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

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| IN RE GUANTANAMO BAY DETAINEE LITIGATION | District Court Docket Nos.:<br>Misc. No. 08-MC-442 (TFH)<br>Civil Action No. 05-CV-1509 (RMU)<br>Civil Action No. 05-CV-1602 (RMU)<br>Civil Action No. 05-CV-1704 (RMU)<br>Civil Action No. 05-CV-2370 (RMU)<br>Civil Action No. 05-CV-2398 (RMU)<br>Civil Action No. 08-CV-1310 (RMU) |

**EMERGENCY MOTION FOR STAY**

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## INTRODUCTION AND SUMMARY

The Government hereby moves for an emergency stay of the district court's minute order of October 7, 2008, pending the Court's disposition of a motion for a stay pending appeal, to be filed imminently on the schedule specified below. The district court has ordered the Government to release into the United States 17 foreign nationals who were captured by U.S. military forces while fleeing a military training camp in Afghanistan and subsequently held at Guantanamo Bay Naval Base, where they are now being held in the least restrictive conditions practicable pending efforts by the Government to locate a country to which to release them.[1] The district court ordered the Government to produce those individuals in district court at 10:00 a.m. on Friday, October 10, for immediate release at that time from government custody, and has also denied the government's request to stay its order pending appeal or even to permit this Court's consideration of a motion for stay pending appeal.

A stay is required to preserve the status quo. Compliance with the district court's order would require the Government to arrange for security measures and for

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[1] The district court issued its ruling orally, and subsequently issued a minute entry. A copy of the minute entry is attached, as is a copy of a draft transcript. The district court indicated that a written order would be forthcoming, which will be filed with the Court as soon as it is issued. On October 7, 2008, the Government filed a notice of appeal from the court's oral ruling and minute entry. A copy of the notice of appeal is attached.

the transportation of 17 detainees from Guantanamo Bay, Cuba, to Washington, D.C., for release on Friday, October 10. The government therefore respectfully requests that this Court issue a temporary stay, no later than Wednesday, October 8, 2008, to permit full consideration of a motion for a stay pending appeal. A decision on the government's request for a temporary stay is needed by that time in order to permit the government to seek an emergency stay from the Supreme Court, if necessary.[2]

The district court, ruling from the bench, gave the Government less than 72 hours to transport to the United States and release in this country 17 individuals who engaged in weapons training at a military training camp sponsored by the Taliban as part of an organized attempt to attack a sovereign government, and who were subsequently detained as enemy combatants at Guantanamo. Although the United States Government no longer seeks to detain those individuals as enemy combatants, and is diligently searching for a country that will accept them and provide adequate assurances of their humane treatment, to date no such country has been found. In the meantime, the individuals are being held in the least restrictive conditions practicable at Guantanamo, with virtually unrestricted access to one another and only limited conditions on their liberty. Diplomatic negotiations continue in an effort to find an

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[2] Counsel for the Government has notified counsel for petitioners that this emergency motion will be filed, and is serving counsel with the motion by electronic service simultaneously with the filing of the motion with this Court.

appropriate country to which the detainees can be sent, as outlined in detail in the Government's classified submissions to the district court.

The district court's order not only short-circuits that diplomatic process, it raises legal questions of the highest magnitude. The order directly conflicts with the basic principle that the decision whether to admit an alien into the United States rests exclusively with the Executive. Furthermore, the district court's order of release into the United States contravenes the considered judgment of Congress that aliens who, like the detainees, have sought to wage terror on a sovereign government — even one other than the United States — are ineligible for admission into this country. Finally, the district court's order threatens serious harm to the interests of the United States and its citizens, by mandating that the Government release in the Nation's capital 17 individuals who engaged in weapons training at a military training camp.

Balanced against the serious harms to the Government and the public at large that would result from the denial of a stay, there are only minimal harms from a stay. As noted, the 17 individuals who are the subject of the district court's order are being held in significantly unrestricted conditions. Furthermore, any delay resulting from the Court's grant of a stay in response to this motion would be minimal. The Government proposes to file a full motion for a stay of the district court's order pending appeal by Friday, October 10, 2008, and proposes that a response could be

filed by petitioners no later than Tuesday, October 14, 2008, with a reply brief to be filed by the Government no later than Thursday, October 16, 2008. This Court could accordingly evaluate the propriety of a stay pending the disposition of an appeal — which the Government would seek to expedite[3] — in a matter of days, with the benefit of full briefing from the parties. The Government has been forced to request this emergency stay in the interim only because the district court has ordered the Government immediately to produce petitioners in the United States for release, and has refused to stay its order even for a limited period in order to permit the Government to seek a stay pending appeal from this Court. *See* Transcript at 53-55, 58-61; Minute Entry.

As we explain here, and will explain in more detail in the forthcoming motion for a stay pending appeal, the Government should not be forced to take the extraordinary step of bringing 17 aliens trained for armed insurrection against their home country to be released in Washington, D.C., without the opportunity for this Court's full appellate review of the crucial and novel legal questions presented. Furthermore, and crucially for purposes of this motion, the Government should be

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[3] If a stay is granted, the appeal could proceed on a highly expedited schedule. The Government proposes that the opening merits brief on appeal be due fourteen days from the date of the Court's ruling on the Government's motion for a stay pending appeal; that the response brief be due fourteen days later; and that the reply brief be due seven days after that date.

given a meaningful opportunity to present its case for a stay pending appeal — and the petitioners' counsel should be given a meaningful opportunity to respond — under a time frame less compressed than the one-day period that currently exists before steps must be taken to transport the detainees from Guantanamo to the United States. Accordingly, the Government respectfully requests that this Court grant an emergency stay pending the Court's disposition of a motion for a stay pending appeal to be filed on the above schedule. The Government respectfully requests that the Court act on this motion by Wednesday, October 8, 2008.

## ARGUMENT

### AN EMERGENCY STAY IS NECESSARY TO PRESERVE THE STATUS QUO AND TO PREVENT GRAVE HARM TO THE GOVERNMENT AND THE PUBLIC INTEREST

An immediate stay is appropriate in this case because the Government can show (1) a "substantial case on the merits" on appeal; (2) a likelihood that it will be irreparably harmed absent a stay; (3) a diminished prospect that petitioners will be substantially harmed if the court grants a stay; and (4) a public interest in granting a stay. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). As we next show, the relevant factors weigh heavily in support of a stay in this case.

### A. The Government Has A Substantial Case On The Merits.

The district court's order that the Government release foreign nationals into the United States raises serious questions under our tripartite constitutional structure and established constitutional and statutory limitations on the admission into this country of individuals such as the detainees. Indeed, the district court explicitly recognized as much in its ruling from the bench, when the court noted that the question whether to order release of petitioners into the United States "strikes at the heart of our constitutional structure" and raises "serious separation-of-powers concerns." *See* Transcript at 38. The court also recognized that its decision conflicts with the only other decision to address the question presented here, *Qassim v. Bush*, 407 F. Supp.2d 198 (D.D.C. 2005), *see* Transcript at 39-40, which holds that district courts lack authority to order the Guantanamo detainees, in general, and the Uigher detainees, in particular, released into the United States.

In this Court's decision in *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008), the Court gave the Government the option to "release Parhat, to transfer him, or to expeditiously convene a new CSRT," *id.* at 851, but the Court expressly reserved the question whether it could order release *at all* under the judicial review provisions of the Detainee Treatment Act. *See id.* at 850. The Court was not faced with, and did not resolve, the question whether the district court could order Parhat's release within

the United States over the objection of the Executive. Furthermore, the *Parhat* Court explicitly recognized, in entering its judgment in *Parhat* in additional cases involving similarly situated detainees, that "no issue regarding the places to which these petitioners may be released is before this panel." *Abdusemet v. Gates*, No. 07-1509 (D.C. Cir. Sept. 12, 2008). The question of a district court's authority to order release of the detainees in the United States is now squarely before the Court, and the serious nature of that question clearly warrants the grant of a stay.

Furthermore, the Government's position on the merits is not just strong, it is correct. The district court's order of release is flatly inconsistent with the holding in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215-216 (1953), that an alien stranded indefinitely because he has been permanently excluded from this country and cannot find another country willing to admit him is not entitled to be released into the United States. The district court reasoned that the holding of *Mezei* has been undermined by subsequent rulings by the Supreme Court (none of which explicitly questions its validity), and also sought to distinguish the case on the ground that the Government did not in that case disclose to the Court the evidentiary basis on which the alien (a 25-year resident of this country) had been excluded. *See* Transcript at 34-35. But the Supreme Court in *Zadvydas v. Davis*, 533 U.S. 678 (2001), specifically discussed *Mezei* and endorsed the "critical distinction" between

the situation in *Mezei*, in which the alien had not been lawfully admitted to the United States, and the position of the aliens in *Zadvydas*. *Id.* at 692-693. In any event, it is the exclusive prerogative of the Supreme Court to overrule its own decisions, and "lower courts lack authority to determine whether adherence to a judgment of [the Supreme] Court is inequitable." *Agostini v. Felton*, 521 U.S. 203, 258 (1997); *cf. Zadvydas*, 533 U.S. at 694 (expressly declining to consider whether "subsequent developments have undermined *Mezei*'s legal authority"). The fact that the district court was not required to rely solely on the unsupported judgment of the United States, but instead had available the testimony of detainees that they sought to wage organized and armed warfare against the Chinese Government and continue to harbor hostile views toward China, weighs even more strongly against an order of release in this country.

The district court's order of release is also flatly at odds with the principle that the decision whether to admit an alien into this country is vested in the political branches. *See, e.g., Bruno v. Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999) ("For more than a century, the Supreme Court has thus recognized the power to exclude aliens as 'inherent in sovereignty,'" and "to be exercised exclusively by the political branches of government * * *."); *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (admission of alien is "sovereign prerogative"). The district court's order also

violates the limitations established by Congress on the admission of aliens into the United States. The detainees in this case received weapons training at a camp in Taliban-controlled Afghanistan where they prepared to attack Chinese interests, and many admitted as much in their testimony before the Combatant Status Review Tribunal.[4] By statute, that renders them inadmissible into this country. *See generally* 8 U.S.C. § 1182(a)(3)(B).

The Supreme Court recently emphasized that a court exercising its habeas authority must be "reluctant to intrude upon the authority of the Executive in military and national security affairs." *Boumediene v. Bush*, 128 S. Ct. 2229, 2218 (2008). The *Boumediene* Court also recognized that release was not an appropriate remedy in every case of unlawful detention. *Id.* at 2239-41; *see also Munaf v. Green*, 128 S. Ct. 2207, 2220-2221 (2008) (recognizing that release is not always an appropriate remedy in habeas, and refusing to order that two habeas petitioners be "released" from U.S. custody within Iraq in a manner that would prevent their detention by Iraqi authorities). The district court's order of release constitutes a significant interference

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[4] *See, e.g., Razakah v. Bush*, No. 05-cv-2370 (RMU) (D.D.C.), Docket No. 54, Unclassified CSRT ("Q: What was the reason you wanted to receive some of the training on the AK-47, the Kalashnikov? A. If something happened in China against the government, then I will go back to fight against the Chinese government."); *Thabid v. Bush*, No. 05-CV-2398 (RMU) (D.D.C.), Docket No. 27, Unclassified CSRT ("I went to Afghanistan to get weapons training, not tactics training."); *id.* ("I told the interrogators that I trained on how to shoot the Kalashnikov").

with the Executive's efforts, through sensitive and confidential diplomatic negotiations with other countries, to locate a third country in which the detainees can be safely released.

Finally, the district court's order of release fails to give adequate weight to the Executive's inherent authority, as part of its power to detain suspected enemy combatants, to return former enemy combatants or individuals determined not to be enemy combatants to their home country or another country. The few short weeks that the 17 detainees have been held since it was determined that they would no longer be treated as enemy combatants is a far cry from the months or even years that it has historically taken following armed conflict to repatriate individuals detained as enemy combatants and who cannot be returned to their home countries.[5] *Boumediene*

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[5] At the end of the Korean War, approximately 100,000 Chinese and North Korean prisoners of war who refused to return to their native countries were held for a year and a half pending consideration by the United Nations Command of whether and how best to resettle them. *See* Charmatz and Wit, *Repatriation of Prisoners of War and the 1949 Geneva Convention*, 62 YALE L.J. 391, 392 (Feb 1953); Delessert, *Release and Repatriation of Prisoners of War at the End of Active Hostilities: A Study of Article 118, Paragraph 1, of the Third Geneva Convention Relative to the Treatment of Prisoners of War*, 157-165 (Schulthess 1977). After World War II, Allied Forces spent several years dealing with issues relating to the repatriation of prisoners of war. *See id.* at 145-156, n.53; Charmatz & Wit, *supra*, 62 YALE L.J. at 401 nn.46, 48, 404 n.70; Delessert, *Repatriation of Prisoners of War to the Soviet Union During World War II: A Question of Human Rights, in World in Transition: Challenges to Human Rights, Development and World Order*, 80 (Henry H. Han ed., 1979). Thousands of Iraqis were held in continued detention by the United States and its allies after the end of combat in the prior Gulf War because they refused to be

itself recognizes that it would be an "impractical and unprecedented extension of judicial power" to extend the writ of habeas corpus to prisoners at the moment they are taken into custody. *Boumediene v. Bush*, 128 S. Ct. 2229, 2275 (2008). The United States Government is similarly entitled to wind up the petitioners' detention in an orderly fashion, without the threat of judicially mandated immediate release of those petitioners into this country.

For all these reasons, the Government's position on appeal presents substantial questions for the Court.

**B. The Balance Of Harms Weighs Strongly In Favor Of A Stay.**

Denial of a stay of the district court's order threatens to cause significant and irreparable harm to the United States and the general public. First, the district court's order to the Government to release the detainees within the United States impinges on the Executive's exclusive authority under our Constitution and laws over the admission of aliens, and over the winding up of the detention of enemy combatants. Releasing petitioners into the United States would also cloud the clear legal and factual distinction between their present status as inadmissible aliens not lawfully in

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repatriated in their native country. *See* Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, at 708 (April 1992) (http://www.ndu.edu/library/epubs/ cpgw.pdf) (discussing the more than 13,000 Iraqi prisoners of war who refused repatriation and remained in custody despite the end of hostilities).

the United States, *see Mezei*, 345 U.S. at 216, and their desired status as detained aliens within the United States. *See, e.g., Clark v. Martinez*, 543 U.S. 371 (2005). Significantly, the district court suggested that the Government would not be permitted to institute immigration proceedings against the detainees following their release, notwithstanding that they are ineligible for admission to the United States under the immigration laws and, accordingly, subject to removal under 8 U.S.C. § 1227(a)(4)(B). Finally, compliance with the district court's order would pose a serious security risk and a risk to the interests of the United States. The detainees have been ordered released in Washington, D.C., as of Friday, October 10, apparently without any conditions on their liberty.[6] As the only other district court to consider the propriety of an order of release for Guantanamo detainees has recognized, such an order has "national security and diplomatic implications beyond the competence or the authority of" a district court. *Qassim*, 407 F. Supp.2d at 203.

In contrast, petitioners would not be substantially harmed by the granting of this motion for a stay. Petitioners are currently being held at Guantanamo in the least

[6] The district court ordered that it would not consider imposing any restrictions on the detainees until a subsequent hearing on Thursday, October 16, 2008. *See* Transcript at 63-68 (DOJ Counsel: "[I]n the meantime, from the Friday that they arrive until the Thursday of the hearing, there will be no supervision of them, is that my understanding of the Court's order?" Court: "That's right."). Although counsel for the detainees has agreed to negotiate conditions on their release, the only conditions that would apply would be those that petitioners undertook voluntarily.

restrictive conditions practicable, in special housing that offers a communal living arrangement with access to all areas of that camp, including a recreation yard, their own bunk house with air conditioning, an activity room, a television equipped with a VCR and DVD, and access to various recreational items. They have expanded access to special food items, shower facilities, and library materials. Furthermore, any delay in their ultimate release from government custody as a result of this stay motion would be brief, in order to give the Court an adequate opportunity to consider a motion for a stay pending appeal, which would be fully briefed in a matter of days. In these circumstances, the balance of harms weighs decisively in favor of granting the relief this motion seeks.

## CONCLUSION

For the foregoing reasons, the United States Government respectfully requests that the Court grant, no later than Wednesday, October 8, 2008, an emergency stay pending the Court's disposition of the Government's forthcoming motion for a stay pending appeal.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2008, I filed and served the foregoing Emergency Motion for Stay by causing an original and four copies to be delivered to the Court via hand delivery, and by causing copies to be delivered to the following counsel of record by electronic service simultaneously with the filing of the motion and by overnight delivery, postage prepaid, on October 8, 2008:

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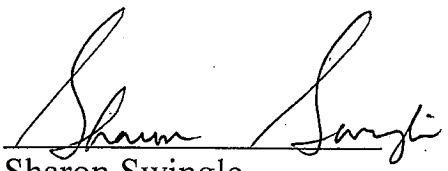

Sharon Swingle

## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Respondents-Movants respectfully submit this Certificate as to Parties, Rulings and Related Cases:

**(A) Parties and Amici:**

Jamal Kiyemba, as next friend.

Abdusabur Doe

Abdusamad Doe

Abdunasir Doe

Hammad Doe

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Sadar Doe

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Ahmad Doe

Abdur Razakah

Ali Thabid

Abdul Ghaffar

Adel Noori

George W. Bush

Donald Rumsfeld

Jay Hood

Mike Bumgarner

**(B) Ruling Under Review**

The ruling under review is Judge Ricardo M. Urbina's decision to grant petitioners' motion to for release into the United States. Judge Urbina issued his decision orally from the bench on October 7, 2008 in district court case numbers 05-1509, 05-1602, 05-1704, 05-2370, 05-2398, and 08-1310. A subsequent minute entry was entered on the docket in those cases.

**(C) Related Cases**

The government is aware of no related cases.

Sharon Swingle