

Cleared for filing 05/09/2006

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

SAIFULLAH PARACHA,

Petitioner,

v.

Case No. 04cv02022-PLF

ORAL ARGUMENT IS REQUESTED

Hon. GEORGE W. BUSH,

et al.,

Respondents.

**PETITIONER'S MOTION
FOR LEAVE TO FILE A SECOND AMENDED PETITION
AND TO ADD THE ATTORNEY GENERAL AS A RESPONDENT**

Petitioner hereby moves to be allowed to file a second amended petition and to add the Attorney General as a respondent.

The initial petition herein was filed November 17, 2004, docket 1. It alleged that petitioner Saifullah Paracha was being held illegally at Guantanamo Bay, Cuba. Before an answer was filed, petitioner filed an amended petition on December 10, 2004, docket 11. The purpose of the amendment was to show that the petition was authorized and prosecuted not by the prisoner himself, who at that time was virtually incommunicado, but by his wife as his next friend. The government filed a factual response, but on March

23, 2005, docket 49, over petitioner's protest, the action was stayed to await appellate rulings in other cases.

In January 2006 the Detainee Treatment Act of 2005 1 was signed into law. For the first time, it became relevant and important which agency of the executive branch is controlling petitioner's confinement. Whether that Act reaches back in time and strips the courts of jurisdiction in a pending case such as petitioner's is highly disputable, but it clearly does not do so unless, in the words of the Act, petitioner is an alien "detained by the Department of Defense" at Guantanamo Bay, Cuba. 28 USC 2241(e), as added by DTA section 1005(e). The restriction of the jurisdiction-stripping to prisoners of the Department of Defense was clearly intentional, as the whole rationale of the DTA is to show deference to the military actions of the President as Commander in Chief, and not to all the investigative activities of the non-military, prosecutorial agencies of the government.

Petitioner therefore asks for permission to file a second amended petition adding a paragraph 10A.:

10A. Petitioner is not "detained by the Department of Defense" and this is not an action relating to aspects of the detention "by the Department of Defense" of petitioner, within the meaning of the recently enacted subsection 28 USC 2241(e), because petitioner's seizure, confinement, questioning, continued confinement, and conditions of confinement were initiated and are continued and controlled by the Department of Justice and the Federal Bureau of Investigation. Petitioner was not seized by Department of Defense personnel and at no time engaged in any opposition to Department of Defense operations. The Department of Defense acts as the agent of the Department of Justice in regard to petitioner.

1 / Sections 1001-1006 of the Department of Defense Appropriations Act of 2006, Public Law 109-148, 119 Stat. 2680, and sections 1401-1406 of the Department of Defense Authorization Act, Public Law 109-163, 119 Stat. 3136.

While his physical confinement may be at the hands of Department of Defense personnel, the decision to confine petitioner and the control of the terms and conditions of his confinement are at the discretion of the Department of Justice and the FBI, and therefore the jurisdiction-stripping provisions of the DTA do not apply, regardless of whether the DTA is legitimately retroactive or not.

Other minor corrections to be made in the second amended petition include:

Paragraph 1. Petitioner attended New York Institute of Technology, not Hunter College. He was seized July 6, 2003, not July 5.

Paragraph 1B. The allegations that petitioner himself is not available to sign the petition is no longer true.

Paragraph 3. References are added to the Detainee Treatment Act as among the sources of jurisdiction.

Paragraph 6A. The Attorney General is added as a respondent.

Paragraph 7. References are added to petitioner's business as a producer of TV films, interviews, and features.

Paragraph 9. The allegation that petitioner "has been held in custody of United States forces" is changed to "held in custody of the United States," to reflect that his custody is ultimately controlled by the Department of Justice.

Paragraph 25. The allegation that petitioner is held without access to counsel is no longer true.

Respondents will oppose this motion.

Respectfully submitted,

April 27, 2006

_____/s/_____
GAILLARD T. HUNT
Attorney for Petitioner
(D.C. Bar No. 89375)
1409 Gleason Street
Silver Spring, Maryland 20902
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ATTACHMENTS:

Affidavit of petitioner dated February 14, 2006.

Proposed Second Amended Petition for Habeas Corpus and Other Relief.

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

SAIFULLAH PARACHA,

Petitioner,

v.

Case No. 04cv02022-PLF
ORAL ARGUMENT IS REQUESTED

Hon. GEORGE W. BUSH,

et al.,

Respondents.

**POINTS AND AUTHORITIES IN SUPPORT OF
PETITIONER'S MOTION
FOR LEAVE TO FILE A SECOND AMENDED PETITION
AND TO ADD THE ATTORNEY GENERAL AS A RESPONDENT**

FRCP Rule 15 allows amendments of any pleading before a responsive pleading is served, or within 20 days if no responsive pleading is required. If that time has elapsed, the Court must give leave to file amendments, "and leave shall be freely given when justice so requires." The D.C. Circuit in *Belizan v. Hershon*, 434 F.3d 579 (D.C. Cir., 2006), recently cited *Foman v. Davis*, 371 U.S. 178, 182 (1962), as teaching that leave to amend is to be granted except if there is undue delay, bad faith, a dilatory motive, repeated failure to cure deficiencies, or undue prejudice.

None of those factors is present here. The purpose of this amended petition is to introduce the allegation that petitioner may be in the physical custody of the Department of Defense but both the fact and the conditions of his confinement are controlled by the

Department of Justice. This was of no importance till the passage of the Detainee Treatment Act (Sections 1001-1006 of the Department of Defense Appropriations Act of 2006, Public Law 109-148, 119 Stat. 2680, and sections 1401-1406 of the Department of Defense Authorization Act, Public Law 109-163, 119 Stat. 3136) which showed great deference to the military functions of the Department of Defense by attempting to suspend habeas corpus for prisoners of that Department at Guantanamo Bay. Petitioner should be allowed to allege that he is not within that zone of deference because he is not a military prisoner but is being held at the behest of the Department of Justice.

If it is shown that petitioner is in fact held by the FBI and the Attorney General, then the Attorney General is a proper respondent. FRCP Rule 21 allows the Court to drop or add parties "on such terms as are just." Rule 15(c)(3) provides that the amending of a pleading relates back to the filing of the original of the pleading when a new U.S. defendant is added and the Attorney General was originally served. The D.C. Circuit rightly observed in *Swan v. Clinton*, 100 F.3d 973, 980 (D.C. Cir., 1996), footnote 3, that government officials and agencies may be added to on-going litigation and "we need not be concerned that they might suffer prejudice," because they are all represented by the Attorney General and the U.S. Attorneys from the start. The Attorney General was served in this action by certified mail, receipt signed December 14, 2004, return filed March 7, 2006, docket 45. Therefore the Attorney General should be added as a respondent.

Respectfully submitted,

April 27, 2006

_____/s/_____
GAILLARD T. HUNT
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IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

SAIFULLAH PARACHA,

Petitioner,

v.

Case No. 04cv020222-PLF

Hon. GEORGE W. BUSH,

et al.,

Respondents.

CERTIFICATE OF CONFERRING

I hereby certify that on April 26, 2006, I conferred with Andrew Warden, Esq., attorney for respondents, in an attempt to narrow the issues raised by the within motion.

Respondents will oppose this motion.

_____/s/_____

April 26, 2006

GAILLARD T. HUNT
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A PROPOSED ORDER FOLLOWS:

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

SAIFULLAH PARACHA,

Petitioner,

v.

Case No. 04cv02022-PLF

Hon. GEORGE W. BUSH,

et al.,

Respondents.

**(PROPOSED) ORDER ALLOWING SECOND AMENDED PETITION
AND ADDING THE ATTORNEY GENERAL AS A RESPONDENT**

On consideration of petitioner's motion, and the opposition thereto, and the entire record,

IT IS HEREBY ORDERED:

That petitioner Saifullah Paracha be allowed to file the SECOND AMENDED PETITION, and that the SECOND AMENDED PETITION submitted with his motion be and hereby is accepted as filed.

IT IS FURTHER ORDERED:

That the Attorney General of the United States, having previously been served with process and having notice of this action, be and hereby is added as a respondent.

IT IS FURTHER ORDERED:

That respondents have 60 days from the date of this order to respond to the SECOND AMENDED PETITION.

IT IS FURTHER ORDERED:

That petitioner's verified traverse, filed November 22, 2005, docket 80, will continue to be accepted as a traverse to respondents' responses, without prejudice to any further traverse petitioner may file.

IT IS SO ORDERED.

Date

United States District Judge

Notify counsel:

GAILLARD T. HUNT, Esq.
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ANDREW I. WARDEN, Esq.
Attorneys for Respondents
U.S. Department of Justice
Civil Division, Federal Programs Branch
Room 7144
20 Massachusetts Avenue NW
Washington, D.C. 20530
Tel: 202-514-4107
Fax: 202-616-8470

Approved for public filing
May 9, 2006
Protected Information redacted

SAIFULLAH PARACHA deposes and says:

1. FBI Agent Janelle Miller testified at a trial in New York in November 2005 that she received an order on March 28, 2003, to look for Saifullah Paracha in New York. Pursuant to that order she visited my business associate Charles Anteby and learned that I was in Pakistan, not New York. I know this from a transcript of that trial.
2. I was not captured or picked up anywhere near any military operation. I was set upon in the parking lot of the civilian airport in Bangkok, Thailand, on July 6, 2003. I was unarmed and not wearing a uniform. The men who confined me were wearing masks and no insignia associating them with any military organization.
3. After I arrived at Bagram, Afghanistan, in early July 2003, the first person to begin questioning me identified [REDACTED] as a Special Agent of the United States Federal Bureau of Investigation. [REDACTED] gave [REDACTED] name as [REDACTED]
4. Thereafter I have been questioned by many officials, but the predominant one was always Agent [REDACTED] of the FBI. I have never had any reason to doubt that my interrogation team was headed, managed, and controlled by Agent [REDACTED].
5. For 16 months or more, I have been at Guantanamo Bay, Cuba. ~~On several occasions I have been told that I am here at the request of the FBI.~~ On several occasions I have been told that the conditions of my confinement are controlled by my "interrogation team", meaning the team headed by Agent [REDACTED]. For instance, when I repeatedly asked for a Bible, I was eventually told that only my interrogation team could order that I have one.

It is for these reasons I believe that I am a prisoner of the Department of Defense only on the physical level. I am actually imprisoned by the Federal Bureau of Investigation and of the Department of Justice.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: Feb 14, 06

Attachment: Affidavit

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

SAIFULLAH PARACHA,
Detainee,
Guantanamo Bay Naval Station,
Guantanamo Bay, Cuba,

Petitioner,

by
FARHAT PARACHA,
65 Khayaban-E-Mujahid
Defence Housing Authority, Phase V,
Karachi, Pakistan,

Next Friend,

v.

Case No. 04cv02022-PLF

Hon . GEORGE W. BUSH
1600 Pennsylvania Avenue NW,
Washington, D.C. 20500,

Hon. ALBERTO GONZALES
Attorney General of the United States
950 Pennsylvania Avenue NW
Washington, D.C. 20530

Hon. DONALD H. RUMSFELD
Secretary of Defense
1000 Defense Pentagon
Washington, D.C. 20301-1000,

and
Brigadier General JAY HOOD,
Commander, Joint Task Force-GTMO,
Guantanamo Bay Naval Station
Guantanamo, Cuba

Respondents.

**SECOND AMENDED PETITION FOR HABEAS CORPUS
AND OTHER RELIEF**

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Petitioner, with his next friend FARHAT PARACHA, alleges and states:

PARTIES

1. Petitioner SAIFULLAH PARACHA (hereafter, "PARACHA") holds a visa as a permanent resident of the United State, a "green card". He is a citizen and national of The Islamic Republic of Pakistan. Mr. PARACHA came to the United States in 1971 and studied at New York Institute of Technology. For several years thereafter his primary residence was in Queens, New York, and he followed various lawful and useful occupations. He has two brothers and ~~three~~ ^{+ wd} sisters who are permanent residents of the United States, and several relatives who are citizens of the United States. On July 6, 2003, Mr. PARACHA was unlawfully seized, as alleged below. He has since that date been held by respondents, or some of them, in facilities under the control of the United States and under the control of respondents, or some of them. Mr. PARACHA is currently confined at the United States Naval Base at Guantanamo Bay, Cuba.

1A. FARHAT PARACHA holds a visa as a permanent resident of the United States, a "green card". She is a citizen and national of the Islamic Republic of Pakistan. In 1979 she earned a masters degree from New York University, and shortly thereafter she was awarded her permanent resident's visa.

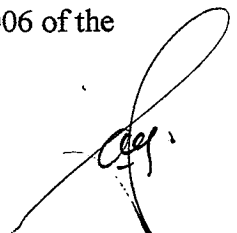
1B. FARHAT PARACHA brings this petition acting on behalf of petitioner SAIFULLAH PARACHA as his next friend. She has a long-standing significant relationship to petitioner in that she has been married to him for several years, during

which time they have lived together and raised several children. She is truly dedicated to the best interests of petitioner.

2. Respondents are officials, agents, and employees of the United States.


JURISDICTION AND VENUE


3. This Court has jurisdiction over this action under the habeas corpus statutes, 28 USC 2241 et seq.; the clause of the United States Constitution guaranteeing habeas corpus from suspension, Article I, section 9; the declaratory judgment statutes, 28 USC 2201, 2202, and Rule 57 of the Federal Rules of Civil Procedure; 28 USC 1331, the Federal question statute; 28 USC 1350, the alien's tort claim statute; the All Writs Act, 28 USC 1651; the mandamus statute, 28 USC 1361; the Administrative Procedure Act, 5 USC 701-706; 42 USC 1981, guaranteeing equal benefit of all laws; the amendments to the Constitution of the United States, especially the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments; the International Covenant on Civil and Political Rights; the American Declaration of the Rights and Duties of Man; other treaties and agreements of the United States; and customary international law. This is a petition for the writ of habeas corpus; an action in the nature of mandamus to compel officers and employees of the United States, or agencies thereof, to perform duties owed petitioner; a civil action to review policies, regulations, or ruling of executive agencies; a civil action arising under the Constitution, laws, or treaties of the United States; and an action under all Constitutional, statutory, and other grounds that may give this Court authority to review Mr. PARACHA's confinement, treatment, and right to communicate with others. This action also rests on the "Detainee Treatment Act of 2005", sections 1001-1006 of the

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Department of Defense Appropriations Act of 2006, Public Law 109-148, 119 Stat. 2680, and sections 1401-1406 of the Department of Defense Authorization Act, Public Law 109-163, 119 Stat. 3136.

4. Venue lies in the District of Columbia under the habeas corpus statute and other provisions, particularly 28 USC 1391(b) and (e). *Rasul v. Bush*, 542 U.S. 466, 124 S. Ct. 2686 (June 28, 2004); and *Gherebi v. Bush*, No. 04-CV-1164, September 29, 2004, memorandum opinion sustaining such jurisdiction and venue. Respondents, acting within the District of Columbia, have caused and are causing petitioner's confinement and have the authority and ability to release petitioner from confinement or to change the conditions of his confinement. Complete relief can be effected within the District of Columbia.

5. Respondent Hon. GEORGE W. BUSH, President and Commander-in-Chief of the armed forces of the United States, has his principal residence and principal place of business in the District of Columbia. ~~It may be pursuant to the November 13, 2001, Military Order promulgated in the District of Columbia by Respondent BUSH that petitioner is being detained.~~ Respondent BUSH, acting in the District of Columbia, is ultimately responsible for petitioner's unlawful detention. 

6. Respondent Hon. DONALD H. RUMSFELD is Secretary of Defense and the cabinet officer in charge of the land and naval forces of the United States. His regular mailing address is Washington in the District of Columbia, and he has many agents and places of business in the District of Columbia, including The National Defense University at Ft. McNair, P Street SW, Washington, D.C. 20319, the Official Department of Defense Timekeeper at the Naval Observatory, Massachusetts Avenue NW, 

Washington, D.C., and numerous other facilities and activities. Respondent RUMSFELD has substantial, continuous, and systematic contacts within the District of Columbia. A substantial part of the events and omissions leading to petitioner's confinement occurred in the District of Columbia.

6A. Respondent ALBERTO GONZALES is Attorney General of the United States and the cabinet officer in charge of the Federal Bureau of Investigation. His office and regular mailing address is within the District of Columbia.

FACTS

7. For many years Mr. PARACHA was active, and well-known and highly-regarded in the United States and Pakistan, in charitable and humanitarian projects (e.g., the financing of an obstetric wing of a hospital), in the production of films and TV interviews and features, and in trading in goods (primarily clothing) with businesses in the United States. In June or July of 2003, an American business associate asked Mr. PARACHA to come to Bangkok, Thailand, to negotiate with representatives of K-Mart, the large American importer and retailer. On July 5, 2003, his wife, FARHAT PARACHA, left Mr. PARACHA at the Karachi international airport.

8. Mr. PARACHA proceeded by a commercial civilian flight to Bangkok. The flight was peaceful and uneventful. Upon landing at Bangkok, Mr. PARACHA disembarked into a peaceful civilian airport.

9. On July 6, 2003, Mr. PARACHA was seized and deprived of his liberty, while unarmed, peaceful, and orderly, at the Bangkok airport. After a brief interval he was

transported against his will to Bagram Air Force Base, in Afghanistan, where he was held by respondents' agents. Since that time he has been held in custody of the United States without trial, in solitary confinement, under cruel and inhuman conditions, and with only limited ability to communicate with his family.

10. Since mid-September 2004 petitioner has been held against his will by respondents at Guantanamo Naval Base, Guantanamo, Cuba.

10A. Petitioner is not "detained by the Department of Defense" and this is not an action relating to aspects of the detention "by the Department of Defense" of petitioner, within the meaning of the recently enacted subsection 28 USC 2241(e), because petitioner's seizure, confinement, questioning, continued confinement, and conditions of confinement were initiated and are continued and controlled by the Department of Justice and the Federal Bureau of Investigation. Petitioner was not seized by Department of Defense personnel and at no time engaged in any opposition to Department of Defense operations. The Department of Defense acts as the agent of the Department of Justice in regard to petitioner.

11. Mr. PARACHA is 58 years old and has health conditions that require medical care and monitoring.

12. Mr. PARACHA is without available financial resources, having been confined for over two years.

COUNT ONE -- THE FIFTH AMENDMENT

13. Petitioner repeats and incorporates by reference all the above allegations.

14. Petitioner SAIFULLAH PARACHA is being deprived of liberty and property by respondents under color of law and other authority, and by the United States, as though convicted of a crime, without due process of law, in violation of the mandate of the Fifth Amendment of the Constitution of the United States, "nor shall any person . . . be deprived of life, liberty, or property, without due process of law".

COUNT TWO -- OTHER CONSTITUTIONAL PROTECTIONS

15. Petitioner repeats and incorporates by reference all the above allegations.

16. Petitioner SAIFULLAH PARACHA is being deprived of liberty and property by respondents under color of law and other authority, and by the United States, as though convicted of a crime, in violation of other provisions of the Fourth, Fifth, Sixth, and Eighth Amendments, and other provisions of the Constitution.

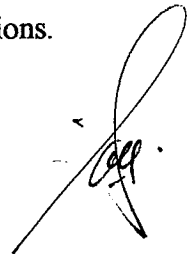
COUNT THREE -- INTERNATIONAL LAW

17. Petitioner repeats and incorporates by reference all the above allegations.

18. Petitioner SAIFULLAH PARACHA is being deprived of liberty and property by respondents under color of law and other authority, and by the United States, in violation of treaties and commitments of the United States, and the obligations and doctrines of international law.

COUNT FOUR -- OTHER LAWS AND REGULATIONS

19. Petitioner repeats and incorporates by reference all the above allegations.

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20. Petitioner SAIFULLAH PARACHA is being deprived of liberty and property by respondents under color of law and other authority, and by the United States, in violation of laws, regulations, and military orders and regulations, especially Army Regulation 190-8.

COUNT FIVE -- THE UNITED NATIONS CHARTER

21. Petitioner repeats and incorporates by reference all the above allegations.

22. At the time of Mr. PARACHA's apprehension, and at all times since then, no state of war, either declared or de facto, has existed in or near Karachi, Bangkok, or any point in between, nor between The Islamic Republic of Pakistan and the United States, nor between The Kingdom of Thailand and the United States.

23. Petitioner SAIFULLAH PARACHA has engaged neither in combat nor in acts of terrorism against the United States, but was taken prisoner while orderly and peaceable, unarmed, in transit in commercial civilian aviation, between, or in, two nations at peace, in violation of the United Nations Charter and numerous other undertakings and treaties of the United States.

COUNT SIX -- RASUL v. BUSH, 124 S. Ct. 2686, FOOTNOTE 15

24. Petitioner repeats and incorporates by reference all the above allegations.

25. Petitioner SAIFULLAH PARACHA has been held in Executive detention for ^{two} more than ~~one~~ year, and is now held in Executive detention in territory subject to the long-term, exclusive jurisdiction and control of the United States, without being charged

with any wrongdoing. Petitioner SAIFULLAH PARACHA is in custody in violation of the Constitution or laws or treaties of the United States.

PRAYER FOR RELIEF

WHEREFORE, petitioner respectfully requests that this honorable Court enter judgment for petitioner and:

A. Give standing to his wife FARHAT PARACHA to pursue this case on his behalf as his next friend, and grant the writ of habeas corpus, or mandamus, or replevin of the body, or any other appropriate writ, to release SAIFULLAH PARACHA from all restraint and confinement;

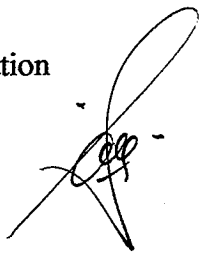
B. Order respondents to return petitioner SAIFULLAH PARACHA to Karachi (or Bangkok, or Washington, or New York, or such other place as petitioner may designate) at the expense of the United States;

C. Declare the seizure and detention of SAIFULLAH PARACHA to be, and to have been, illegal and unconstitutional, and against international law;

D. Declare all further imprisonment, indictment, and prosecution of SAIFULLAH PARACHA to be barred by laches and by the denial of proper criminal procedures, including the right to indictment by a grand jury and the right to a speedy trial;

E. Immediately forbid and enjoin the removal of SAIFULLAH PARACHA from the jurisdiction of this Court, unless he is granted his full and permanent release;

F. Order respondents and their agents to preserve all evidence and information concerning the treatment of prisoners before, during, and after interrogation;



G. Order respondents to arrange for, at their expense, immediate, private, and unmonitored communication between petitioner SAIFULLAH PARACHA and counsel;

H. Assign the undersigned member of its bar to represent SAIFULLAH PARACHA at the expense of the United States, under the Criminal Justice Act, 28 USC 3006A(a)(2)(B), or some other provision, or the Court's inherent authority;

I. Waive all filing fees and other expenses; and authorize payment of translators, investigators, and other assistance needed for this litigation from funds of the United States;


J. Order that petitioner recover the costs of suit and that petitioner's attorney be awarded attorney's fees in accordance with the Criminal Justice Act, 28 USC 3006A, the Equal Access to Justice Act, 28 USC 2412, and other applicable statutes, rules, and principles;

K. And grant petitioner such other relief as may be appropriate.

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Respectfully submitted,

Feb. 14, 2006



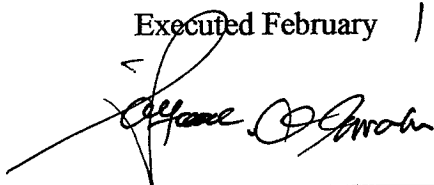
SAIFULLAH A. PARACHA



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I declare under penalty of perjury under the laws of the United States that the above statements are true and correct, to the best of my information and belief.

Executed February 14, 2006, at Guantanamo Bay, Cuba.



SAIFULLAH A. PARACHA