habeas corpus* determinations); *Rasul*, 542 U.S. at 485. When an order amounts to a dismissal of a case or results in the loss of a litigant's rights, it is deemed final for purposes of appeal under section 1291. *See, e.g., Dellinger*, 442 F.2d at 789 (finding that a stay order may be considered final if it is "so indefinite as to be the practical equivalent of a dismissal"); *McClellan*, 426 F.2d at 668 (holding that the stay entered pending resolution of a parallel criminal case against the defendant amounted to a loss of right

for all practical purposes); *Amdur v. Lizars*, 372 F.2d 103, 106 (4th Cir. 1967) (holding that a stay entered in a federal court case pending resolution of a state case, which itself was indefinitely stayed, amounted to a dismissal of plaintiffs' claims).

Alternatively, even if the district courts' Stay Orders were not final orders, they fall within the collateral-order exception to the final-judgment rule under 28 U.S.C. § 1291.[5] *See Gulfstream*, 485 U.S. at 276 (recognizing that a stay is appealable under section 1291 if it involves claims of rights separable from, and collateral to, other rights asserted in the action that are too important to be denied review and too independent of the cause itself to require deferral of appellate consideration). This doctrine has been held to confer appellate jurisdiction over an order staying a case pending resolution of another matter. *Id.* at 276-77.

An order must meet three requirements for the collateral order doctrine to apply. First, it must conclusively determine a disputed question. 485 U.S. at 276. Second, it must resolve an important issue separate from the merits of the action. *Id.* And third, it must be "effectively unreviewable on appeal from a final judgment." *Id.*

The Stay Orders in these cases easily satisfy the first prong of this test. The grant of a stay is conclusive because it is made "with the expectation that [it] will be the final word on the subject addressed," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 12, n. 14 (1983), namely, the suspension of proceedings. The Stay Orders also clearly satisfy the second

[5] The two cases relied on by the Government, *see* Brief for Cross-Appellees at 29, are completely inapposite. Indeed, neither case addresses the collateral order doctrine at all. In *Dellinger*, this Court addressed the question whether an excessive stay was sufficiently indefinite to be considered a *final order*, and specifically distinguished the issue of appealability under the collateral order doctrine in a footnote. *Dellinger*, 442 F.2d at 789 & n. 12. In *McSurely*, after finding the stay order sufficiently final for purposes of jurisdiction under section 1291, the Court went on to consider, *inter alia*, the scope of the district court's discretion in granting or denying a stay, noting that "[t]here is undoubted appellate jurisdiction to review the grant of an indefinite stay in a civil proceeding." 426 F.2d at 671, n. 47.

prong of the test. In *Rasul*, the Supreme Court held that the *habeas corpus* statute requires the district courts to consider *the merits* of Petitioners' claims. 542 U.S. at 485. In granting the stays, the district courts failed to heed the Supreme Court's directive to adjudicate Petitioners' claims -- an issue plainly important, and independent of the merits of the claims themselves. *See Moses H. Cone*, 460 U.S. at 11 ("An order that amounts to a refusal to adjudicate the merits plainly presents an important issue separate from the merits."). As for the third prong, the Stay Orders (which give rise to another set of violations and harms to the Petitioners) would effectively be unreviewable on appeal, as the case would have already been decided and these violations would have no remedy. Accordingly, the Court has jurisdiction under the collateral-order doctrine, even if it finds that the Stay Orders are not final orders.

II. THE STAY ORDERS ARE IMPROPER.

A. The Hardship To Petitioners Of Continuing The Stay Orders Outweighs Any Benefit To The Respondents.

In evaluating the propriety of a stay pending resolution of an appeal in another case, the court "must weigh the competing interests and maintain an even balance." *Landis*, 299 U.S. at 254-55. The Supreme Court requires that the "the suppliant for a stay make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else." *Id.* at 255. Here, the Government cannot meet its burden, as the harm to the Petitioners caused by the Stay Orders is unquestionably greater than any hardship to the Government.

The Government first argues, citing the district courts' entry of preliminary injunctions in Petitioners' cases, that the Stay Orders are proper because they are "of limited scope." Brief for Cross-Appellees at 31. Putting aside the irony that the Government has appealed entry of these very same orders on the ground that they exceed the district courts' authority, the preliminary

injunctions in *Kiyemba* and *Mamet* were entered simultaneously with the Stay Orders. App. 46-47, 62. Accordingly, there were no stays in effect to preclude consideration of the injunction motions at the time they were filed.

More important, entry of the Stay Orders foreclosed any possibility of prompt substantive consideration and relief, as the law of *habeas corpus* requires. Now in their fifth year of imprisonment, Petitioners still spend their lives in a cage, with no opportunity to prove their innocence in a court of law. All the while, their year-old *habeas corpus* petitions rest undisturbed in a file room in Washington D.C. The Stay Orders clearly are *not* limited in their denial of relief.

Next, the Government posits that the Stay Orders are "likely to expire shortly" as the parties are "awaiting a decision" from this Court in *Al-Odah v. United States* (Nos. 05-5064, 05-5095 through 05-5116) and *Boumediene v. Bush* (Nos. 05-5062 and 05-5063). Brief for Cross-Appellees at 31. This assertion is meritless. First, the appeals in *Al-Odah* and *Boumediene* have been pending for more than eighteen months. No one can say that it will not be another eighteen months before a decision is made. Moreover, just one week before the Government filed its Brief for Cross-Appellees, this Court ordered a third round of briefing in the *Al-Odah* and *Boumediene* appeals. *See* Order (July 26, 2006) (dkt. no. 982362). Thus, there is no reason to believe that the stay will be dissolved any time soon. Furthermore, the Government's argument completely ignores the near certainty that this Court's decision in *Al-Odah* and *Boumediene* will be appealed to the Supreme Court, itself reason enough to vacate the Stay Orders. *Yong*, 208 F.3d at 1119 ("[I]f the Supreme Court should grant certiorari to review this court's decision . . . the stay could remain in effect for a lengthy period of time, perhaps for years if our decision . . . is reversed and the case is remanded for further proceedings."); *Dellinger*, 442 F.2d at 786 ("The

trial phase of the [parallel] case has come to an end but the appellate and remand phases may go on for years . . . . If there should be a reversal and remand, the time span of the delay and stay embraced by the District Court order may come to embrace a new trial and appeals."). Contrary to the Government's assertions, the Stay Orders should be examined "in light of [their] probable substantial longevity," *see Yong*, 208 F.3d at 1119, and vacated in view of the obvious and substantial harm to Petitioners caused by their continued imprisonment with no access to the prompt judicial review required by the law of *habeas corpus*.

Next, the Government contends that the Stay Orders are justified by reasons of economy benefiting the court, counsel and *the litigants themselves*. Brief for Cross-Appellees at 31. In making this statement, the Government surely cannot be suggesting that Petitioners would benefit from waiting out the pending appeals in *Al-Odah* and *Boumediene*. Still, the statement underscores the Government's refusal to acknowledge the harm that the Stay Orders inflict on the Petitioners. In all events, concerns over economy cannot justify the denial of Petitioners' rights under the law of *habeas corpus*. *See Murray v. Carrier*, 477 U.S. 478, 505 (1986) (correcting an unjust incarceration has always been a judicial imperative); *Yong*, 208 F.3d at 1120 ("[H]abeas proceedings implicate special considerations that place unique limits on a district court's authority to stay a case in the interests of judicial economy."). Clearly, prompt adjudication of the propriety of Petitioners' detention by the Executive is more important than saving the Government's time.[6]

[6] Apparently, at least one Respondent agrees. *See* Press Release, Remarks by President Bush, White House Press Office (June 9, 2006), *available at* http://www.whitehouse.gov/news/releases/2006/06/20060609-2.html (stating that he would like to end Guantánamo and that the detainees "ought to be tried in courts here in the United States").

The harm inflicted on these Petitioners by the Stay Orders is real and devastating. All that these men are asking for is a chance to stand up in a court of law, view the evidence against them and attempt to prove their innocence, as the Supreme Court held in *Rasul* is their right. The Stay Orders deny them that right and perpetuate their unlawful incarceration. There can be no greater harm.

B. The Stay Orders Are Indefinite.

The Government claims that the Stay Orders entered in these cases are not indefinite. Brief for Cross-Appellees at 35. This is not true. An indefinite stay is one "having no exact limits." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 612 (9th ed. 1983). Here, the district courts entered the Stay Orders "pending resolution of *all appeals* in *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005), and *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005)." App. 62 (emphasis added); *see also* App. 46-47. Thus, the plain terms of the Stay Orders contain no identifiable limit to their duration. No one can say for sure when all appeals in the pending cases will terminate. Accordingly, the Stay Orders are, by definition, indefinite. The Government that provides blandishments is the same Government that recently sought -- and received -- yet a further delay in *Al Odah* and *Boumediene* to brief a *footnote*.

As the Supreme Court explained in *Landis*, "an order which is to continue by its terms for an immoderate stretch of time is not to be upheld as moderate because conceivably the court that made it may be persuaded at a later time to undo what it has done." 299 U.S. at 257. In other words, indefinite stays cannot stand, especially in the *habeas corpus* context. *See Yong*, 208 F.3d at 1119. Thus, the possibility that the district courts might lift the Stay Orders at some indeterminate date in the future cannot serve to sustain their validity.

Contrary to the Government's contentions, *see* Brief for Cross-Appellees at 33-35, this case is on all fours with *Yong*. In *Yong*, the district court entered a five-month stay of an alien's *habeas corpus* petition pending a similar appeal in a parallel case and, upon appeal, the Court of Appeals held that the stay was indefinite and unlawful. 208 F.3d at 1118-19. While acknowledging the possibility that a "short stay" might be permissible in these circumstances, the *Yong* Court flatly rejected the Government's argument that the stay in that case was justified on grounds of judicial economy and the public interest, holding that "an indefinite, potentially lengthy stay in a *habeas* case" is unlawful. *Id.* at 1119. "A long stay," the *Yong* Court reasoned, "threatens to create the perception that courts are more concerned with efficient trial management than with the vindication of constitutional rights." *Id.* The *Yong* decision is squarely on point and the same result should obtain here.

C. The District Courts Must Hold Hearings.

The Government says that "[t]he court's ruling in Rasul . . . did not order the district courts to hold such hearings." *See* Brief for Cross-Appellees at 32. This contention is demonstrably false.

In *Rasul*, the Supreme Court resolved the question of "whether the *habeas* statute confers a right to judicial review of the legality of Executive detention of aliens" held at Guantánamo. 542 U.S. at 475. "In the end," the Court held, "the answer to the question presented is clear . . . . We [] hold that § 2241 confers on the District Court jurisdiction *to hear* petitioners' *habeas corpus* challenges to the legality of their detention at the Guantanamo Bay Naval Base." *Id.* at 483 (emphasis added). Expressly contemplating that the Government would "make [a] *response* to the merits of petitioners' claims," as the *habeas* statute requires, the Court remanded the case "for the District Court to *consider in the first instance the merits* of petitioners' claims." *Id.* at

485 (emphasis added). There can be no doubt that *Rasul* directs the district courts "to hold such hearings" on Petitioners' *habeas* petitions. Because the indefinite Stay Orders prevent these hearings from moving forward, they violate the mandate of *Rasul* and must be vacated.

The Government also contends that hearings in these specific cases are not justified, arguing that "the fact that the CSRT's determined, in individualized hearings, that some of the Uighurs were not enemy combatants, has no bearing on whether petitioners in this case were properly designated as enemy combatants." Brief for Cross-Appellees at 37-38. The facts tell a different story.

As detailed in their opening brief, Petitioners are Uighurs. SA 316. Uighurs make up a very small percentage of the detainee population at Guantánamo. SA 253, 520. The Government publicly stated several times that the Uighurs at Guantánamo are deserving of release. App. 50-51. Consistent with this understanding, most of the Uighur Petitioners appear to have lived, traveled and been captured together, alongside other Uighurs who have since been declared innocent and transferred from Guantánamo. SA 317-18. Nevertheless, each of the remaining Petitioners involved in this cross-appeal has been designated an enemy combatant. Given the factual similarity of these Petitioners' cases to the cases of the non-enemy combatant Uighurs, along with the Government's statements supporting the release of the Uighurs generally, there is undoubtedly reason to believe that the Petitioners in this case are non-enemy combatants and should be freed. Indeed, these cases in particular cry out for judicial review. Because the Stay Orders prevent any inquiry into the merits of Petitioners' *habeas corpus* claims, they should be vacated.

D. The Stay Orders Violate The Suspension Clause.

The Government argues that the Suspension Clause does not apply to aliens held at Guantánamo. Brief for Cross-Appellees at 36. This is not so. The Supreme Court has recognized that the Suspension Clause applies to *habeas corpus* petitions brought by aliens held within the territorial jurisdiction of the United States. *See St. Cyr*, 533 U.S. at 298, 300 (revoking a deportable alien's *habeas corpus* rights would raise "substantial constitutional problems" under the Suspension Clause); *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("A statute permitting indefinite detention of an alien would raise a serious constitutional problem."). It has also held that the detainees imprisoned at Guantánamo are "within the territorial jurisdiction of the United States." *Rasul*, 542 U.S. at 480. Accordingly, denial of Petitioners' *habeas corpus* rights violates the Suspension Clause.

The Government's argument that "the practical effect of the stays is not a suspension of the writ, but merely a delay in the adjudication of [Petitioners'] claims," Brief for Cross-Appellees at 37, is without merit. The Petitioners' *habeas corpus* petitions, which allege (among other things) that their continued incarceration by the Executive violates the Constitution, have been pending in the district courts since July and August of 2005, yet Petitioners are no closer to a hearing date than they were a year ago. As the Supreme Court has long recognized, "if the means be not in existence, the privilege [of filing a *habeas corpus* petition] itself would be lost, although no law for its suspension should be enacted." *Ex parte Bollman*, 8 U.S. 75, 95 (1807); *cf. Davis v. Adult Parole Auth.*, 610 F.2d 410, 414 (6th Cir. 1979) ("[A] rule which would permit a court to dismiss an action for *habeas* relief without any consideration of the equities presented renders the *habeas corpus* process inadequate to test the legality of a person's conviction and, thereby, constitutes a prohibited suspension of the writ."). Here, the indefinite Stay Orders

entered by the district courts have stripped Petitioners of the means to challenge their continued detention. We are long past the point of delay. The Stay Orders have effected an unlawful suspension of the Great Writ, and must be vacated.

CONCLUSION

For the foregoing reasons, the *Kiyemba* and *Mamet* Petitioners respectfully request that the Court vacate the Stay Orders.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)(C) and D.C. CIRCUIT RULE 32(a)

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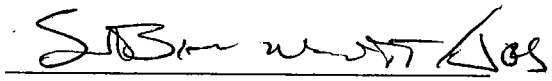

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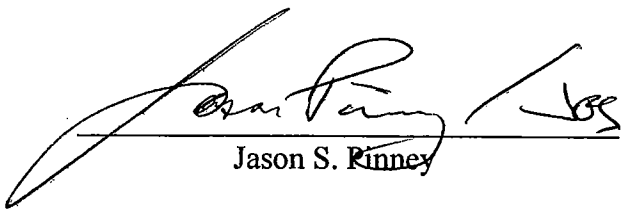

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