

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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IN RE: ) Misc. No. 08-0442 (TFH)  
)  
) Civil Action Nos.  
GUANTANAMO BAY )  
DETAINEE LITIGATION ) 02-CV-0828, 04-CV-1136, 04-CV-1164, 04-CV-1194,  
) 04-CV-1254, 04-CV-1937, 04-CV-2022, 04-CV-2035,  
) 04-CV-2046, 04-CV-2215, 05-CV-0023, 05-CV-0247,  
) 05-CV-0270, 05-CV-0280, 05-CV-0329, 05-CV-0359,  
) 05-CV-0392, 05-CV-0492, 05-CV-0520, 05-CV-0526,  
) 05-CV-0569, 05-CV-0634, 05-CV-0748, 05-CV-0763,  
) 05-CV-0764, 05-CV-0833, 05-CV-0877, 05-CV-0881,  
) 05-CV-0883, 05-CV-0889, 05-CV-0892, 05-CV-0993,  
) 05-CV-0994, 05-CV-0995, 05-CV-0998, 05-CV-0999,  
) 05-CV-1048, 05-CV-1124, 05-CV-1189, 05-CV-1220,  
) 05-CV-1236, 05-CV-1244, 05-CV-1347, 05-CV-1353,  
) 05-CV-1429, 05-CV-1457, 05-CV-1458, 05-CV-1487,  
) 05-CV-1490, 05-CV-1497, 05-CV-1504, 05-CV-1505,  
) 05-CV-1506, 05-CV-1509, 05-CV-1555, 05-CV-1590,  
) 05-CV-1592, 05-CV-1601, 05-CV-1602, 05-CV-1607,  
) 05-CV-1623, 05-CV-1638, 05-CV-1639, 05-CV-1645,  
) 05-CV-1646, 05-CV-1649, 05-CV-1678, 05-CV-1704,  
) 05-CV-1725, 05-CV-1971, 05-CV-1983, 05-CV-2010,  
) 05-CV-2083, 05-CV-2088, 05-CV-2104, 05-CV-2112,  
) 05-CV-2185, 05-CV-2186, 05-CV-2199, 05-CV-2200,  
) 05-CV-2249, 05-CV-2349, 05-CV-2367, 05-CV-2370,  
) 05-CV-2371, 05-CV-2378, 05-CV-2379, 05-CV-2380,  
) 05-CV-2381, 05-CV-2384, 05-CV-2385, 05-CV-2386,  
) 05-CV-2387, 05-CV-2398, 05-CV-2444, 05-CV-2477,  
) 05-CV-2479, 06-CV-0618, 06-CV-1668, 06-CV-1674,  
) 06-CV-1684, 06-CV-1688, 06-CV-1690, 06-CV-1691,  
) 06-CV-1758, 06-CV-1759, 06-CV-1761, 06-CV-1765,  
) 06-CV-1766, 06-CV-1767, 07-CV-1710, 07-CV-2337,  
) 07-CV-2338, 08-CV-0987, 08-CV-1085, 08-CV-1101,  
) 08-CV-1104, 08-CV-1153, 08-CV-1185, 08-CV-1207,  
) 08-CV-1221, 08-CV-1222, 08-CV-1223, 08-CV-1224,  
) 08-CV-1227, 08-CV-1228, 08-CV-1229, 08-CV-1230,  
) 08-CV-1231, 08-CV-1232, 08-CV-1233, 08-CV-1235,  
) 08-CV-1236, 08-CV-1237, 08-CV-1238, 08-CV-1310,  
) 08-CV-1360, 08-CV-1440, 08-CV-1628

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**RESPONDENTS' MOTION TO DISMISS IMPROPER RESPONDENTS<sup>1</sup>**

The respondents in these coordinated matters respectfully move this Court to dismiss all respondents in these proceedings, other than the Secretary of Defense.<sup>2</sup> Petitioners in these cases sued a variety of respondents in their official capacities, seeking writs of *habeas corpus* on grounds that they have been unlawfully detained. However, most of the respondents named by the petitioners are not appropriate parties to these proceedings and should be dismissed. This Court has jurisdiction over the Secretary of Defense, the only respondent necessary for effectuating any relief the Court might order in these habeas petitions. All other respondents should thus be dismissed. In particular, the President is an improper respondent, because it is well-settled that courts lack jurisdiction to compel the President to perform official acts. Likewise, the Vice President and all other respondents who are outside of the chain of command under the Secretary of Defense are improper respondents, because these individuals lack legal or physical control over the petitioners' custody. Moreover, all respondents who are within the Department of Defense answer to and may be directed by the Secretary of Defense and are, therefore, redundant. Thus, other than the Secretary of Defense, in his official capacity, the respondents should be dismissed from these actions.

**ARGUMENT**

**RESPONDENTS OTHER THAN THE SECRETARY OF DEFENSE SHOULD BE DISMISSED AS IMPROPER AND UNNECESSARY**

Although *Boumediene* holds that the petitioners may pursue petitions for writ of habeas corpus in this Court, they may only seek that relief from a proper respondent. First, it is patently clear that the President must be dismissed. Simply put, the Court lacks jurisdiction to order the

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<sup>1</sup> Counsel for respondents has conferred with counsel for petitioners in accordance with this Court's local rules. See Appendix A.

<sup>2</sup> Petitioners have named various different groupings of respondents in each of these different cases.

President himself to provide relief. Second, the Vice President and all other respondents, other than the Secretary of Defense, in his official capacity, should likewise be dismissed. A respondent who is not the petitioners' custodian or does not have legal control over the petitioners' custody cannot be compelled to provide any relief and must be dismissed as improperly named. Moreover, the respondents who are within the Department of Defense chain of command, but subordinate to the Secretary of Defense, are not necessary to these cases. Rather, the Secretary of Defense, in his official capacity, over whom the Court properly has jurisdiction, is the only proper respondent necessary to carry out the relief, if any, granted by this Court.

#### **I. The President of the United States Is Not A Proper Respondent**

The federal courts have “no jurisdiction ... to enjoin the President in the performance of his official duties” or to otherwise compel the President to perform any official act. *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 498-499, 18 L.Ed. 437 (1867); *see Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992) (plurality); *id.* at 825 (Scalia, J., concurring in part and concurring in the judgment). Thus, in *al-Marri v. Rumsfeld*, 360 F.3d 707, 708 (7th Cir. 2004), the Seventh Circuit dismissed the President in a similar habeas case, concluding that “[s]uits contesting actions of the executive branch should be brought against the President's subordinates.” Although the Supreme Court has left open the question of whether the President may be ordered to perform a purely “ministerial” duty, *see Franklin*, 505 U.S. at 802, the relief that the petitioners ultimately seek in the instant cases—*i.e.*, their release from custody—is far from ministerial. In any event, there is no reason to test the issue where, as here, there is a proper respondent—the Secretary of Defense—whom the Government concedes can fully effectuate any relief that might be ordered by the Court.

Moreover, even if he were otherwise an appropriate litigant, the President could not be considered the petitioners' custodian. While the President may have authorized custody of the petitioners, it is the Secretary of Defense who is the legal custodian, as discussed below. *See al-Marri*, 360 F.3d at 708; *Rumsfeld v. Padilla*, 542 U.S. 426, 436 n.9 (2004). Thus, the President must be dismissed as a respondent in these habeas proceedings.

## **II. The Respondents Other Than The Secretary Of Defense Either Lack Legal Control Over The Petitioners Or Are Unnecessary To These Actions**

Respondents who are not within the Department of Defense, including the Vice President, are not the petitioners' immediate custodians, are not supervisory officials of the petitioners' immediate custodian, and do not have legal control over any form of the "custody" of the petitioners. Thus, they are improperly named as respondents in these proceedings and should be dismissed.

In *Padilla*, the Supreme Court made clear that the only proper respondent to a petition for a writ of habeas corpus is: (1) the immediate custodian of the petitioner (except that a supervisory official of that custodian may be the respondent where the petitioner is held abroad in a military context) or (2) the entity or person who exercises legal control with respect to the challenged custody. *Rumsfeld*, 542 U.S. at 434-38 & n.9. The Vice President and other officials outside of the Department of Defense do not meet either criterion. These respondents have no authority to direct the Secretary of Defense or his subordinates regarding custody of the petitioners. Indeed, only those within the chain of command between the petitioners' immediate custodian at Guantanamo Bay, Cuba and the Secretary of Defense have either "custody" or "legal control" over the petitioners. Although the immediate custodian would normally be the only proper respondent in a habeas petition, the Supreme Court has recognized an exception in cases of extraterritorial detentions to include supervisory officials up to, and including, the

Secretary of Defense. *Rumsfeld*, 542 U.S. at 436, n.9 (citing *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955); *Burns v. Wilson*, 346 U.S. 137 (1953)). Thus, the Vice President and all other respondents not within the custodial chain of command must clearly be dismissed.

Finally, because the Secretary of Defense is a proper respondent and is within this Court's jurisdiction, those other named respondents who are within the Department of Defense chain of command are superfluous and should be dismissed. Indeed, in the related context of the Detainee Treatment Act ("DTA"), Congress provided that, in cases challenging enemy combatant status determinations, only the Secretary of Defense should be named as the respondent. See Pub.L. 109-163, Div. A, Title XIV, § 1405(e)(5), 119 Stat. 3476 (Jan. 6, 2006) ("The Secretary of Defense shall be the named respondent in any appeal to the United States Court of Appeals for the District of Columbia Circuit under this subsection."). Congress' judgment in the DTA context should be followed here as well. Any order of relief in these cases may be properly addressed to the Secretary of Defense, in his official capacity, and no other respondents are required.

### CONCLUSION

For the foregoing reasons, all respondents, other than the Secretary of Defense, in his official capacity, should be dismissed from these actions.

Dated: October 14, 2008

Respectfully submitted,

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JOHN C. O'QUINN  
Deputy Assistant Attorney General

/s/ Scott M. Marconda

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Attorneys for Respondents

**APPENDIX A**

Pursuant to local rule 7(m), counsel for respondents contacted counsel for each of the petitioners in these matters to meet and confer regarding potential opposition to the instant motion. Respondents have set forth below all of the responses received from the petitioners' counsel, as of 6:00 p.m. EST on the day of filing.

**OPPOSED**

<b>Civil Action No.</b>	<b>Petitioner(s), if specifically identified by counsel</b>	<b>Responding Attorney(s)</b>
05-CV-2386, 06-CV-1761		Thomas Sullivan
05-CV-2386		Charles Carpenter *
05-CV-0883, 08-CV-0442		Paul Rashkind
08-CV-1207	Al-Nashiri	Paul Turner
05-CV-1497		Michael Cooper *
05-CV-1509, 05-CV-1602, 05-CV-1704, 05-CV-2398, 08-CV-1310		Susan Manning *
05-CV-0392		Robert Rachlin
05-CV-2378, 05-CV-2386		H. Candace Gorman
05-CV-2386		Peter Ellis *
05-CV-0999		Shereen Charlick
05-CV-2386		Matthew O'Hara
05-CV-0569		Nancy Hollander
05-CV-2386		James Nickovich
05-CV-0889, 05-CV-0892		Stephen Sady
08-CV-0442, 05-CV-2386	Saeed	Noah Rashkind
08-CV-1223	Rahman	Robert Elliot
04-CV-2022	Paracha	Gaillard Hunt
04-1254, 05-1429, 05-1048		Alan Pemberton
05-392, 05-526, 05-1220, 05-1347, 05-1971, 05-2088, 06-1684, 06-1690, 08-1153		Wells Dixon
06-CV-1668		Julia Symon
08-CV-1230		Amy Cleary on behalf of Timothy Ivey, Andy Hart, and Jonathan Witmer-Rich
08-CV-1231		Amy Cleary on behalf of Debra Hughes, Darin Thompson, and Amy Cleary

\* Counsel for these Petitioner(s) responded to Respondents' effort to meet and confer, but did not set forth any answer with regard to whether petitioner(s) would oppose the instant motion or not. For purposes of this appendix, said counsel are being treated as if they had expressly objected.

08-CV-1233		Amy Cleary on behalf of Edward Bryan, Carlos Warner, and Jonathan Witmer-Rich
08-CV-1236		Amy Cleary on behalf of Jacqueline Johnson, Vicki Werneke, and Amy Cleary
05-CV-1645, 05-CV-1646		Michael Poulshock and Judith Chomsky
05-CV-2371	Al Darbi	Karen Abravanel
05-CV-0270	El-Mashad and Algazzar	Carol Elder Bruce *
06-CV-1765	Saleh	Adil Haq on behalf of Brent Rushforth and Kit Pierson
08-CV-5339 [sic]	Hentif	Adil Haq on behalf of Brent Rushforth and Kit Pierson
05-CV-1678	Ahmed	Adil Haq on behalf of Brent Rushforth and Kit Pierson
07-CV-2337	al Yazidi	Adil Haq on behalf of Brent Rushforth and Kit Pierson
07-CV-2338	al Shubati	Adil Haq on behalf of Brent Rushforth and Kit Pierson
07-CV-1710	Nasser	Adil Haq on behalf of Brent Rushforth and Kit Pierson
05-CV-1638	Ghanem	Adil Haq on behalf of Brent Rushforth and Kit Pierson

**UNOPPOSED**

<b>Civil Action No.</b>	<b>Petitioner(s), if specifically identified by counsel</b>	<b>Responding Attorney(s)</b>
08-CV-1085		Scott Fenstermaker

**CONSENT SUBJECT TO CONDITIONS \*\***

<b>Civil Action No.</b>	<b>Petitioner(s), if specifically identified by counsel</b>	<b>Responding Attorney(s)</b>
02-CV-0828		Matthew MacLean

\*\* Counsel for these Petitioner(s) conditioned their consent to Respondents' motion on agreement by Respondents to several conditions which spoke to the legal authority of the Secretary of Defense, as the only proper respondent, to carry out the relief requested by Petitioners and to act on behalf of the government in the course of this litigation. Because such authority is dictated by the operation of law, Respondents consider such responses as effective refusal to consent to Respondents' motion.



05-CV-2386		Barbara Olshansky
05-CV-1353, 05-CV-1504, 05-CV-1505, 05-CV-1506, 05-CV-2087		Anne Castle
04-CV-1194	Al Madhwani	Sarah Crane
05-CV-1487	Al-Sahlani	Sarah Crane
05-CV-2384	Al Qahtaani and Zahrani	Sarah Crane
05-CV-2386	Sulaiman	Sarah Crane
06-CV-1761	Abdessalam	Sarah Crane
05-CV-1983, 05-CV-2104		Wesley Powell
05-CV-2398	Hassan and Thabid	George Clark
05-CV-2386	Al Yafie and Al Bihani	George Clark
04-CV-1194	Anam, Al Madhwani and Bin Amer	Darold Kilmer
05-CV-1490	Faraj	Eldon Greenberg
05-CV-0280	Al-Assani, Al-Nahdi, Al- Adahi, Bawazir and Hamdoon	Brian Spahn
05-CV-2386	Al-Haag and Al Shamiri	Brian Spahn
08-CV-1235, 08-CV-1237, 08-CV-1238		Craig Harbaugh
05-CV-0877	Khiali-Gul	Mary Petras
05-CV-1244	Alsawam	Mary Petras
05-CV-2386	Jabbarov	Michael Mone
05-CV-2380	Al-Baidany	Glenn Jones
05-CV-2379	Ali-Awad	Glenn Jones
05-CV-0329, 05-CV-0764, 05-CV-1457, 05-CV-2386, 08-CV-1440		Zachary Katznelson
05-CV-0748	Aboassy petitioners	Joseph O'Neil
05-CV-0492	Aziz	Agnieszka Fryszman and Matt Handley
05-CV-1607	Rabbani	Agnieszka Fryszman and Matt Handley
04-CV-1144, 08-CV-1360		George Brent Mickum
05-CV-2386	Mattan	Gordon Woodward
05-CV-2386	Ajam	David Marshall
05-CV-1124, 05-CV-1601, 05-CV-2367		Juliet Sarkessian
05-CV-2199		John Snodgrass
04-CV-2035		Jonathan Hafetz
05-CV-0998	Karim	Brian Mendelsohn
08-CV-1224	Gul	Brian Mendelsohn
08-CV-1227	Hafizullah	Brian Mendelsohn

08-CV-1229	Yakubi	Brian Mendelsohn
05-CV-0247	Al-Mohammed	Samuel Kauffman
05-CV-2386	Alsa'ary	David Marshall
04-CV-2046	Zemiri	Debra Schneider
05-CV-2386		Ellen Lubell
05-CV-0993	Sohail	Scott Tilsen
04-CV-2215	Aamer	Cori Crider
05-CV-0764	Boujaadia	Cori Crider
05-CV-0764	Nasser	Cori Crider
05-CV-1457	Dhiab	Cori Crider

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DETAINEE LITIGATION

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) 05-CV-1506, 05-CV-1509, 05-CV-1555, 05-CV-1590,  
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) 08-CV-1236, 08-CV-1237, 08-CV-1238, 08-CV-1310,  
) 08-CV-1360, 08-CV-1440, 08-CV-1628

**ORDER**

Upon consideration of the Respondents' Motion to Dismiss Improper Respondents, and any responses thereto, it is hereby ordered that all respondents named in these coordinated

matters, other than the Secretary of Defense, in his official capacity, are DISMISSED WITH PREJUDICE.

**SO ORDERED.**

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Thomas F. Hogan  
United States District Judge

Dated: \_\_\_\_\_