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Nos. 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, et al.,

Plaintiffs-Petitioners-Appellees/Cross-Appellants,

v.

UNITED STATES OF AMERICA, et al.,

Defendants-Respondents-Appellants/Cross-Appellees.

ON CONSOLIDATED APPEALS FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL BRIEF FOR THE GUANTANAMO DETAINEES

BARBARA J. OLSHANSKY
CENTER FOR CONSTITUTIONAL RIGHTS
666 BROADWAY
NEW YORK, NY 10012
TELEPHONE: 212-614-6439

JOSEPH MARGULIES
MACARTHUR JUSTICE CENTER
UNIVERSITY OF CHICAGO LAW SCHOOL
1111 EAST 60TH STREET
CHICAGO, IL 60637
TELEPHONE: 773-702-9560

THOMAS B. WILNER
NEIL H. KOSLOWE
KRISTINE A. HUSKEY

SHEARMAN & STERLING LLP
WASHINGTON, D.C. 20004
TELEPHONE: 202-508-8000

COUNSEL FOR THE GUANTANAMO DETAINEES
(CONTINUED FROM COVER)

ADRIAN LEE STEEL, JR.
MAYER, BROWN ROWE & MAW LLP
1909 K STREET, NW
WASHINGTON, DC 20006
TELEPHONE: 202-263-3237

BAHER AZMY
SETON HALL LAW SCHOOL
CENTER FOR SOCIAL JUSTICE
833 MCCARTER HIGHWAY
NEWARK, NJ 07102
TELEPHONE: 973-642-8700

CLIVE STAFFORD SMITH
JUSTICE IN EXILE
636 BARONNE STREET
NEW ORLEANS, LA 70113
TELEPHONE: 504-558-9867

JOHN J. GIBBONS
LAWRENCE S. LUSTBERG
GITANJALI GUTIERREZ
JONATHAN L. HAFETZ
GIBBONS, DEL DEO, DOLAN,
GRIFFINGER & VECCHIONE
ONE RIVERFRONT PLAZA
NEWARK, NJ 07102
TELEPHONE: 973-596-4493

GEORGE BRENT MICKUM, IV
DOUGLAS JAMES BEHR
KELLER & HECKMAN, LLP
1001 G STREET, NW, SUITE 500
WASHINGTON, DC 20001
TELEPHONE: 202-434-4245

ERWIN CHEMERINSKY
DUKE LAW SCHOOL
SCIENCE DRIVE & TOWERVIEW RD.
DURHAM, NC 27708
TELEPHONE: 919-613-7173

RICHARD J. WILSON
MUNEER I. AHMAD
AMERICAN UNIVERSITY
WASHINGTON COLLEGE OF LAW
4801 MASSACHUSETTS AVENUE, NW
WASHINGTON, DC 20016
TELEPHONE: 202-274-4140

PAMELA ROGERS CHEPIGA
KAREN LEE
ADRIAN RAIFORD STEWART
ANDREW BRUCE MATHESON
NATHAN REILLY
ALLEN & OVERY
1221 AVENUE OF THE AMERICAS
NEW YORK, NY 10020
TELEPHONE: 212-610-6300

CHRISTOPHER G. KARAGHEUZOFF
JOSHUA COLANGELO-BRYAN
MARK S. SULLIVAN
STEWART D. AARON
DORSEY & WHITNEY LLP
250 PARK AVENUE
NEW YORK, NY 10177
TELEPHONE: 212-415-9200

DAVID H. REMES
MARK FALKOFF
COVINGTON & BURLING
1201 PENNSYLVANIA AVENUE, NW
SUITE 803E
WASHINGTON, DC 20004
TELEPHONE: 202-662-5212

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SUPPLEMENTAL BRIEF FOR THE GUANTANAMO DETAINEES

The Guantanamo Detainees submit this supplemental brief pursuant to this Court's order of July 26, 2005, in response to the brief submitted by the government "addressing the effect of the court's opinion in *Hamdan v. Rumsfeld,* No. 04-393 (D.C. Cir. July 15, 2005)."

ARGUMENT

I. *Hamdan* Does Not Support The Government's Argument That Detainees Have No Right To Review Of The Merits Of Their Claims.

The government contends that *Hamdan* "significantly undercuts" petitioners' claims that they have a right to review of the merits of their claims. Gov't. Supp. Brief at 5. It relies on two isolated sentences in *Hamdan*: (i) that *Rasul* decided a "'narrow' question: whether federal courts had jurisdiction under 28 U.S.C. § 2241 'to consider challenges to the legality of the detention of foreign nationals' at Guantanamo Bay" (slip op. 11) and (ii) "[t]hat a court has jurisdiction over a claim does not mean that the claim is valid," citing *Bell v. Hood*, 327 U.S. 678, 682-83 (1946) (slip op. 13). *Id.* However, the government's contention is inconsistent with the holding in *Rasul.* Moreover, the government's argument (i) is premised on a misunderstanding of habeas relief for executive detention, which does not depend on demonstrating constitutional error, (ii) is premised as well on a misunderstanding that the *Bell v. Hood* analysis applies to habeas petitions for executive detention where the cause of action is implicit in the jurisdiction to issue

the writ, and (iii) is inconsistent with the habeas statute itself, which makes clear that summary dismissal of Detainees' habeas claims is inappropriate and a factual inquiry is required.

1. The government's contention simply cannot be squared with *Rasul*'s holding. In affirming the dismissal of Detainees' claims, this Court in *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003) linked habeas jurisdiction and substantive rights. This Court said: "This much is at the heart of *Eisentrager*. If the Constitution does not entitle the detainees to due process, and it does not, they cannot invoke the [habeas] jurisdiction of our courts to test the constitutionality or the legality of restraints on their liberty . . . *Eisentrager* itself directly tied jurisdiction to the extension of constitutional protections." *Id.* at 1141. In other words, this Court concluded that the federal courts lacked jurisdiction over Detainees' habeas claims *because* Detainees lacked substantive rights.

The Supreme Court in *Rasul* reversed. In doing so, it did not say that it was leaving open the issue of Detainees' substantive rights. Rather, the Supreme Court ruled that the Detainees' allegations that they have been deprived of their liberty without sufficient cause or process "unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.' 28 U.S.C.

§ 2441(c)(3)." 124 S. Ct. at 2698 n. 15. The Supreme Court thus concluded that the Detainees' allegations state a cognizable claim under the habeas statute.[1]

The Supreme Court went beyond that. It also confirmed the Detainees' right to traditional common law habeas review. It defined the question before it as "whether the habeas statute confers a *right* to judicial review of the legality of Executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction but not 'ultimate sovereignty.'" 124 S. Ct. at 2693 (emphasis added). Answering that question in the affirmative, the Supreme Court held that these Detainees at Guantanamo, "no less than American citizens," have a right to habeas review of the executive detention imposed upon them, and the Court remanded to the district court "to consider in the first instance the merits of petitioners' claims." *Rasul* 124 S. Ct. at 2699.

That relief mandated by the Supreme Court – judicial review of the legality of executive detention – is the traditional common law standard incorporated in the habeas statute at 28 U.S.C. § 2241(c)(1). Detainees allege that they are innocent

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[1] That holding flowed directly from the Supreme Court's finding that Guantanamo, an area over which "the United States exercises 'complete jurisdiction and control,'" is "within 'the territorial jurisdiction' of the United States." *Rasul*, 124 S. Ct. at 2696. This Court had earlier recognized that fundamental constitutional guarantees apply in areas over which the United States lacks formal sovereignty if they are equivalent to territories of the United States. *See Ralpho v. Bell,* 569 F.2d 607, 618-19 (D.C. Cir. 1977). The Supreme Court made clear in *Rasul* that Guantanamo, like Micronesia in that case, is equivalent to U.S. territory.

and detained in federal custody without sufficient cause. Nothing more is required to state a claim for relief under § 2241(c)(1). If, on examination of the merits, the Detainees' allegations are found to be true, there can be no doubt that they are being held unlawfully and are entitled to relief under § 2241(c)(1).

The Supreme Court recognized the Detainees' "claim to be wholly innocent of wrongdoing." *Id.* at 2699. *Hamdan* is certainly correct that, in upholding habeas jurisdiction, the Supreme Court in *Rasul* did not decide the validity of that claim. But it clearly did decide that the Detainees are entitled to have the validity of that claim examined and determined on the merits, and it remanded to the district court to do so.[2]

2. The government's erroneous interpretation of *Hamdan* is also based on a fundamental misunderstanding of the meaning of the writ of habeas corpus in cases of executive detention. The government premises its argument on the mistaken belief that habeas relief may be granted only if the Detainees demonstrate a violation of some constitutional right to which they are entitled. That is simply wrong. *See* Detainees' Opening Brief at 16-22 and Reply Brief at 6-11.

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[2] *Rasul*'s direction to the district court "to consider in the first instance the merits of petitioners' claims" that they are "wholly innocent of wrongdoing" (124 S. Ct. at 2699) is nearly identical to its direction in *Strait v. Laird*, 406 U.S. 341, 347 (1972) where, after finding jurisdiction under § 2241(c)(1), the Supreme Court remanded to decide "the merits of the controversy – whether petitioner is entitled to a discharge."

The basic habeas provision, 28 U.S.C. § 2241(c)(1), was enacted in its original form by the first Congress in 1789, prior to the adoption of the Fifth Amendment. It incorporates the fundamental protection of human liberty developed under the common law requiring independent judicial review of the facts and circumstances surrounding a detention to ensure that no individual is deprived of liberty by the executive without sufficient cause. *See Ex parte Watkins*, 28 U.S. 193, 202 (1830) (the object of the writ is "the liberation of those who may be imprisoned without sufficient cause").

Therefore, the Detainees need not show a constitutional violation to state a cognizable habeas claim under 28 U.S.C. § 2241(c)(1). *See INS v. St. Cyr*, 533 U.S. 289, 302-03 (2001); *McNair v. McCune*, 527 F.2d 874, 875 (4th Cir. 1975) (reversing the district court's dismissal of a habeas petition for lack of a constitutional right and holding that § 2241(c)(1), independent of a constitutional deprivation, entitles a federal prisoner to challenge his confinement "without elementary procedural due process and without just cause"). The government's assumption that the Detainees' habeas claims must be dismissed if they cannot make out a due process claim under the Fifth Amendment is without foundation.[3]

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[3] Section 2241(c)(3) was added to the habeas statute in 1867, extending the federal courts' habeas authority to prisoners detained in state custody. In line with principles of federalism, the federal courts' authority to grant relief to state prisoners was limited to cases where the prisoners were detained in violation of federal law – that is, "in violation of the Constitution or law or treaties of the

3. The government's reliance on *Hamdan*'s citation to *Bell v. Hood* also is misplaced. The Supreme Court held in *Bell v. Hood* that, in most civil actions, whether a court has jurisdiction and whether the complaint states a cause of action are normally distinct questions, and that the jurisdictional question should be resolved first and without regard to the cause of action question.[4] This jurisdiction/cause of action dichotomy, however, never has been applied to habeas actions challenging executive detention because a cause of action is inherent in the existence of jurisdiction to issue the writ. No other legal provision must be invoked to show entitlement to relief. In cases of executive detention, the writ of habeas corpus is a procedural instrument having a single purpose: it commands the respondent to bring the petitioner before the court, so the court may then determine the legality of the respondent's detention of the petitioner. *See Ex parte Milligan*,

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United States." There is no such limitation on the authority of the federal courts under § 2241(c)(1) to grant relief to prisoners held in federal executive custody. The courts' authority over federal prisoners, incorporating the standards developed under the common law, extends to anyone held without sufficient cause in fact or law. Fortunately, cases of executive detention by the United States have been rare over the last 150 years, and most of the case law has focused on petitions for other types of habeas relief. As the Supreme Court has pointed out, however: "[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." *Rasul,* 124 S. Ct. at 2692.

[4] Of course, *Bell v. Hood* does not deprive the Court of the power to decide both that it has jurisdiction and that the complaint states a cognizable claim, as the Supreme Court did in *Rasul.*

71 U.S. (4 Wall.) 2, 113 (a proceeding for habeas corpus is the "'*cause*' of the party applying for it" and the questions raised by it are "matter of right and not of discretion"). Once the petitioner is before the court – that is, once jurisdiction exists – there is only one question that can be asked: is the petitioner's detention just and lawful or not? If it is just and lawful, the petitioner is remanded to the custody of the respondent. If it is not, the petitioner is discharged. *Ex parte Tong,* 108 U.S. 556, 559 (1883) ("the writ of habeas corpus is the remedy which the law gives for the enforcement of the civil right of personal liberty"); W.S. Church, *A Treatise on the Writ of Habeas Corpus* 139 (1892).

4. Finally, the government's contention that *Hamdan* supports its argument that the Detainees' claims should be summarily dismissed conflicts with the express procedural provisions of the habeas statute. Because the "cause of action" to consider and determine the legality of executive detention is implicit in jurisdiction to issue the writ, once habeas jurisdiction exists, the district court must adhere to provisions of the habeas statute that automatically trigger entitlement to factual inquiry into the validity of the claim. As Justice O'Connor stated in *Hamdi:*

> [I]t is undisputed that Hamdi was properly before an Article III court to challenge his detention under 28 U.S.C. § 2241. Further, all agree that § 2241 and its companion provisions provide at least a skeletal outline of the procedures to be afforded a petitioner in federal habeas review. Most notably, § 2243 provides that 'the

> person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts,' and § 2246 allows the taking of evidence in habeas proceedings by deposition, affidavit, or interrogatories.
>
> The simple outline of § 2241 makes clear . . . that Congress envisioned that habeas petitioners would have some opportunity to present and rebut facts . . . .

Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2644 (2004) (plurality opinion).

Where petitioner is properly before the Court, dismissal without some factual inquiry is inappropriate under the habeas statute. *See McNair v. McCune,* 527 F.2d 874, 875 (4th Cir. 1975) ("Because the facts have not been ascertained, we are compelled to assume the truth of the complaint . . . . On remand the District Court will . . . issue an order directing the respondent to show cause why the writ should not be granted, and proceed to summarily hear and determine the facts."); *Lake v. Cameron*, 331 F.2d 771, 771-72 (D.C. Cir. 1964); *Smith v. Anderson,* 317 F.2d 172 (D.C. Cir. 1963); *Stewart v. Overholser,* 186 F.2d 339, 342 (D.C. Cir. 1950) ("[w]hen a factual issue is at the core of a detention challenged by an application for the writ it ordinarily must be resolved by the hearing process").

Thus, nothing in *Hamdan* undermines the Detainees' submission that the Court should affirm the denial of the government's motion to dismiss, and remand to the district court to consider what specific "further proceedings" are necessary to "determine the legality of the executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing," *Rasul*, 124 S. Ct. at

2699. Such proceedings will necessarily vary depending upon the circumstances of a particular case, but courts are empowered under the habeas statute to take whatever are steps appropriate and consistent with due process norms to vindicate the right embedded in habeas. *See Harris v. Nelson*, 394 U.S. 286, 300 (1969) ("[w]here specific allegations before the Court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for adequate inquiry").

II. The Effect of *Hamdan* On Detainees' International Law Claims.

The Court in *Hamdan* held that the Third Geneva Convention does not create rights that are judicially enforceable in U.S. courts. Detainees disagree with that decision for the reasons stated in their earlier briefs. *Hamdan* does not address claims for violations of international law under the Alien Tort Statute. It does not address habeas claims by petitioners held in custody in violation of customary international law.[5] And it does not address habeas claims by petitioners held in custody by the government in violation of its own regulations, a question that involves no issue of the enforcement of international law in the U.S. courts.

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[5] Detainees' claims include only those that have met the customary international law standard as articulated by the Supreme Court in *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2766 (2004): torture, cruel, inhuman or degrading treatment, prolonged arbitrary detention, and war crimes. *See, e.g., id.* at 2783; *Filartiga v. Pena-Irala*, 630 F. 2d 876 (2d Cir. 1980).

Detainees continue to press their arguments on these issues as expressed in their earlier briefs.

CONCLUSION

For the foregoing reasons and those stated in our briefs, the District Court's order should be affirmed insofar as it denies the motion to dismiss and reversed insofar as it grants that motion.

Respectfully submitted,

Thomas B. Wilner
Neil H. Koslowe
Kristine A. Huskey
SHEARMAN & STERLING LLP
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 508-8000
Facsimile: (202) 508-8100

August 9, 2005

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C) OF THE FEDERAL RULES OS APPELLATE PROCEDURE AND CIRCUIT RULE 32(a)

I certify that, in accordance with Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32(a), the foregoing Supplemental Brief for the Guantanamo Detainees is proportionally spaced, has a typeface of 14 point and contains 2,499 words (which does not exceed the applicable 2,500 word limit authorized by this Court in its Order of July 26, 2005).

Kristine A. Huskey
Attorney.

CERTIFICATE OF SERVICE

I certify that today, August 8, 2005, I served the foregoing Supplemental Brief for the Guantanamo Detainees on the government by causing copies to be hand-delivered to the Court Security Officer for hand-delivery to the following counsel of record for the government:

Robert M. Loeb
Attorney
Appellate Staff
Civil Division, Room 7268
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Kristine A. Huskey
Attorney.