U. S. Department of Justice

Civil Division

Deputy Assistant Attorney General

Washington, D.C. 20530

September 3, 2004

Delivery by Hand

The Honorable Joyce Hens Green
Senior United States District Judge
United States Courthouse
333 Constitution Ave., NW, Room 2315
Washington, DC 20001

Re: Guantanamo Bay Detainee Cases CA04-1164

Dear Judge Green:

At the conference on these cases last Friday, you asked the government to report to the Court in writing on the procedures that the military uses to make the administrative decision whether to continue to detain at Guantanamo Bay individuals designated as enemy combatants, as well as the timing of those decisions. A description of those procedures–both for initial decisions and for more formalized assessments at later stages–is set forth below.

Before describing these procedures, however, it is important to put this matter in the perspective of the issues presented in this litigation. It is well settled that under the law of war enemy combatants may properly be detained for the duration of "active hostilities"–i.e., so long as "[a]ctive combat operations ... are ongoing." See Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2640-42 (2004) (plurality). Hamdi (a case involving a United States citizen) confirmed that the government may detain individuals "legitimately determined" to be enemy combatants at least for the duration of hostilities. Id. at 2642. What Hamdi left open was "the question of what process is constitutionally due to a citizen who disputes his enemy-combatant status," and it was on that issue that the case was remanded, with an admonition that "an appropriately authorized and properly constituted military tribunal" might be sufficient even for United States citizens. Id. at 2651.

The Guantanamo Bay cases now before the Court present the issue (among others) of whether the petitioner-detainees have been legitimately determined to be and are being detained as enemy combatants. The issue that you have asked us to report on is the separate determination by the military as to whether the continuing detention of those properly designated as enemy

combatants is appropriate. That separate determination involves a weighing national security and threat risks, resource considerations, and other factors to determine whether continued detention of the detainee (or his release or transfer to the custody of another government) is in the interest of the United States. Such a weighing of factors by the Executive Branch is non-justiciable and not properly before the Court in these habeas proceedings.[1/]

While the law of war does not require the use of any periodic review process to support the continued detention of an enemy combatant, the Department of Defense has determined, as a matter of policy, to implement review procedures. Initially, less formal assessments are made by military officers on the battlefield and through screening procedures prior to sending individual

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[1/] "Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." Haig v. Agee, 453 U.S. 280, 292 (1981); see also Dep't. of Navy v. Egan, 484 U.S. 518, 530 (1988) ("Courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs."); Dist. No. 1, Pacific Coast Dist., Marine Engs. Beneficial Ass'n v. Maritime Admin., 215 F.3d 37, 42 (D.C. Cir. 2000) (Executive's "judgments on questions of foreign policy and national interest . . . are not subjects fit for judicial involvement"). Moreover, the D.C. Circuit has specifically held that the Executive Branch's determination regarding the existence of a national security risk is not justiciable. See People's Mojahedin Org. of Iran v. United States Dep't of State, 182 F.3d 17, 23 (D.C. Cir. 1999) (determination by the Secretary of State that "'the terrorist activity of the organization threatens the security of United States nationals or the national security of the United States'" was "nonjusticiable."). Thus, the balancing of national security risks levels, resources, and other factors involved in determining the appropriateness of the continued detention of an enemy combatant is a matter entirely inappropriate for judicial review. There simply would be no "judicially discoverable and manageable standards" for resolving the propriety of the Executive Branch's decision in this circumstance. See Baker v. Carr, 369 U.S. 186, 217 (1962); see also Nat'l Fed'n of Fed. Employees v. United States, 905 F.2d 400, 405 (D.C. Cir. 1990) (APA claim challenging decisions concerning closure and realignment of military bases was nonjusticiable due to lack of judicially manageable standards because it would "necessarily involve second-guessing the Secretary's assessment of the nation's military force structure and the military value of the bases within that structure"; "We think the federal judiciary is ill-equipped to conduct reviews of the nation's military policy."); Industria Panificadora, S.A. v. United States, 63 F.Supp. 1154, 1160 (D.D.C. 1991), aff'd on other grounds, 957 F.2d 886, 887 (D.C. Cir. 1992) ("[D]ecisions which affect our national security involve policy decisions beyond the scope of judicial expertise. 'To attempt to decide such a matter without the necessary expertise and in the absence of judicially manageable standards would be to entangle the court in matters constitutionally given to the executive branch.'" (citation omitted)).

detainees to particular detention facilities. More formal procedures have been implemented subsequently at Guantanamo, first under an interagency procedure implemented by the Deputy Secretary of Defense to review and make recommendations regarding the release or transfer of individual detainees held at Guantanamo Bay. As of August 2, 2004, this process resulted in 156 detainees being released from Guantanamo Bay or transferred to custody of another government.

On May 11, 2004, the Deputy Secretary of Defense ordered the establishment of an Administrative Review Board process to assess, at least annually during the course of current hostilities, the need for continued detention of each enemy combatant at Guantanamo Bay who is not charged with or under sentence for war crimes. Unlike the predecessor interagency process, the Review Board process will permit each enemy combatant to explain why he believes he is no longer a threat to the United States and its allies in the ongoing armed conflict against al Qaeda and its affiliates and supporters or why his release would otherwise be appropriate. The process also involves, where not inconsistent with national security interests, permitting a detainee's home country and relatives to submit information to the Review Board.

The Department of Defense is currently finalizing the administrative procedures to be used in the Review Board process. Given that the process is still being finalized, we anticipate that decisions with respect to the release of individual Guantanamo Bay detainees will begin being issued in November of this year. We are unable to provide more precise estimates at this time regarding the timing of future decisions from the Review Board process with respect to detainees, including petitioner-detainees in these cases.

Respectfully submitted,

Thomas R. Lee
Deputy Assistant Attorney General

On Behalf of Respondents

cc: Counsel for petitioners in: (by electronic mail)

Rasul v. Bush, No. 02-CV-0299;
Al Odah v. United States, No. 02-CV-0828;
Habib v. Bush, No. 02-CV-1130;
Kurnaz v. Bush, No. 04-CV-1135;

O.K. v. Bush, No. 04-CV-1136;
Begg v. Bush, No. 04-CV-1137;
Benchellali v. Bush, No. 04-CV-1142;
El-Banna v. Bush, No. 04-CV-1144;
Gherebi v. Bush, No. 04-CV-1164;
Boumediene v. Bush, No. 04-CV-1166;
Anam v. Bush, No. 04-CV-1194;
Almurbati v. Bush, 04-CV-1227;
Abdah v. Bush, No. 04-CV-1254.