

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:)	
)	
GUANTANAMO BAY)	Misc. No. 08-442 (TFH)
DETAINEE LITIGATION)	
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AMER MOHAMMON, <i>et al.</i> ,)	
(MAHER EL FALESTENY))	
)	
<i>Petitioners,</i>)	
)	
v.)	Civil No. 05-2386 (RBW)
)	
GEORGE W. BUSH, <i>et al.</i> ,)	
)	
Respondents.)	
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OPPOSITION TO MOTION TO STAY

Petitioner Maher El Falesteny opposes the government's motion to stay his case. The government asserts that the need to move forward with this case is less pressing than some other cases, but cannot demonstrate how this could be so. Falesteny continues to be imprisoned, and in a flagrant violation of the Geneva Conventions, remains in solitary confinement. In briefing before the Court of Appeals, and at the recent oral argument in *Kiyemba v. Bush*, the Solicitor General made much of the fact that the Uyghur prisoners are held in a less restrictive environment within the Guantanamo prison complex. While Falesteny seeks, and continues to be entitled to an unconditional release, he is also entitled to be treated

as required by applicable law pending release. The government contends, when it is convenient for it to do so, that an adjudication of Falesteny's claim, even if it cannot result in release without diplomatic efforts, would result in a material improvement of his circumstances. This alone is reason not to stay this case.

Of course there is more. He has been detained for seven years, out of contact with his family (who may not know he is alive) while the facts show that he is not, and never was, a combatant of any kind.¹ His case was already stayed for more than two years while the government tried, unsuccessfully, to evade all accountability for its actions.

Although the State Department does seem to be making at least a token effort to resettle Falesteny,² this effort cannot but be helped by a reversal of the government's erroneous and unsupportable finding that he was a combatant, and might therefore present a danger of some kind once resettled. Even if the government is unable to discern this truth for itself, it is apparent in press reports

¹ See Exhibit A, an unsigned declaration by Falesteny. A classified version will be filed under separate cover from the Secure Facility.

² Although the State Department's efforts are generally opaque, we believe that Falesteny is the Palestinian referred to in today's Washington Post:

The Bush administration shopped lists of detainees to a number of European countries, including late last year when European officials were asked to take 16 of the 17 Uighurs, four Uzbeks, an Egyptian, a Palestinian and a Somali, according to U.S. diplomats and human rights groups. "There was a big push last year," said Bellinger, the State Department legal adviser, who said that the administration has cabled approximately 100 countries seeking help with clearing out Guantanamo Bay.

from target countries.³ There is certainly no reason to believe that Falesteny's vindication will *complicate* efforts to resettle him. The affidavit from Ambassador Williamson is conspicuously silent on this, the only truly salient issue for this motion.

Falesteny is not unaware that continuing his case visits some minor inconvenience on the government. If the government is truly concerned about the allocation of resources, and is as little interested in the legal merits of its position as the motion to stay appears to suggest, there is a superior alternative: the government can concede the case as to liability, and move to the remedy phase. This would result, if the Solicitor General is to be believed, in an immediate dramatic improvement in Falesteny's quality of life while diplomatic initiatives proceed. And, obviously, it should help with those initiatives. What the government may not do under the law – what is very plainly inconsistent with the timing embedded in 28 U.S.C. § 2243 and the direct admonition of the Supreme Court – is have its cake (indefinite detention) and eat it too (be free of judicial review).

³ See e.g., Exhibit B (BBC Monitoring Europe, *German Official Signals Hamburg Might Accept Guantanamo Prisoners*, Dec. 22, 2008 (stressing eligibility of those prisoners who are “demonstrably innocent”); Dow Jones Factiva, *German Official urges Berlin to Accept Guantanamo Inmates*, Dec. 21, 2008 (head of Amnesty International chapter encouraging EU countries to take in “apparently innocent” prisoners); Dow Jones Factiva, *Germany Considers Taking in Guantanamo Prisoners*, Dec. 22, 2008.)

In *Dellinger v. Mitchell*, 442 F.2d 782, 786-87 (D.C. Cir. 1971), the Court of Appeals explained the limits of a court's discretion to stay cases under *Landis v. North American Co.*, 299 U.S. 248 (1936): The delay created by a stay must be "not immoderate in extent and not oppressive in its consequences." This is especially pertinent here because habeas cases are "particularly inappropriate for any delay." *Cross v. Harris*, 418 F.2d 1095, 1105 n.64 (D.C. Cir. 1969). As the Ninth Circuit explained more recently in *Yong v. INS*, 208 F.3d 1116, 1119-21 (9th Cir. 2000), excessive delay makes the Great Writ a "sham." *Id.* at 1120 (quoting *Jones v. Shell*, 572 F.2d 1278, 1280 (8th Cir. 1978)). The government's reliance on *United States v. Stover*, 576 F.Supp. 2d 134 (D.D.C. 2008), is curious. While it is, as the government indicates, a habeas case, in *Stover*, Judge Lamberth *denied* a stay requested *by the petitioner* based on his claim that state court litigation might moot his federal case. Certainly, given the relative burdens on the parties, the government presents a much less compelling argument for stay here than the unsuccessful petitioner did in *Stover*.

Falesteny has waited long enough to clear his name, and win his release. The government's request for an indefinite stay should be denied.

Respectfully submitted,

/s/ Charles H. Carpenter

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Dated: December 24, 2008

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FOR THE DISTRICT OF COLUMBIA

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GUANTANAMO BAY)	Misc. No. 08-442 (TFH)
DETAINEE LITIGATION)	
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GEORGE W. BUSH, <i>et al.</i> ,)	
)	
Respondents.)	

DECLARATION OF MAHER RIF'AT AL-KAWARI
(Maher El Falesteny (ISN 519))

1. My name is Maher Rif'at Al-Kawari (aka Maher El Falesteny (ISN 519)), and I make this declaration in support of my application for habeas corpus pending in Civil Action No 05-2386 in the United States District Court for the District of Columbia. I make this declaration based on personal knowledge unless otherwise stated. I wish to explain that I have taken no act within the scope of the so-called AUMF or "Force Resolution" enacted by the U.S. Congress in September of 2001, shortly after the attacks on the World Trade Center. *See* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001)

2. In particular, I have neither planned, aided, authorized, nor participated in any manner whatsoever in the September 11, 2001 attacks on the World Trade Center. Nor have I harbored or hidden any person who has done so. I have not taken part in military operations against the United States or any of its allies.
3. I am not familiar with the use of firearms, explosive devices, or the waging of war in general and have received no training from anyone in such matters. In fact, I have never fired any weapon at anything.
4. I am not and never have been a member of, nor have I been employed by, any organization (political, military, or para-military) supporting the overthrow or attack upon any government or organization, including the United States or any of its allies.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed September ____, 2008
Guantanamo Naval Air Station, Cuba

Maher Rif'at Al-Kawari

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December 22, 2008 Monday

LENGTH: 383 words

HEADLINE: German official signals Hamburg might accept **Guantanamo** prisoners

BODY:

Text of report by independent German news agency ddp

["Hamburg Wants To Examine Admission of **Guantanamo** Prisoners" - ddp headline]

Hamburg (ddp) - Hamburg Interior Senator [minister] Christoph Ahlhaus (CDU [Christian Democratic Union]) wants to examine the possibility of taking in prisoners from the controversial US **Guantanamo** prison camp. Persons eligible for admission would be inmates who were "demonstrably **innocent**" or who, according to German legal order, had served their sentence and were harmless, the politician told [the evening paper] Hamburger Abendblatt (Monday [22 December] edition). However, Ahlhaus qualified this by saying that "Germany must not become the country where the United States can send their unwanted terrorists." Finally, it depended on the individual case.

In the election campaign, future US President Obama announced that he wanted to close the controversial prison camp in Cuba. The Federal Government has demanded that for several years.

Federal Chancellor Angela Merkel (CDU [Christian Democratic Union]) has adopted a restrained view regarding the possible admission of prison camp inmates to Germany. This was not a specific issue for Germany, but for the European Union, said deputy government spokesman Thomas Steg in Berlin on Monday. This question could only be answered in the European context based on agreements between all EU states. At the same time, Steg made it clear that an admission of prisoners must not be tied to any other political conditions.

Foreign Ministry spokesman Jens Ploetner stated that Foreign Minister Frank-Walter Steinmeier (SPD [Social Democratic Party of Germany]) had given instructions to examine all questions connected with this issue. As early as in January, the EU foreign ministers should discuss the matter, although a decision was unlikely to be made as early as next month.

For Germany, for example, it would be an option to take in Uighurs, who cannot return to their home country China because the Muslim minority there is threatened with oppression. Guenther Nooke (CDU), the Federal Government's human rights commissioner, whose office is the responsibility of the Foreign Ministry, has already spoken out in favour of taking in Uighurs from the prison camp.

Source: ddp news agency, Berlin, in German 0000 gmt 22 Dec 08

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December 21, 2008

LENGTH: 492 words

HEADLINE: German Official Urges Berlin to **Accept Guantanamo Inmates**

BODY:

The human rights envoy for the German government has urged Berlin to help US President-Elect Obama meet his promise to close the controversial prison camp **Guantanamo Bay** by taking in **innocent** inmates.

In an interview with newspaper Frankfurter Rundschau published on Saturday, Dec 20, Guenter Nooke said Germany along with other European nations had to ensure that **Guantanamo's** planned closure went ahead as planned.

"**Guantanamo** is an American problem. But you can't allow its closure to fail because no-one knows where to put the prisoners," Nooke told the paper.

In particular, Germany should be prepared to take in some of the 17 Uighurs held at the prison camp in Cuba, Nooke said.

Germany urged to take in Uighur prisoners

A Muslim minority native to Central Asia, the Uighurs face political persecution in their homeland China, according to human rights groups. Their struggle for independence is strongly opposed by China. Germany has a small Uighur community, many of whom live in Munich.

The head of Amnesty International's Germany chapter, Barbara Lochbiler too urged the German government to lay particular emphasis on the Uighurs at **Guantanamo** -- there is no evidence of their involvement in terrorist activities -- while considering taking in prisoners.

"The Uighurs have a network in Germany. That's why it would be easier for them to start a new life here," Lochbiler told German news agency dpa.

Lochbiler said the German government together with other European Union nations should show its readiness to take in apparently **innocent Guantanamo** inmates. "Quick action is more than overdue," she said.

Guantanamo closure won't be easy

Earlier this week, a US defense official said the Pentagon is working on a plan to shut **Guantanamo Bay** that would be available to President-elect Barack Obama when he takes office on Jan. 20

Obama's decision to close the hugely controversial prison camp located at the US naval station in southeastern Cuba, has been welcomed by human rights groups and governments around the world. The prison has come to symbolize aggressive detention practices and has opened the United States to allegations of torture.

But it's largely accepted that shuttering the prison, set up by President Bush after the Sept 11 attack on New York and Washington, will be a tricky legal task. Many experts doubt whether any of the suspected Taliban and al-Qaeda fighters imprisoned there will receive a fair public trial.

The German government has long called for the prison's closure with Chancellor Angela Merkel repeatedly bringing it up in talks with President Bush.

German Official Urges Berlin to Accept Guantanamo Inmates Deutsche Welle December 21, 2008

One of the first prisoners brought to **Guantanamo** Bay in 2002 included a German-born Turkish national Murat Kurnaz. He was held in the camp until 2006 and claims to have been tortured. No trial was held.

The head of Germany's opposition Green Party, Claudia Roth, on Saturday urged Merkel "to convey to the US government that Germany was prepared to take in **Guantanamo** inmates."

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December 22, 2008

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HEADLINE: Germany Considers Taking in **Guantanamo** Prisoners

BODY:

Germany is considering granting **asylum to prisoners** being held at **Guantanamo** Bay, a government spokesman said Monday. The move has been welcomed by the United States as it works to close the controversial prison camp.

Thomas Steg, German deputy government spokesman, said on Monday, Dec 22 Germany strongly backed Obama's plans to shutter the detention facility and said Berlin was assessing the possibility of **accepting inmates** who declined to return to their home countries.

"In our view **Guantanamo** must be closed on legal and humanitarian grounds, in terms of international law and human rights, and for moral reasons," Steg told reporters in Berlin.

Steg emphasized that it is up to the US to find a place for inmates it did not want to accept and who could not be returned to their home countries.

"We would need to, and want to, examine this issue when the United States has made clear what its specific plans and timeline are," Steg said.

"If we begin to review such closure plans and take a stance, then it can only be in a European context based on a discussion with all member states," he said, adding that Germany would reject any "side deals, swaps or conditions" put forward by Washington linked to handing over **Guantanamo** prisoners.

US hails EU acceptance of prisoners

The US said on Monday it welcomed moves by European nations to take in prisoners from the controversial prison camp which has prompted worldwide criticism of what are considered aggressive detention practices and which has opened the US to allegations of torture.

An opening from Germany and other European countries to take prisoners marked "positive steps forward" by governments that had been reluctant to help out in the past, US State Department spokesman Sean McCormack said.

"Many of these countries have previously been unwilling to work with us to either resettle or to, in some way, detain these individuals under circumstances where they won't pose a threat to others," McCormack said.

Hamburg willing to take in prisoners

US President-elect Barack Obama made it clear last week that he wants to shutter the detention facility in **Guantanamo** Bay, Cuba, which holds 255 men arrested on suspicion of fighting for al-Qaeda or the Taliban.

Yet many of the men have languished in the detention center of the US Naval Base for years without being charged. About 50 are now thought to be innocent, but have not been released because they would face torture or death if sent back to their countries of origin. Yet many do not want to live in the United States.

Rights groups have calls on EU countries to offer asylum to **Guantanamo** detainees. German Chancellor Angela Merkel has long publicly advocated closing the camp for terror suspects, situated at a US navy base in Cuba.

Germany Considers Taking in Guantanamo Prisoners Deutsche Welle December 22, 2008

In a surprise move, Hamburg's interior minister Christoph Ahlhaus signaled on Monday that his state might be willing to take in **Guantanamo** prisoners. Ahlhaus told the Hamburger Abendblatt newspaper that prisoners who were shown to be innocent should be given the option of coming to Germany.

Germany not "dumping ground"

Germans have been particularly interested in the plight of the Uighurs, a Muslim minority in Central Asia. Germany has a small Uighur community, many of whom live in Munich.

Hamburg's Ahlhaus and fellow Christian Democrat Guenter Nooke, the government's human rights envoy, are among the first high-ranking German politician to publicly call for Germany to consider taking in some of **Guantanamo** prisoners.

Even so, both politicians have been careful to say that Germany should not become a dumping ground for unwanted prisoners.

Ruprecht Polenz, chair of the foreign relations committee in the Bundestag, pointed out that just because a country wants to "get rid of someone" does not mean that person would automatically qualify for German asylum. Yet it could be enough if the **Guantanamo** prisoner had previously lived in Germany, Polenz said.

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