

[NOT SCHEDULED FOR ORAL ARGUMENT]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHAMAN	)	
Appellant,	)	
	)	No. 10-5130
v.	)	
	)	
BARACK OBAMA, et al.,	)	
Appellees.	)	
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AMINULLAH	)	
Appellant,	)	
	)	No. 10-5131
v.	)	
	)	
BARACK OBAMA, et al.,	)	
Appellees.	)	
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MUSTAFA AHMED HAMLILY	)	
Appellant,	)	
	)	No. 10-5179
v.	)	
	)	
LEON E. PANETTA, et al.,	)	
Appellees.	)	
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BENJAMIN HABASHI, et al.,	)	
Appellants,	)	
	)	No. 10-5182
v.	)	
	)	
BARACK OBAMA, et al.,	)	
Appellees.	)	
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AHMED ZAID SALEM ZUHAIR	)	
Appellant,	)	
	)	No. 10-5183
v.	)	
	)	
BARACK OBAMA, et al.,	)	
Appellees.	)	
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MOHAMMED SULAYMON BARRE	)	
Appellant,	)	
	)	No. 10-5203
v.	)	
	)	
BARACK OBAMA, et al.,	)	
Appellees.	)	
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#### **APPELLEES' MOTION FOR SUMMARY AFFIRMANCE**

Appellees respectfully move for summary affirmance of the district court's order dismissing these consolidated cases as moot. Summary affirmance is appropriate when, drawing all inferences in favor of the non-moving party, the merits of the case are so clear that expedited action is justified and no benefit will be gained from further briefing and argument of the issues presented. *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297–98 (D.C. Cir. 1987) (per curiam). Under this Court's July 22, 2011 decision in *Gul v. Obama et al.*, No. 10-5117 (D.C. Cir.) and *Hamad v. Obama et al.*, 10-5118 (D.C. Cir.), petitioners' cases are moot. The district court's decision in these cases is clearly correct and summary disposition is warranted.

## STATEMENT

1. Appellants in these cases (hereinafter “petitioners”) are habeas petitioners who were previously in the custody of the United States at the Guantanamo Bay Naval Base. Petitioners brought habeas actions challenging the lawfulness of their detention by the United States. Thereafter, they were transferred from United States custody and sent to other countries. In light of those changed circumstances, the government argued to the district court that petitioners’ habeas cases were moot.

2. In various orders, four district courts agreed that the petitions of all former Guantanamo detainees were moot.<sup>1</sup> In the first set of cases, Judge Leon, on November 23, 2009, dismissed the habeas cases of four such petitioners as moot.<sup>2</sup> All four appealed.

In a separate set of cases, Judge Hogan, on April 1, 2010, dismissed the habeas

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<sup>1</sup> Some detainees have chosen to voluntarily dismiss their habeas petitions upon transfer from United States custody. *See, e.g., Legseirein v. Bush*, No. 06-1754 (D.D.C.), docket # 11; *Al-Sharekh v. Bush*, 05-0583 (D.D.C.), docket # 43; *Wahab v. Bush*, 05-0886 (D.D.C.), docket # 100; *Hafiz v. Obama*, 09-1461 (D.D.C.), docket # 18; *Hashim v. Obama*, 09-1460 (D.D.C.), docket # 10. Petitioners whose cases were dismissed are those who have chosen not to do so.

<sup>2</sup> *See* No. 05-0429 (D.D.C.), docket #255 (Al Hajji); No. 05-0795 (D.D.C.), docket #64 (Hamoodah); No. 05-1010 (D.D.C.), docket #68 (Khan); No. 05-2427 (D.D.C.), docket #30 (Rimi).

cases of approximately 105 petitioners as moot.<sup>3</sup> Eight of the petitioners before Judge Hogan appealed.

On April 9, 2010, Judge Robertson dismissed two habeas petitions as moot for the reasons set forth by Judge Hogan in his opinion dismissing the approximately 105 cases before him.<sup>4</sup> Similarly, on April 30, 2010, Judge Kennedy dismissed one habeas petition as moot for the same reasons.<sup>5</sup> All three of these petitioners appealed.

3. Following motions by the government, this Court consolidated the various appeals. The four appeals from Judge Leon's order were consolidated together.<sup>6</sup> Five of the appeals from Judge Hogan's order and the appeal from Judge Kennedy's order were consolidated together.<sup>7</sup> These ten appeals, along with the appeal of two

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<sup>3</sup> See No. 08-01628 (D.D.C.), docket # 35 (Hamlily); No. 05-0765 (D.D.C.), docket # 200 (Habashi); No. 08-0864 (D.D.C.), docket # 231 (Zuhair); *see also* No. 05-0888 (D.D.C.), docket #100 (Gul); No. 05-1009 (D.D.C.), docket #122 (Hamad); No. 05-1237 (D.D.C.), docket #112 (Chaman); No. 05-0887 (D.D.C.), docket #71 (Aminullah).

<sup>4</sup> See No. 05-00270 (D.D.C), docket # 291 (El-Mashad and Algazzar); *In re Petitioners Seeking Habeas Corpus Relief in Relation to Prior Detention at Guantanamo Bay*, 08-0444 (D.D.C.), docket # 120.

<sup>5</sup> See No. 08-01153 (D.D.C.), docket # 174 (Barre).

<sup>6</sup> See No. 10-5019 (D.C. Cir.) (Khan); No. 10-5021 (D.C. Cir.) (Rimi); No. 10-5023 (D.C. Cir.) (Hamoodah); No. 10-5024 (D.C. Cir.) (Al Hajji).

<sup>7</sup> See No. 10-5130 (D.C. Cir.) (Chaman); No. 10-5131 (D.C. Cir.) (Aminullah); No. 10-5179 (D.C. Cir.) (Hamlily); No. 10-5182 (D.C. Cir.) (Al  
(continued...))

petitioners from Judge Robertson's order,<sup>8</sup> were held in abeyance pending the disposition of two consolidated appeals from Judge Hogan's order, *Gul v. Obama et al.*, No. 10-5117 (D.C. Cir.) and *Hamad v. Obama et al.*, No. 10-5118 (D.C. Cir.), which were scheduled for briefing and argument.

4. On July 22, 2011, this Court affirmed the district court's dismissal of the petitions in *Gul* and *Hamad*, holding that petitioners had suffered no redressable injury under Article III. *Gul*, Slip. Op. at 2. This Court did not decide whether the collateral consequences doctrine applies to former Guantanamo detainees. Instead, the Court held that, even if the doctrine applied, it could "not save from mootness the petitions filed in these cases." *Id.* at 7. In so holding, the Court rejected *Gul* and *Hamad*'s arguments, common to all of these cases. This Court first rejected *Hamad* and *Gul*'s contention that they were entitled to a presumption of collateral consequences, explaining that "[a] former detainee, like an individual challenging his parole, must instead make an actual showing his prior detention or continued designation burdens him with 'concrete injuries.'" *Id.* at 9 (quoting *Spencer v. Kemna*, 523 U.S. 1, 14 (1998)).

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<sup>7</sup>(...continued)  
Habashi); No. 10-5183 (D.C. Cir.) (Zuhair); No. 10-5203 (D.C. Cir.) (Barre).

<sup>8</sup> See No. 10-5232 (D.C. Cir.) (El-Mashad and Algazzar).

The Court then held that all of the claimed injuries that Hamad and Gul alleged were insufficient or not redressable in a habeas proceeding. With respect to their allegations that they were subject to travel restrictions or other restraints on liberty in the countries to which they were transferred, the Court credited the government's declaration that petitioners are "transferred entirely to the custody and control of the [receiving] government," and held that any such restrictions are "traceable to the act of a foreign sovereign," not the United States. *Id.* at 11. With respect to their contention that the habeas action could remedy their alleged placement on the "No Fly List," the Court held that, by statute, their placement on that list is mandated regardless of the outcome of any habeas case. *Id.* at 13. With respect to Gul and Hamad's contention that habeas review was necessary because otherwise they would be inadmissible to the United States under the immigration laws pursuant to 8 U.S.C. § 1182(a)(3)(B), this Court held that the determination of inadmissibility under that statute "involves a separate legal standard than the question of whether an individual was detainable"; "there are a number of factors in the immigration laws which [the Government] look[s] at in order to determine whether someone is excludable" and designation as an enemy combatant, unlike involvement with terrorism, "is not one of them," so any injury is speculative. *Id.* at 14 (quoting government brief).

The Court also rejected Gul and Hamad's suggestion that they would be

targeted by the United States under the laws of war—even after their transfer from United States custody—as “the most speculative of all,” noting that Gul and Hamad “have no basis whatsoever for believing the Government might pursue them because of their continuing designation (or for that matter, any other reason).” *Id.* at 15. Finally, with respect to Gul and Hamad’s contention that stigma as a result of their detention was a sufficient collateral consequence to allow them to maintain their habeas action after their transfer from United States custody, the Court held that “‘when injury to reputation is alleged as a secondary effect of an otherwise moot action, we [require] some tangible concrete effect . . . susceptible to judicial correction’ before we assert jurisdiction,” *id.* at 15 (quoting *McBryde v. Comm. to Rev. Circuit Council Conduct*, 264 F.3d 52, 57 (2001)), and that “the label ‘enemy combatant’ brings with it neither a ‘concrete effect’ nor a ‘civil disability’ susceptible to judicial correction,” *id.*

Having broadly determined that each category of alleged collateral consequences did not prevent mootness, this Court then rejected the remainder of Gul and Hamad’s assignments of error, holding that the burden of proof was properly borne by habeas petitioners once they had been transferred from United States custody, *id.* at 16; that Gul and Hamad had received individualized consideration of their cases on appeal and “raised no individual issue sufficient to establish their cases

are not moot,” *id.* at 17; and that equitable considerations were inapt, because “[r]egardless of the equity that delay might afford the appellants, ‘mootness, however it may have come about, simply deprives us of our power to act,’” *id.* at 18 (quoting *Spencer*, 523 U.S. at 18)).

5. Having rejected all of Gul and Hamad’s contentions as to why their cases were not moot, this Court affirmed the district court’s dismissal of their habeas petitions.

Following this decision, this Court entered orders in all of these cases, directing that the parties file motions to govern future proceedings by August 29, 2011.

### **ARGUMENT**

Petitioners’ cases are moot under this Court’s decision in *Gul*. As this Court noted in *Gul*, the more than 100 petitions of habeas petitioners who had been held at Guantanamo but have since been transferred from United States custody present “the same basic issue,” *id.* at 17, of whether such habeas petitions are moot. This basic issue was resolved for all of these petitioners by the district courts for the same reasons—Guantanamo detainees transferred from United States custody are beyond the control of the United States government, and any injuries they suffer are either not traceable to the United States or are not redressable in a habeas action that challenged the lawfulness of their prior detention. On appeal of the district courts’ generalized

holdings, petitioners in *Gul* presented the same arguments that the district courts had rejected below, and this Court categorically rejected them as well.

1. The Court in *Gul* held that, whether or not the collateral consequences doctrine applies to the former Guantanamo detainees' habeas cases, petitioners' cases are moot. This Court rejected each category of *Gul* and Hamad's claimed collateral consequences. Notably, these are the very same types of alleged consequences all of these petitioners had raised in the district courts as well. *Gul* rejected these alleged consequences with broad rulings that do not rest on the facts of each case. Therefore, the holding of *Gul* is fully applicable to these cases and they should be summarily affirmed.

Specifically, assuming any of the remaining petitioners could allege any continuing restrictions on their liberty, the government demonstrated in general declarations, credited by *Gul*, that such restraints are imposed by sovereign foreign governments, not by the United States government, and therefore are beyond the reach of a habeas action against the United States. Because these same declarations<sup>9</sup>

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<sup>9</sup> See Decl. of Joseph A. Benkert, Asst. Sec'y of Defense for Global Security Affairs, May 7, 2009; Decl. of Daniel Fried, Special Envoy for the Closure of Guantanamo Bay Detention Facility, November 25, 2009; Decl. of Sandra L. Hodgkinson, Dep'y Asst. Sec'y of Defense for Detainee Affairs, July 9, 2008; Decl. of Lt. Col. David F. Koonce, Director, Detainee Capabilities Directorate for the Combined Security Transition Command-Afghanistan, Oct. 31, 2008; Decl. of Clint  
(continued...)

have been submitted in all of these cases and apply equally to all of the remaining petitioners, any argument petitioners might make about continued restraints on liberty is, as a general matter, inapt. Moreover, petitioners' arguments about various statutory disabilities—including the “No Fly List” statute and the terrorism bar on admissibility in the INA—were rejected by this Court as a legal matter; in both instances, this Court held that the outcome of a habeas action was of little or no relevance to the statutory determination. Finally, *Gul* rejected any arguments the remaining petitioners could make about possible future action against them by the United States or about equitable interests (such as the various delays in adjudication of their habeas petitions or their desire to have a court ruling recognizing their alleged “actual innocence”).

In sum, every argument remaining petitioners made in the district courts has been rejected by this Court for reasons that are generally applicable to *all* former detainees in these cases.

2. Four separate district courts, and now a panel of this Court, have held that the habeas cases of Guantanamo petitioners who have been transferred from United States custody and control are moot. As the district courts held, the individual facts

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<sup>9</sup>(...continued)  
Williamson, Ambassador-at-Large for War Crimes Issues, July 7, 2008.

of these cases do not affect mootness, and no further briefing is warranted. By resolving these appeals through summary affirmance, the Court will conserve resources and prevent repetitive briefing on issues already resolved by this Court. For these reasons, the government respectfully submits that it is appropriate to summarily affirm the district court in these appeals.

## CONCLUSION

For the foregoing reasons, the government respectfully requests that the judgments of the district court be summarily affirmed.

Respectfully submitted,

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*Assistant Attorney General*

s/ Robert Mark Loeb

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**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES****(A) PARTIES AND AMICI**

Chaman v. Obama et al. (No. 10-5130):

Petitioners-appellants:

Chaman

Respondents-appellees:

Barack Obama, President of the United States

Leon E. Panetta, Secretary of Defense

Jeffrey Harbeson, Navy Rear Admiral

Donnie Thomas, Army Colonel

Aminullah v. Obama et al. (No. 10-5131):

Petitioners-appellants:

Aminullah

Respondents-appellees:

Barack Obama, President of the United States

Leon E. Panetta, Secretary of Defense

Jeffrey Harbeson, Navy Rear Admiral

Donnie Thomas, Army Colonel

Hamli v. Panetta et al. (No. 10-5179):

Petitioner-appellant:

Mustafa Ahmed Hamli

Respondents-appellees:

Leon E. Panetta, Secretary of Defense

Jeffrey Harbeson, Navy Rear Admiral

Donnie Thomas, Army Colonel

Habashi et al. v. Obama et al. (No. 10-5182):

Petitioners-appellants:

Benjamin Mohammed Al Habashi

Shaker Amer, as next friend of Benjamin Mohammed al Habashi

Respondents-appellees:

Barack Obama, President of the United States

Leon E. Panetta, Secretary of Defense

Jeffrey Harbeson, Navy Rear Admiral

Donnie Thomas, Army Colonel

Zuhair v. Obama et al. (No. 10-5183):

Petitioners-appellants:

Ahmed Zaid Salem Zuhair

Respondents-appellees:

Barack Obama, President of the United States

Leon E. Panetta, Secretary of Defense

Jeffrey Harbeson, Navy Rear Admiral

Donnie Thomas, Army Colonel

Barre v. Obama et al. (No. 10-5203):Petitioners-appellants:

Mohammed Sulaymon Barre

Respondents-appellees:

Barack Obama, President of the United States

Leon E. Panetta, Secretary of Defense

Jeffrey Harbeson, Navy Rear Admiral

Donnie Thomas, Army Colonel

**(B) RULINGS UNDER REVIEW**

## Orders of the district court:

No. 05-1237 (D.D.C.), docket #112 (Chaman)

No. 05-0887 (D.D.C.), docket #71 (Aminullah)

No. 08-01628 (D.D.C.), docket # 35 (Hamlily)

No. 05-0765 (D.D.C.), docket # 200 (Habashi)

No. 08-0864 (D.D.C.), docket # 231 (Zuhair)

No. 08-01153 (D.D.C.), docket # 174 (Barre).

### **(C) RELATED CASES**

These cases have not previously been before this Court or any other court.

There are thirteen public appeals that are or were pending before this Court and that present the same legal issues as these cases:

Gul v. Obama, et al., No. 10-5117 (D.C. Cir.);

Adel Hamad v. Obama, et al., No. 10-5118 (D.C. Cir.);

Khan v. Obama, et al., No. 10-5019 (D.C. Cir.);

Rimi v. Obama, et al., No. 10-5021 (D.C. Cir.);

Hamoodah, et al. v. Obama, et al., No. 10-5023 (D.C. Cir.);

Al Hajji, et al. v. Obama, et al., No. 10-5024 (D.C. Cir.);

Chaman v. Obama, et al., No. 10-5130 (D.C. Cir.);

Aminullah v. Obama, et al., No. 10-5131 (D.C. Cir.);

Hamlily v. Panetta, et al., No. 10-5179 (D.C. Cir.);

Habashi et al. v. Obama, et al., No. 10-5182 (D.C. Cir.);

Zuhair v. Obama, et al., No. 10-5183 (D.C. Cir.);

Barre v. Obama, et al., No. 10-5203 (D.C. Cir.);

El-Mashad, et al. v. Obama, et al., No. 10-5232 (D.C. Cir.).

s/ Benjamin S. Kingsley

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 29, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

s/ Benjamin S. Kingsley

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