[ORAL ARGUMENT HELD ON SEPTEMBER 8, 2005 AND MARCH 22, 2006]

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

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| LAKHDAR BOUMEDIENE, et al.,<br><br>Appellants,<br><br>v.<br><br>GEORGE W. BUSH, President of the United States, et al.,<br><br>Appellees. | No. 05-5062<br>consolidated with<br>No. 05-5063 |
| KHALED A. F. AL ODAH, et. al.,<br><br>Appellees-Cross-Appellants,<br><br>v.<br><br>UNITED STATES OF AMERICA, et al.,<br><br>Appellants-Cross-Appellees. | No. 05-5064<br>consolidated with<br>Nos. 05-5095 - 05-5116 |

**GOVERNMENT'S OPPOSITION TO PETITIONERS' MOTION TO LIFT THE STAY**

Petitioners have filed a "Motion to Expedite Issuance of Decision on the Merits and to Lift the Stay." The Government takes no position on the expedition motion and defers to this Court as to the question of when it is ready to issue an opinion in this case. We do, however, oppose the motion insofar as it seeks to lift the district

court's stay governing petitioners' habeas actions. The district court here stayed its proceedings pending the outcome of the merits ruling in the appeals pending in the above-captioned cases. More than 120 similar stay orders from virtually every district court judge in this Circuit have been issued in detainee habeas cases. In each of those cases, the district courts properly recognized that proceeding with the habeas cases would be inappropriate until this Court issues its decision in these cases addressing the fundamental jurisdictional and constitutional issues.

Moreover, the propriety of such stays have already been fully briefed and argued to this Court in several related appeals. See Kiyemba v. Bush (D.C. Cir. Nos. 05-5487 through 05-5492, and 06-5042) (argued September 11, 2006); Paracha v. Bush (D.C. Cir. 05-5194, 05-5211, 05-5333) (argued December 8, 2005). As more fully explained in our briefs in those related appeals, a stay of the district court proceedings in this context is an entirely proper case-management order that is well within the district court's discretion. In addition, vacating the district court's stay to permit petitioners' habeas and conditions-of-confinement claims to proceed in the district court would be contrary to the Military Commissions Act, which eliminates the district court's subject matter jurisdiction over petitioners' habeas and condition-of-confinement claims. Notably, this Court in both Kiyemba and Paracha, when faced with arguments that the district court stays were erroneous, did not vacate the

stays. To the contrary, this Court itself stayed proceedings, after oral argument, pending the outcome of the merits appeals pending in these cases.

1. Petitioners seek to immediately lift the district court's order staying the proceeding in Al Odah, pending the outcome of these appeals. That stay, however, was an entirely proper order, well within the district court's discretion. A district court "has broad discretion to stay proceedings as an incident to its power to control its own docket." Clinton v. Jones, 520 U.S. 681, 706 (1997); accord Rhines v. Weber, 125 S. Ct. 1528, 1534 (2005). In exercising that discretion, the district court "must weigh competing interests and maintain an even balance." Landis v. North Am. Co., 299 U.S. 248, 254-55 (1936). When a case presents "great issues" and "novel problems of far-reaching importance to the parties and the public," and a stay "will settle many and simplify them all," a stay is unquestionably proper, so long as it is "kept within the bounds of moderation." Landis, 299 U.S. at 256. As the Supreme Court has explained, "'[e]specially in cases of extraordinary public moment, [a plaintiff] may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted.'" Clinton, 520 U.S. at 707 (quoting Landis, 299 U.S. at 256).

In accordance with these standards, the district court properly exercised its discretion in staying the proceedings in Al Odah pending this Court's resolution of

the merit appeals in Al Odah and Boumediene. The stay was entered to ensure consistent and expeditious treatment of overlapping, complex and fundamental issues critical to the litigation of these cases. The appeals before this Court raise the fundamental questions of: whether the district court has habeas jurisdiction and, if so, what is the scope and nature of that habeas review; whether the action should be transferred to this Court's jurisdiction under the Detainee Treatment Act ("DTA"); whether the detainees, as aliens outside the United States detained as enemy combatants, can invoke rights under the U.S. Constitution; and, if so, whether the process afforded in enemy combatant tribunal proceedings violated any constitutional due process rights that the detainees might have. In sum, the decision from the Court in the present appeals will provide guidance as to how petitioners' habeas cases should proceed, if at all. Recognizing this fact, the district courts in this Circuit have issued well over 120 stay orders – staying disposition of the habeas claims until this Court renders its ruling in Al Odah and Boumediene. The broad consensus reached by the district court judges in this Circuit is that permitting the cases to move forward absent guidance from this Court would waste the resources of the judiciary and the parties.

As noted above, the propriety of such stays has already been fully briefed and argued to this Court in several related appeals. See Kiyemba v. Bush (D.C. Cir. Nos.

05-5487 through 05-5492, and 06-5042) (argued September 11, 2006); Paracha v. Bush (D.C. Cir. 05-5194, 05-5211, 05-5333) (argued December 8, 2005). As we have more fully explained in our briefs in those related appeals, a stay of the district court proceedings in this context is an entirely proper case-management order that is well-within the district court's discretion. In both Kiyemba and Paracha, when faced with arguments that the district court stays were an abuse of discretion, this Court did not vacate the stays. To the contrary, this Court itself stayed proceedings, after oral argument, pending the outcome of the merits appeals pending in these cases. This Court has likewise stayed other related appeals and petitions filed under the DTA. See, e.g., Parhat v. Gates (No. 06-1397), Bismullah v. Rumsfeld (No. 06-1197), Al Ginco (Nos. 06-5191, 06-5196, 06-5197, 06-5198, 06-5205, 06-5235, 06-5236). This Court's act of staying these cases demonstrates that the similar stays entered by the district courts were not an abuse of discretion.

2. The rationale for staying the cases is even stronger given the enactment of the MCA, which withdraws jurisdiction from the district court in these cases. As we have explained in our supplemental brief to this Court, pursuant to the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (MCA), which became law on October 17, 2006, the district courts no longer possess jurisdiction over petitioners' cases, including their claims challenging their conditions of

confinement. See also Hamdan v. Rumsfeld, No. 04-1519 (JR), 2006 WL 3625015, at *2-3 (D.D.C. Dec. 13, 2006). The MCA amends 28 U.S.C. § 2241 to provide that "[n]o court, justice, or judge shall have jurisdiction" to consider any action "relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of aliens detained by the United States as enemy combatants. See MCA § 7(a). This amendment to Section 2241 took effect on the date of enactment and applies specifically "to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001." MCA § 7(b). Thus, petitioners' requested relief – vacatur of the district court stay of proceedings – would be futile in that the district court no longer possesses jurisdiction over this matter.

Petitioners' reliance on their conditions-of-confinement claims as a ground for vacating the district court stay of proceedings is particularly inappropriate. While petitioners, in supplemental briefing regarding the MCA, have argued that the MCA's elimination of jurisdiction over habeas detention claims violates the Suspension Clause of the Constitution, the MCA's removal of jurisdiction to consider claims pertaining to conditions of confinement clearly does not implicate the Suspension

Clause.[1] Thus, regardless of how this Court rules in regard to the MCA's effect on the pending habeas detention claims, section 7 of the MCA unambiguously removes jurisdiction over petitioners' claims regarding conditions of confinement.

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[1] As we have explained in other cases (see U.S. Br. in Paracha (Nos. 05-5194, 05-5211, 05-5333) at 42-43) habeas action is not an appropriate vehicle for challenging conditions of confinement. See, e.g., Wilkinson v. Dotson, 544 U.S. 74, 86 (2005) (Scalia, J., concurring) (condition-of-confinement claims in habeas would "utterly sever the writ from its common-law roots"); Bell v. Wolfish, 441 U.S. 520, 526 n.6 (1979). In Miller v. Overholser, 206 F.2d 415 (D.C. Cir. 1953), this Court recognized that a habeas action "is not the correct remedy" for challenging "discipline or treatment." Id. at 419-20; see also id. at 419 ("legal validity of confinement in a certain place is a different problem" than "discipline or treatment in a place of legal confinement"); Blair-Bey v. Quick, 151 F.3d 1036, 1041-42 (D.C. Cir. 1998) ("pure prison-conditions cases" are "easy to identify" as outside the scope of habeas corpus); Brown v. Plaut, 131 F.3d 163, 1689-69 (D.C. Cir. 1997) (use of habeas corpus to challenge conditions of confinement would extend "beyond the 'core' of the writ").

## CONCLUSION

For the foregoing reasons, this Court should deny petitioners' motion to vacate the district court stay of petitioners' habeas actions.

Respectfully submitted,

PETER D. KEISLER
*Assistant Attorney General*

GREGORY G. KATSAS
*Principal Deputy Associate Attorney General*

DOUGLAS N. LETTER
(202) 514-3602

ROBERT M. LOEB
(202) 514-4332

CATHERINE Y. HANCOCK
(202) 514-3469
*Attorneys, Appellate Staff*
*Civil Division, Room 7268*
*U.S. Department of Justice*
*950 Pennsylvania Ave., N.W.*
*Washington, D.C. 20530-0001*

FEBRUARY 2007

CERTIFICATE OF SERVICE

I hereby certify that I have on February 14, 2007, served a copy of the foregoing "Government's Opposition to Petitioners' Motion to Lift the Stay" on the following counsel of record by causing a copy to be sent by first-class mail:

Tom Wilner
Neil H. Koslowe
SHEARMAN AND STERLING LLP
801 Pennsylvania Avenue, NW, Suite 900
Washington, DC 20004
(202) 508-8000
Email: Twilner@shearman.com
Email: neil.koslowe@shearman.com

Stephen H. Olesky
Robert C. Kirsch
Melissa A. Hoffer
Mark Fleming
Wilmer Cutler Pickering Hale and Dorr LLP
60 State Street
Boston, MA 02109
(617) 526-6000
Rob.Kirsch@wilmerhale.com
Melissa.Hoffer@wilmerhale.com
Mark.Fleming@wilmerhale.com

David J. Cynamon
Pillsbury Winthrop Shaw Pittman, LLP
2300 N Street, NW
Washington, DC 20037-1122
202-663-8000
david.cynamon@pillsburylaw.com

Jon W. Norris
641 Indiana Avenue, N.W.
Washington, DC 20004
(202) 842-2695
jonnorrislaw@hotmail.com

L. Barrett Boss
1627 I Street, NW
Suite 1100
Washington, D.C. 20006-1605
bboss@cozen.com

Joseph Margulies
Macathur Law Center
Northwestern University Law School
357 East Chicago Ave.
Chicago, IL 60611
(301) 503-0890
j-margulies@law.northwestern.edu

Adrian Lee Steel, Jr.
Mayer, Brown Rowe & Maw Llp
1909 K Street, NW
Washington, DC 20006-1152
(202) 263-3237
asteel@mayerbrownrowe.com

Baher Azmy
Seton Hall Law School
Center for Social Justice
833 McCarter Highway
Newark, NJ 07102
(973) 642-8700
azmybahe@shu.edu

Barry J. Pollack
Kelley Drye & Warren LLP
3050 K Street, NW, Suite 400
Washington, DC 20007
(202) 342-8472
bpollack@kelleydrye.com

Eric M. Freedman
250 West 94th Street
New York, NY 10025
(212) 665-2713
eric.m.freedman@hofstra.edu

Richard J. Wilson
Muneer I. Ahmad
American University Washington College of Law
4801 Massachusetts Avenue, NW
Washington, DC 20016
(202) 274-4140
mahmad@wcl.american.edu

Shayana Devendra Kadidal
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012
(212) 614-6431
kadidal@ccr-ny.org

George Brent Mickum, IV
Douglas James Behr
Keller & Heckman, Llp
1001 G Street, NW
Washington, DC 20001
(202) 434-4100
mickum@khlaw.com

Michael Ratner
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012
(212) 212-614-6464
mratner@igc.org

Erwin Chemerinsky
Duke Law School
Corner of Science Drive & Towerview Road
Durham, NC 27708
(919) 613-7173
CHEMERINSKY@law.duke.edu

Pamela Ann Chepiga
Allen & Overy
1221 Avenue of the Americas
New York, NY 10020
212-610-6300
pamela.chepiga@newyork.allenovery.com

Ralph A. Taylor
Dorsey & Whitney Llp
1050 Connecticut Avenue, NW
Washington Square, Suite 1250
Washington, DC 20036
202-442-3000
taylor.ralph@dorseylaw.com

Kevin B. Bedell
Greenberg Traurig
1750 Tysons Boulevard
Suite 1200
McLean, VA 22102
703-749-1300
bedellk@gtlaw.com

David H. Remes
COVINGTON & BURLING
1201 Pennsylvania Avenue, NW
Suite 803E
Washington, DC 20004-2494
(202) 662-5212
dremes@cov.com

Marc D. Falkoff
2166 Broadway
New York, NY
347-564-5043
mfalkoff@niu.edu

Wesley Powell
Hunton & Williams
200 Park Avenue
New York, NY 10166
(212) 309-1013
wpowell@hunton.com

Julia Symon
James Hosking
Clifford Chance US LLP
31 W. 52nd St.
New York, NY 10019
(212) 878-8000
Julia.Symon@cliffordchance.com
James.Hosking@cliffordchance.com

Catherine Y. Hancock