

No. 05-892

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IN THE  
**Supreme Court of the United States**

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ABU BAKKER QASSIM and ADEL ABDU' AL-HAKIM,  
*Petitioners,*

v.

GEORGE W. BUSH, *et al.*,  
*Respondents.*

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**ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**REPLY BRIEF**

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**REPLY FOR THE PETITIONERS**

The Executive's<sup>1</sup> obstructionism and the erroneous conclusion of the court below that the judiciary is powerless to do anything about illegal Executive imprisonment have created a crisis of the first magnitude -- one that threatens the system of checks and balances that grounds our Constitution as well as the very lives of the men imprisoned at Guantánamo. The public importance of the question presented in this case cannot be overstated.

But why should the Court grant certiorari now, with oral argument in the court of appeals set for May 8, 2006? The answer is crystallized in footnote four of the Executive's opposition. The Executive has avoided the mandate of *Rasul v. Bush*, 542 U.S. 466 (2004), for almost two years. That footnote shows its plan for the next two, and that plan *applies to every pending habeas case outside the military tribunal context*. There the Executive says that, "[b]ecause petitioners received a favorable CSRT determination, they have no claim under Section 1005(e)(2) [of the Detainee Treatment Act of 2005 (the "Act")] and their case is not properly "in the court of appeals" for purposes of this Court's jurisdiction under 28 U.S.C. § 1257."<sup>2</sup> This argument proceeds from the Act's language purporting to confine review in the court of appeals to challenges to the "validity of any final decision of a [CSRT] that an alien is properly detained as an enemy combatant." Section 1005(e)(2)(A), codified at 28 U.S.C. § 2241(2)(A). Thus, the Executive argues, if, as in this case, an alien secures a CSRT determination that he is *not* an enemy combatant, no court at all has jurisdiction to order his release.

All of the other *habeas* appeals now plodding their way through the court of appeals involve a contest over whether the detainee is an "enemy combatant," and legal questions as to

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<sup>1</sup> Unless otherwise indicated, capitalized terms have the meanings ascribed to them in the petition.

<sup>2</sup> This case is properly "in" the court of appeals. See Pet. 8; *United States v. Nixon*, 418 U.S. 683, 690-92 (1974); Robert L. Stern, *et al.*, SUPREME COURT PRACTICE, § 2.4 (8th ed. 2002).

whether that dispute should be resolved in the district courts under *habeas* review or in the court of appeals under the Act. The Executive now says that once that dispute is resolved in favor of the detainee, it will be free to extend imprisonment at its pleasure with no court review at all. That means that in every case of the hundreds pending in which, as in this one, a detainee is shown to have been wrongly detained, a new round of Executive obstructionism will commence -- with still more years of litigation, and the interminable stays, appeals, and delays that have already rendered judicial review all but useless. Quite apart from its Kafkaesque legal premise, this consequence should be intolerable to the Court as a practical matter.

Guantánamo is at the precipice. As the systemic failure to implement *Rasul* now reaches its second anniversary, suicide attempts and hunger strikes have become common. *See* Detainees' Br. 10-19.<sup>3</sup> Only prompt intervention by this Court to vindicate its own mandate can prevent the rule of law itself from being drowned in this intensifying whirlpool of desperation.

If the Court were to grant certiorari now and expedite the merits briefing (briefs could be submitted swiftly, as the case is fully briefed now in the court of appeals), it could decide this case before rising for the summer recess, as was done in *Felker v. Turpin*, 518 U.S. 651 (1996) (certiorari granted May 3, 1996; argued June 3, 1996; decided June 28, 1996). This is just that extraordinary case for which the statute and rule permitting review before judgment exist.

#### **A. The Executive's Resort To Words Of Resonance**

The Executive repeatedly incants incendiary words such as "weapons training," "fleeing," "Afghanistan," "military facility,"

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<sup>3</sup> Amicus briefs in support of the petition have been filed on behalf of more than 300 detainees incarcerated at Guantánamo ("Detainees' Br."), the Uyghur American Association ("Uyghur Br."), and the American Civil Liberties Union ("ACLU Br.").

“Taliban,” “Tora Bora” to frighten the reader<sup>4</sup> and divert attention from the most salient fact in this case: the Executive itself concluded that Petitioners are not “enemy combatants” and, therefore, were not “part of or supporting Taliban or Al Qaeda forces or associated forces.” Pet. 4. As for “weapons training,” the Executive concluded that neither Petitioner is a “person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.” *Id.*

The Executive does not claim that Petitioners had any affiliation with or even sympathy for the Taliban or that the Taliban trained or employed them. Knowing that to be false, it darkly asserts that the men were trained at a *facility* “supplied by the Taliban.” Opp. 11. But the Taliban controlled essentially all property and commercial activity in most regions of pre-war Afghanistan.<sup>5</sup> Does that mean simply that the Taliban sold or rented the real property to whoever operated it? We do not and cannot know because there was no return, no factual hearing, and

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<sup>4</sup> The general proposition that Guantánamo houses “terrorists” and “enemy combatants” is myth. According to the CSRT findings, only five percent of Guantánamo detainees were taken on a battlefield. Mark Denbeaux *et al.*, REPORT ON GUANTANAMO DETAINEES: A PROFILE OF 517 DETAINEES THROUGH ANALYSIS OF DEPARTMENT OF DEFENSE DATA 2 (2006), [http://law.shu.edu/news/guantanamo\\_report\\_final\\_2\\_08\\_06.pdf](http://law.shu.edu/news/guantanamo_report_final_2_08_06.pdf) (“DOD DATA”). Most, like these Petitioners, were sold for bounties by local tribesmen who received leaflets promising enormous (by local standards) amounts of cash. *Id.* at 3. CSRT records disclose not a single hostile act in the case of more than half of the detainees. DOD DATA 2; Detainees’ Br. 6-10. The truth about the men held at Guantánamo has, until recently, remained unknown because of the refusal of the Executive and the courts to follow the mandate of *Rasul* and “consider in the first instance the merits of petitioners’ claims.” 542 U.S. at 485.

<sup>5</sup> OFFICE OF THE UN COORDINATOR FOR AFGHANISTAN, VULNERABILITY AND HUMANITARIAN IMPLICATIONS OF UN SECURITY COUNCIL SANCTIONS IN AFGHANISTAN 4 (Dec. 2000), [http://www.humanitarianinfo.org/sanctions/handbook/docs\\_handbook/OCHA%20-%20Sanctions%20in%20Afghanistan.pdf](http://www.humanitarianinfo.org/sanctions/handbook/docs_handbook/OCHA%20-%20Sanctions%20in%20Afghanistan.pdf) (last visited Apr. 2, 2006); DOD DATA 16.



no chance to traverse a return. We do know -- because the CSRT so concluded -- that Petitioners were not “part of or supporting Taliban or al Qaeda forces, or associated forces.”<sup>6</sup> Pet. 4.

The Executive also calls the Afghan village where the men stayed a “military training camp.” Opp. 11. Even if that were true, the world is full of military training camps. Was this one hostile to the U.S.?<sup>7</sup> For all this record shows, the “military training camp” that General Hood speaks of (in a document that Petitioners were never permitted to address) was as supportive of U.S. interests as were the “camps” of the Northern Alliance. There is no evidence -- indeed, no overt assertion, although the implication is powerful and intentional -- that Petitioners were “trained” with malign or criminal intent toward U.S. interests, or that the “camp” had any connection to any conflict in which the President was authorized to engage by the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (“AUMF”), or Article II of the Constitution.

The “Guantánamo Myth” unravels when the reader focuses on what the record actually says. General Hood (who was not in Afghanistan himself, and never tells us where he learned what he has repeated in his affidavit) says that Petitioners received “training in, among other things, the use of small arms.” That is, the general says, they were taught how to disassemble and assemble firearms, how to clean them, how to load, handle, aim and fire them. If this allegation is true, then Petitioners received the same “weapons training” that thousands of Americans lawfully receive every day.<sup>8</sup>

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<sup>6</sup> Petitioners should not be confused with, for example, Sayed Rahmutullah Hashemi, the former Taliban spokesman who today is a freshman at Yale. See Chip Brown, *The Freshman*, N.Y. TIMES MAG., Feb. 26, 2006, at 55.

<sup>7</sup> There is no record evidence that any Taliban personnel were at the “camp.”

<sup>8</sup> See e.g., National Rifle Ass’n, Basic Firearm Training Program, <http://www.nrahq.org/education/training/find.asp?State=VA&Type=> (weapons training offered at seventy-two different places in Virginia

Petitioners bear no animosity toward America and (remarkably) share the admiration for America so common to Uyghurs regularly admitted here as political refugees from China. Uyghur Br. 9. If Petitioners are “dangerous,” then so are the millions of Americans who daily receive the same weapons training that Petitioners are accused of receiving. Indeed, “[t]he United States believes that the responsible use of firearms is a legitimate aspect of national life. . . . We . . . do not begin with the presumption that all small arms and light weapons are the same or that they are all problematic.” John R. Bolton, Under Sec’y for Arms Control and Int’l Sec. Affairs, Dep’t of State, U.S. Statement at Plenary Session to the UN Conf. on the Illicit Trade in Small Arms and Light Weapons in All its Aspects (July 9, 2001), *available at* <http://www.state.gov/t/us/rm/janjuly/4038.htm>.

The Executive’s words of resonance, powerful as they may be in the court of public opinion, should be impotent in this Court. In particular, they should not be permitted to drown out one simple truth: *the Executive’s own self-created process has found to be non-existent the only asserted basis for imprisoning these Petitioners.*

More remarkable still is the Executive’s suggestion that it has indulged Petitioners’ request not to return to their “native” country, is doing them a favor by not returning them to China, and is “hosting” them while it diligently seeks on their behalf a better situation. Opp. 13. But they were not living in China, bought in China, or held in China. The prisoners of war referred to by the Executive, *see id.*, were soldiers who had lived in China and North Korea before marching out with their armies. Petitioners were *not* soldiers and were living *outside* China when the Executive seized them.

The Executive itself has created the very circumstances that it says bars any relief for Petitioners. It has known for years that

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alone); Colin Harrison, *High: Vegas on \$1,000 a Day*, N.Y. TIMES, Mar. 19, 2006 (Uzis, AK-47s, and Mac-10s are available for rent at the Las Vegas Gun Range and Firearms Center); Cumberland Tactics, <http://www.guntactics.com/page6.php> (offering “urban carbine” training).

Petitioners should not be at Guantánamo. Resettlement abroad has become all but hopeless, as the Executive long ago persuaded the rest of the world that Guantánamo prisoners are terrorists. The stain of this libel is indelible. Of the many wrongs done to the Petitioners, it may be the cruelest.<sup>9</sup>

**B. The Petition Merits Certiorari Review.**

**1. The Act does not apply here and is not retroactive.**

The Act has no bearing on this case because, by its terms, it applies only to actions seeking “to determine the validity of any final decision of a [CSRT] that an alien *is* properly detained as an enemy combatant.” 28 U.S.C. § 2241(2)(A) (emphasis supplied). Since Petitioners seek to vindicate, not challenge, the CSRT’s decision that they are *not* enemy combatants, the Act is inapplicable here, as the Executive explicitly concedes. Opp. 10 n.4; Brief for Appellees, *Qassim v. Bush* (D.C. Cir. No. 05-5477, filed March 15, 2006) at 19 (stating that the Act “does not provide any remedy to petitioners in this case”). *Rasul* thus applies unchanged -- unless the Act is read to cut off *any* judicial challenge to Petitioners’ imprisonment.<sup>10</sup>

The Act is not retroactive in any case, as demonstrated in briefs and argument presented to this Court in *Hamdan v.*

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<sup>9</sup> Justice Jackson wrote of Ignatz Mezei, the alien stranded at Ellis Island, “Since we proclaimed him a Samson who might pull down the pillars of our temple [Mezei was a suspected communist], we should not be surprised if peoples less prosperous, less strongly established and less stable feared to take him off our timorous hands.” *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 220 (1953) (Jackson, J., dissenting).

<sup>10</sup> As discussed above, this is the remarkable argument the Executive now wants to make. Of course, application of the Act to prisoners who have been cleared by a CSRT would create insuperable Suspension Clause issues. See *Hamdan v. Rumsfeld*, No. 05-184 March 28, 2006 Oral Arg. Tr. 48 (“Hamdan Tr.”). For this and other reasons, if the Act were deemed to apply here, it would have to be construed to provide a remedy to avoid unconstitutionality.

*Rumsfeld*, No. 05-184,<sup>11</sup> and in the court of appeals in *Al Odah, Khaled A.F. v. United States*, No. 05-5064,<sup>12</sup> and *Boumediene v. Bush*, No. 05-5062.<sup>13</sup> Petitioners also have addressed the issue in the court of appeals.<sup>14</sup> But, again, that issue need not be reached in this case.<sup>15</sup>

**2. The judiciary has the power and duty to provide a remedy for unlawful Executive imprisonment.**

Contrary to the Executive's contention that Petitioners' imprisonment is lawful because the AUMF authorized their capture, *see* Opp. 11-12, Congress never authorized the President to purchase from Pakistan and export to Guantánamo opponents of Chinese communism. But even if it had that would not explain why Petitioners remain in captivity four years later. Thus the Executive is forced to invent a "wind up" power, *see* Opp. 12-14, presaging its approach in any other cases in which a detainee is exonerated by a fair process and confirming the need for immediate review. It cites no legal authority and points to inapposite history involving North Korean and Chinese soldiers taken on Korean battlefields and being returned to their homelands, and the Geneva-compliant, six-months-and-done post-war operations of the First Gulf War. It never explains what, if anything, limits this power. If the Executive may lawfully seize

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<sup>11</sup> *E.g.*, Brief Amici Curiae of More than 300 Detainees Incarcerated at U.S. Naval Station, Guantánamo Bay, Cuba, and their Family Members, in Support of Petitioner and in Support of Jurisdiction (filed Jan. 6, 2006).

<sup>12</sup> *See* Guantánamo Detainees' Supplemental Briefs Addressing the Effect of the Detainee Treatment Act of 2005 on this Court's Jurisdiction Over the Pending Appeals, filed Jan. 25 and March 1, 2006).

<sup>13</sup> *See* Supplemental Briefs of Appellants Regarding Section 1005 of the Detainee Treatment Act of 2005, filed Jan. 25 and Mar. 10, 2006).

<sup>14</sup> *See* Brief of Petitioners-Appellants and Reply Brief of Petitioners-Appellants *Qassim v. Bush* (D.C. Cir. No. 05-5477, filed Feb. 10, 2006 and March 22, 2006, respectively).

<sup>15</sup> For these reasons too, there is no basis to hold the petition pending a decision in *Hamdan*, a case that presents entirely distinct issues.

anyone, anywhere in the world, and confine him on an island forever, as long as it assures us that it is pursuing an “orderly windup,”<sup>16</sup> then we are long past little old ladies in Geneva who unwittingly give to the wrong charity.<sup>17</sup>

The Executive contends that, having seized individuals abroad and imprisoned them on a military base at a location of its choice, it may then invoke the nature and location of the prison as the reason the individuals may not be released, notwithstanding the illegality of the imprisonment. It cites *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), the decision -- roundly criticized at the time and ever since -- that stranded Ignatz Mezei at Ellis Island, potentially indefinitely. It arose during a period not unlike our own, when a single word (“communist”) prompted such fear and revulsion that few trifled to inquire whether, in a given case, the word fairly described the person branded with it. Justice Jackson -- who knew something of indefinite detention, having opened for the prosecution at Nuremberg by discussing what indefinite detention did to Germany<sup>18</sup> -- filed a dissent eerily predictive of our current national folly. “Fortunately it still is startling, in this country, to find a person held indefinitely in executive custody without accusation of crime or judicial trial,” it began. *Id.* at 218. It continued: “Quite unconsciously, I am sure, the Government’s theory of custody for ‘safekeeping’ without disclosure of charges, evidence, informers or reasons, even in an administrative proceeding, has unmistakable overtones of the ‘protective custody’ of the Nazis more than of any detaining

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<sup>16</sup> The Executive’s position, vindicated by the court below, is that even that assurance must be accepted untested by the courts. *Cf.* Pet. 7.

<sup>17</sup> As this Court is aware, *see* Hamdan Tr. 21, the Executive argued in *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 475 (D.D.C 2005), that it had the power to detain a “little old lady in Switzerland” who unwittingly gave to a charity front.

<sup>18</sup> 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL TRIBUNAL 110-11 (1947). The indictment alleged that the defendants used “protective custody” to make the regime “secure from attack and to instill fear in the hearts of the . . . people.” *Id.* at 34-35.

procedure known to the common law.” *Id.* at 226. Three others joined him.

Unlike Petitioners, Mezei left the U.S. voluntarily and returned, voluntarily, without a visa. The Executive did not buy him or interrogate him for six months in Kandahar before deciding to bring him in chains to “territory over which the United States exercise exclusive jurisdiction and control,” *Rasul*, 542 U.S. at 475, a “place that belongs to the United States,” *id.* at 487 (Kennedy, J., concurring in the judgment). And while the government apparently believed that Mezei was a “communist,” the Executive concedes that Petitioners are not enemy combatants.

The Executive dismisses *Zadvydas v. Davis*, 533 U.S. 678 (2001), and *Clark v. Martinez*, 543 U.S. 371 (2005), on the ground that they construe an irrelevant immigration statute. *Opp.* 15-17. But the rule of each case is that *no* statute can be read to permit indefinite imprisonment -- even if it deals with alien criminals and appears on its face to authorize their indefinite imprisonment.

### **3. The district court was obliged to fashion a remedy.**

Petitioners asked only that the district court do what Congress said it should do: command that the bodies be produced, conduct a hearing, and should it find (as it rightly did) no lawful basis for their imprisonment, order their discharge. 28 U.S.C. § 2243.

The Executive does not respond to the authorities cited in the petition that require a court having jurisdiction to decide a case and give an effectual remedy. *See also* ACLU Br. 14-20. Nor does immigration law justify the district court’s abdication of that duty. *Id.* 5-14. No immigration status was sought here. Granting the relief sought by Petitioners would not conflict with statutory law, usurp the immigration authority of the political branches, or contravene the separation of powers doctrine. *Id.* To hold otherwise would make a mockery of the “Great Writ of Liberty.” *See* ERIC M. FREEDMAN, *HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY* 1 (N.Y. Univ. Press 2001). In fact, it would lead to the conclusion that *habeas* itself is an unconstitutional violation of separation of powers. Every time the writ is granted, a court orders the Executive to release someone that it, in the exercise of its prerogatives, had chosen to imprison.

Until now, that had been seen as the essence of separation of powers -- checks and balances operating precisely as they should. If the Executive is found to have detained someone illegally it is subject to an enforceable judicial order that the individual be released if the illegality cannot be promptly remedied. Here, as in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the Executive asserts an entitlement to unilateral decisionmaking that “serves only to condense power into a single branch of government.” 542 U.S. at 536. Here, as in *Hamdi*, the Court should vindicate the rule of law by rejecting that claim.

**C. Certiorari Before Judgment Is Warranted.**

Two years after *Rasul*, hundreds of Guantánamo cases languish at a standstill, *see Hamdan* March 28 Tr. 6, 54; Detainees’ Br. 5, while the sufferings of men trapped in a lawless limbo intensify. *See Detainees’ Br.* 16-19. The Court has granted certiorari before judgment in circumstances presenting similar combinations of extraordinary public importance, systemic fault lines, and clashes between the coordinate branches. *See Pet.* 14-19.<sup>19</sup> The issues are plain and can be resolved only by this Court. Delay pending an appellate decision will perpetuate not just the harm being suffered by these innocent Petitioners, *see Uyghur Br.* 7-9, but also the intolerable uncertainty that is stymying the lower courts and sapping the authority of the judiciary. Petitioners pray that, for the reasons set forth herein, in the petition, and in the briefs filed by supporting amici, the Court grant certiorari now.

Respectfully submitted,

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<sup>19</sup> The Executive’s reliance, *see Opp.* 8 n.3, on the orders in *Padilla v. Hanft*, 125 S. Ct. 2906 (2005), and *Hamdan v. Rumsfeld*, 543 U.S. 1096 (2005), is misplaced. Those cases did not involve detainees who were concededly not enemy combatants and had been found by a court to be imprisoned unlawfully. Further, those petitioners had been granted relief below and the Executive argued that this Court should defer review pending further fact-finding. *See Padilla*, No. 04-1342, Brief in Opposition 7, 12, 15 (May 9, 2005); *Hamdan*, No. 04-702, Brief in Opposition 7, 9, 11 (Dec. 2004).

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