

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HANI SALEH RASHID ABDULLAH, <i>et al.</i> ,))	
)	
<i>Petitioners,</i>)	
)	
v.)	
)	No. 05-00023 (RWR)
GEORGE W. BUSH, <i>et al.</i> ,)	
)	
<i>Respondents.</i>)	

**PETITIONER’S REPLY MEMORANDUM IN
SUPPORT OF MOTION TO LIFT STAY AND FOR DISCOVERY**

The batch processing of *habeas* petitions, which is what the government here urges via witless, *en masse* perpetuation of the stay, is profoundly contrary both to the statute codifying the writ’s availability and the historic office of the writ itself: individual assessment of the jailer’s right to hold a particular prisoner. Here the stay entered has been in effect since April of 2005, more than seventeen months ago. However wise it may have seemed then, that time is long past and continuation of the stay prevents petitioner Abdullah from any meaningful inquiry into the basis of his imprisonment although the statute and common sense demand a prompt inquiry.

As the Supreme Court in *Landis v. N. Amn. Co.* noted:

[T]he suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward even if there is a fair possibility that the stay for which he prays will work damage on some one else. Only in a rare circumstances will a litigant in one cause be compelled to stand aside while a litigant on another settles the rule of law that will define the rights of both.

299 U.S. 248, 254-255 (1936). No such circumstance is here present and the continuation of the stay works a denial of justice.

That the Circuit court is considering related issues in *Boumedienne* and *Al Odah* affords no reason for this Court not to examine if the stay should now be lifted. And given that the Circuit has gotten it precisely backwards in two successive Guantanamo prisoner cases (*Rasul* and *Hamdan*), awaiting their further deliberations rather than addressing the underlying merits now, is a very bad idea. Indeed, if the past is a guide, the Circuit will blunder again, thus requiring Supreme Court correction, all with attendant unconscionable delay.

These considerations, as well as the misguided reasons pressed for extending the stay, require that this Court exercise its familiar role now: evaluation of the stay to see if it should remain in effect.

1. At bottom the government's position is that this Court lacks jurisdiction over Abdullah's *habeas* petition and other claims for relief and that the stay should not be lifted until the Circuit court has made this clear.¹ The validity of this view must be assessed by this Court on this motion to lift the stay, just as it approaches any other legal question. Substituted for this Court's jurisdiction under 28 U.S.C. 2241 is a new remedy in the Circuit said to be "exclusive" under the combined effect of the Detainee Treatment Act and the new Military Commissions Act which will be law by the time the Court reads

¹ This is said to follow from either the Detainee Treatment Act ("DTA") or the recently enacted (but unsigned) Military Commissions Act ("MCA"). As both acts, according to the government, purport to remove this court's jurisdiction and substitute therefor a very limited review of CSRT determinations in the Circuit on the "record" compiled at Guantanamo, we treat their effect as the same in so far as this court's jurisdiction is concerned.

this pleading. The government's position depends entirely on the efficacy of section 7 of the MCA which works the "jurisdiction-stripping" and the equivalence of the new Circuit remedy provided for the *habeas* action eliminated. (Cong Rec. MCA of 2006, SA 5087, p. S10430 (Sept. 28 2006)).

If, of course, the MCA's jurisdiction stripping provisions operate to suspend *habeas corpus* then they are unconstitutional, cannot be given effect, and this Court's power to act under § 2241 is unimpaired. In other words, if the Act does divest this Court of jurisdiction over this case, then it is unconstitutional. The Suspension Clause guarantees that, unless Congress *validly* acts to suspend the writ, the core of the Great Writ at common law, which would issue to test the legality of Executive detention, must remain available. Since neither preconditions of a valid suspension – domestic rebellion or invasion – are here present there can be no suspension and § 2241 remains intact.

The Supreme Court has described *habeas corpus* as "a writ antecedent to statute, . . . throwing its roots deep into the genius of our common law." *Rasul v. Bush*, 542 U.S. 466, 472 (2004) (internal quotations marks omitted; alterations in the original). "It was brought to America by the colonists, and claimed as among the immemorial rights descended to them from their ancestors . . . this great writ found prominent sanction in the Constitution." *Ex parte Yerger*, 75 U.S. 8 Wall.), 85, 95.

The negative phraseology of the Suspension Clause itself reflects the Framers' understanding that the privilege of the writ of *habeas corpus* is not something for Congress to give. Article 1, § 9, cl. 2 of the Constitution (the "Suspension Clause") provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless

when in Cases of Rebellion or Invasion, the public Safety may require it.” The exercise of this authority to suspend the Great Writ is justly hailed as the “highest safeguard of liberty” *Smith v. Bennett*, 365 U.S. 708, 712 (1961) is a momentous step, and the Supreme Court has consistently expressed its hesitation to conclude that Congress has exercised its authority to suspend the Great Writ. *See INS v. St. Cyr*, 533 U.S. 289, 305 (2001) (“[A] serious Suspension Clause issue would be presented if we were to accept the INS’ submission that the 1996 statutes have withdrawn that power from federal judges and provided no adequate substitute for its exercise.”); *Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807) (“[u]ntil the legislative will [to suspend the writ] be expressed, this court can only see its duty” to issue the writ). Congress, too, has historically been extremely sparing in its exercise of the suspension power, acting to suspend the writ on only four prior occasions, when the country was facing actual or imminent hostilities on its territory.

Here, however, Congress’ intent to eliminate the writ for prisoners at Guantanamo is clear, and the validity of the Suspension must be directly faced.

In turn, that question depends on whether the alternative provided by Congress in lieu of *habeas* is its equivalent. Although today the writ of habeas corpus is most frequently employed as a post-conviction collateral remedy for an unlawful criminal conviction, its “historical core” served “as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest.” *Rasul*, 542 U.S. at 474 (quoting *St. Cyr*, 533 U.S. at 301); *Swain v. Pressley*, 430 U.S. 372, 386 (1977) (Burger, C.J., concurring) (“[T]he traditional Great Writ was largely a remedy against executive detention.”). From its earliest *habeas corpus* cases, this Court has

made clear that the writ should issue for the benefit of a petitioner who challenges the Executive's authority to bring him to trial, even before a final conviction is had at such a trial. Thus, in *Bollman*, 8 U.S. (4 Cranch) 75 (1807), and *Burford*, 7 U.S. (3 Cranch) 448 (1806), the Court issued the writ for the benefit of a prisoner who contended that the government had an inadequate basis to detain him for criminal proceedings. *See also United States v. Hamilton*, 3 U.S. (3 Dall.) 17 (1795). Similarly, in *United States v. Villato*, 2 U.S. (2 Dall.) 370 (C.C.D. Pa. 1797), the defendant, committed by the district judge on a charge of high treason, persuaded the court that he had never been validly naturalized, and therefore could not be prosecuted for treason for acts committed abroad.

These decisions were reaffirmed after the Civil War. In *Ex parte Yerger*, the Court held that it had jurisdiction to issue the writ to determine whether Yerger's impending trial by a military commission was lawful. *See Yerger*, 75 U.S. (8 Wall.) at 106; *see also id.* at 88 (statement of the case) (noting that Yerger was awaiting trial). The Court expressed no doubt that, if Yerger had (as he claimed) a right not to be tried by the military commission, he was entitled to release from the custody of the commission. The petitioner in *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868) was in the same position; he brought a pre-conviction habeas petition challenging the constitutionality of his military detention. Although the Court ultimately ruled in *McCardle* that it lacked jurisdiction over McCardle's appeal from the circuit court's decision to remand him to military custody, *see id.* At 515, it expressed no doubt that the circuit court could have issued a writ to prevent McCardle's trial by a military commission, had McCardle established a right not to be so tried. These decisions also establish that, when a *habeas* petitioner challenges the authority or jurisdiction of the body that lays claim to try or

detain him, the petitioner is entitled to be heard on the merits of that challenge even before any contemplated trial is completed.

Here, petitioner contends, in essence, that he has a right not to be classified by the Combatant Status Review Tribunal (“CSRT”) process (challenged as violating due process) that the military authorities, acting under the direction of the President, have convened. In addition he seeks a hearing on whether his detention is lawful. If the writ were completely unavailable to challenge this procedure, the right not to be classified by an entity with no authority over the petitioner would become a nullity.

In assessing the Suspension question, the view of Kenneth Starr, former Solicitor General, Circuit Court judge, and Independent Counsel, is of more than passing interest. Mr. Starr neither had reason to mince words nor act for any particular interest. He is also qualified to opine. In the debates on the MCA, Mr. Starr wrote a one-page letter to Senator Specter succinctly establishing the invalidity of the jurisdiction-stripping provision relied on by the government here. (Ex A annexed hereto.) Mr. Starr concluded with respect to Guantanamo prisoners, citing Article I, Section 9, clause 2, “[t]he United States is neither in a state of rebellion nor invasion. Consequently it would [be] problematic for Congress to modify the constitutionally protected writ of *habeas corpus* under current events.” (*Id.*)

The opposing view seems to have been based on the idea that prisoners at Guantanamo have no constitutional rights so that their *habeas* rights *cannot* be suspended, as they have none. Mr. Starr addressed this point in observing that as to Guantanamo, *Rasul*, not *Eisentrager*, was good law. (*Id.*)

There are, we submit, five Supreme Court votes *for* the proposition that Guantanamo is within the jurisdiction of the United States for constitutional purposes, not just statutory analysis. That is the bottom line of forecasting if Mr. Abdullah can invoke the Suspension clause here. That fact should inform this Court's disposition of this motion to lift the stay, the pendency of *Boumedienne* and *Al Odah* before the circuit notwithstanding.

2. If the jurisdiction-stripping provisions of the DTA and MTA are bad, it will be because the Circuit remedy *in lieu of habeas* is not its equivalent. As a corollary, this means that whatever role the Circuit may have, it does not affect this Court's power to act under § 2241. But is the *in lieu* Circuit remedy the equivalent to *habeas*? To that question we now turn. We first sketch the *in lieu* rights before the Circuit court and then compare them to *habeas*.

A) *The In Lieu Circuit Remedy.* Under the DTA and MCA, a prisoner's entitlement to judicial review of the legality of his detention is entirely predicated on the government's decision to institute proceedings against him, either in the form of a CSRT or a military commission. If the government simply does nothing, the detainee has no means of challenging the legality of his detention. Naturally, this provides an incentive for the government to delay, or not institute proceedings at all, which would effectively deprive detainees of any judicial forum. This is simple despotism.

Further, as Judge Green has already found, the CSRT procedures are deficient in at least three respects. *In Re Guantanamo Detainee Cases*, 355 F. Supp. 122, 443 (D.D.C. 2005). First she noted the general defect in all CSRT proceedings, namely

the failure to provide detainees access to material evidence on which their “enemy combatant” status was affirmed and the absence of counsel. Next she identified reliance on statements obtained by torture or other coercive measures as a grotesque shortcoming of the CSRT procedures. Finally she observed the overly broad definition of “Enemy Combatant” was problematic. Each of these defects in the CSRT proceedings affect petitioner here and each was found by Judge Green to be of constitutional significance. We do not repeat her findings in detail but suffice it to say they indicate the CSRT proceedings deviated markedly from a fair fact-finding procedure such as *habeas* entails, and the review provided by the DTA in the Circuit will not allow challenges to the composition and functioning of the CSRTs themselves.

Thus none of the infirmities identified by Judge Green can be pressed before the Circuit. Rather that review is limited to:

(i) whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence)²

This amounts to saying that review is limited to determining if the CSRT has followed its own deeply flawed playbook.

² The Detainee Treatment Act of 2005 was enacted as Title X of Division A of Public Law No. 109-148, which was signed into law by the President on December 30, 2005. An identical version of the Detainee Treatment Act appears at Title XIV of the National Defense Authorization Act, H.R. 1815, 109th Cong., 1st Sess., which has passed both Houses of Congress but has not yet been signed by the President.

B. Habeas Corpus. *Habeas corpus* has long provided a searching factual and legal inquiry into the basis for a prisoner's detention.³ This basic purpose of the writ crystallized in response to the seminal, *Darnel's Case*, 3 How. St. Tr. 1 (K.B. 1627). There, the king had indefinitely detained suspected enemies of state based solely upon his "special command," *id.* at 37, and sought to block any inquiry into the factual and legal basis for their confinement. When the court upheld the Crown, it sparked a constitutional crisis that firmly established habeas as the pre-eminent safeguard of common law process and personal liberty with the enactment of the Petition of Right, 3 Car. 1, c.1 (1628); the Habeas Corpus Act of 1641, 16 Car. 1, c.10 (1641); and the Habeas Corpus Act of 1679, 31 Car. 2, c.2 (1679). By the late 1600s, habeas corpus had become, and would remain, "the great and efficacious writ, in all manners of illegal confinement," 3 William Blackstone, Commentaries *131, and the most "effective remedy for executive detention," Dallin H. Oaks, *Legal History in the High Court – Habeas Corpus*, 64 Mich. L. Rev. 451, 460 (1966).

At common law, *habeas* courts did not simply accept the government's return to a prisoner's petition; rather, they often probed the return and examined additional evidence submitted by both sides to ensure the factual and legal sufficiency of the commitment. *See, e.g., Goldswain's Case*, 96 Eng. Rep. 711, 712 (C.P. 1778) (judges temporarily discharge impressed sailor, refusing to "shut their eyes" to facts in petitioner's affidavits showing he was legally exempt from impressment); *R. v. Delaval*, 97 Eng. Rep. 913, 915- (K.B. 1763) (scrutinizing affidavits and concluding that girl had

³ We lay out the history of the writ as it existed in 1789 and was known to the framers of the Constitution.

been fraudulently indentured as an apprentice and was being misused as a prostitute); *R. v. Turlington*, 97 Eng. Rep. 741, 741 (K.B. 1761) (discharging woman from “mad-house” after ordering medical inspection, reviewing doctor’s affidavit, and inspecting women who “appeared to be absolutely free from the least appearance of insanity”); *Eleanor Archer’s Case* 1701, Lincoln’s Inn, MS Misc. 713, p.164 (K.B. 1701) (Holt, C.J.) (“court upon oath examined [woman]” to assess claim of mistreatment by her father); *Barney’s Case*, 87 Eng. Rep. 683 (K.B. 1701) (allowing bail after affidavits proved malicious prosecution); *R. v. Lee*, 83 Eng. Rep. 482, 482 (K.B. 1676) (reviewing affidavits to adjudicate wife’s assertion of “ill usage, imprisonment and danger of her life” by husband); *see also Goldswain’s Case*, 96 Eng. Rep. at 712 (Gould, J.) (“I do not conceive, that either the Court or the party are concluded by the return of a *habeas corpus*, but may plead to it any special matter necessary to regain his liberty”); *Bushell’s Case*, 124 Eng. Rep. 1006, 1010 (C.P. 1670) (Vaughan, C.J.) (deeming return insufficient because it lacked “full and manifest” evidence necessary to sustain commitment); *see generally, e.g., R.J. Sharpe, The Law of Habeas Corpus* 66-68 (1989) (citing *habeas* cases involving factual inquiries); *Oaks, supra*, at 454 n.20 (observing that the instances where habeas courts conducted fact-finding in non-criminal cases are “sufficiently comprehensive to include most . . . cases”).

Indeed, alleged enemy aliens could also challenge the factual basis of their commitment on *habeas* to ensure it was within the bounds prescribed by law. *Three Spanish Sailors’ Case*, 96 Eng. Rep. 775 (C.P. 1779) (examining affidavit detailing facts supporting petitioners’ release, but concluding that, “upon their own showing,” they are alien enemies) (emphasis added); *accord R. v. Schiever*, 97 Eng. Rep. 551 (KB. 1759).

Further, *habeas* courts exercised broad equitable powers to fashion remedies as the circumstances required. *See, e.g., Earl of Aylesbury's Case*, Harv. L. Sch. MS 1071, fol. 52 (K.B. 1696) (bailing prisoner suspected of treason because it was “just and reasonable” to do so, and “within [the court’s] power by the common law”).⁴

The very essence of habeas – its substance – was a searching inquiry by neutral judges into the factual and legal validity of the jailer’s proffered justification for the detention. And, to the extent that the lawfulness of the detention turned upon disputed issues of fact, the courts conducted adversary hearings in which the parties presented evidence for courtroom examination. It was these broad equitable features, not the technicalities of pleading, that made the Great Writ of Liberty great.

It is those same features that are denied by the misshapen proceedings that would be substituted for it.

C. The searching inquiry into the basis of detention afforded by habeas supported another core guarantee at common law – the categorical prohibition on

⁴ The occasional general statement that at common law the petitioner could not controvert the truth of a return to a habeas petition must be read in the specific context in which it was made: criminal cases. Rollin C. Hurd, *A Treatise on the Right of Personal Liberty, and on the Writ of Habeas Corpus*, 270-71 (1876) (hereinafter “Hurd”). The reason is simple: In criminal cases, the prisoner either had already been convicted at a trial that provided full common law process, including the opportunity to confront and cross-examine any witnesses against him, *Crawford v. Washington*, 541 U.S. 36, 49 (2004), or was confined pending such trial, in which case habeas guaranteed that he would receive that process without delay. Habeas Corpus Act of 1679, 31 Car. 2, c.2, § 7 (1679) (securing right to speedy trial); *see also Hurd* at 266 (“It was the hateful oppressiveness of long and close confinement, and not the dread of a trial by his peers, which made the suffering prisoner of state exclaim: ‘The writ of habeas corpus is the water of life to revive from the death of imprisonment.’”) (emphasis omitted). By contrast, in non-criminal cases, including and especially cases of executive detention without trial, the habeas court itself supplied common law process by undertaking a factual inquiry into the basis of detention in the first instance.

the use of torture. During the sixteenth century, crown officials occasionally issued warrants authorizing the torture of prisoners. John H. Langbein, *Torture and the Law of Proof: Europe and England in the Ancient Regime* 130 (1977) (hereinafter “Langbein”). Pain was inflicted by a variety of ingenious devices, including thumbscrews, pincers, and the infamous rack. David Hope, *TORTURE*, 53 Int’l & Comp. L. Q., 807, 811 (2004). The use of torture declined after a subsequent investigation showed that a suspected traitor had been “tortured upon the rack” based upon false allegations. *Langbein*, at 130-31.

Shortly thereafter, Charles I asked the Law Lords whether another suspected traitor (John Felton who had murdered a close friend of the King) “might not be racked” to make him identify accomplices, and “whether there were any law against it.” The judges’ answer was unanimous: the prisoner could not be tortured as the Lords declared unanimously “to their own honour and the honour of English law,” that “no such punishment is known or allowed by our law.” *Proceedings Against John Felton*, 3 Howell’s St. Tr. 367, 371 (1628). (See also *A (FC) v. Secretary of State*, [2005] UKHL 71, at 52). This longstanding common law prohibition was recently reaffirmed in the unanimous decision of a specially convened panel of seven members of the House of Lords. *A (FC) v. Secretary of State*, [2005] UKHL 71 (appeal taken from Eng.). In ruling that evidence obtained by the torture of witnesses by a foreign State could not be admitted even when the United Kingdom had not been complicit in the torture, the law lords explained that “the common law has regarded torture and its fruits with abhorrence for over 500 years” – an abhorrence “now shared by over 140 countries which have acceded to the Torture Convention.” *Id.* ¶ 51 (per Lord Bingham). This categorical

prohibition against evidence obtained by torture has long been a distinguishing feature of the common law, not simply because of its “inherent unreliability” but also because “it degraded all those who lent themselves to the practice.” *Id.* ¶ 11.

The Great Writ protects against this vice.

D. The close connection between availability of the writ and the prevention of torture is at stake in this case. Petitioner was seized in Pakistan on September 11, 2002 in a police action described as a joint CIA /Pakistani effort. Petitioner was tortured by agents (military and/or civilian) of respondents.⁵ He believes that other prisoners held at Guantanamo were tortured during interrogations that, *inter alia*, included questioning about Abdullah’s conduct. Although not evident in the factual return, Abdullah has reason to believe that most of the information about him in the possession of the government was obtained in this manner. Abdullah further believes that the circumstances under which the evidence presented to the CSRT was gathered were not fully disclosed to the CSRT.

In any review of Abdullah’s detention, the provenance of the evidence used to justify his continued detention is directly relevant. Certainly this Court should not, and, under centuries of well-established law, cannot, accept evidence obtained under torture for any purpose. This same prohibition applies to the Court of Appeals, and with equal force. Even if the CSRT had no explicit rule precluding the use of evidence obtained under torture, surely the Defense Department is also bound by the norms of civilized society, the traditions of Anglo-American law, and the law of war (including the

⁵ Truitt Declaration, Exhibit B hereto.

Geneva Conventions). Respondents and their agents had no right to torture Abdullah, and have no right to hold him based on information obtained under torture or threat of torture. Abdullah is confident that even under DTA review – should the Court rule that this is his only avenue for review of his detention – the evidence that he was tortured will be admitted into evidence and considered.⁶

Respondents undoubtedly possess documents, and have other evidence, that go directly to the question of Abdullah's treatment, and the treatment of any other witnesses who have offered evidence relating to him. Although the Court has already ordered that all such evidence be preserved, *see* [Item 36]⁷, the fact is that with the passage of time, non-documentary evidence is being lost, as memories fade. The stay in this case, especially if it continues while the constitutional issues raised by the MCA are litigated before the Court of Appeals and the Supreme Court, is directly and substantially prejudicial to the interests of Abdullah. This is the case whether or not the Supreme Court ultimately allows this Court to review Abdullah's detention, or rules that the Court of Appeals must do so.

On the other hand, the prejudice to the government is slight. Turning over documents in its possession should not be difficult: all such documents are, at most, five years old, all should be in electronic form or readily searchable. Indeed, the government should be eager to review the relevant documents, because, as Abdullah can show, his

⁶ If it is not, this fact alone conclusively establishes the inadequacy of DTA review as a substitute for habeas corpus review.

⁷ A copy of this Order was served by certified mail on the then-Director of the Central Intelligence Agency and his general counsel.

treatment amounts to criminal misconduct on the part of some agents of Respondents. While Abdullah will likely need to take some depositions to preserve evidence, he contemplates doing so only with leave of Court, thus allowing the Court to balance, on a case-by-case basis, any burdens that might be caused.⁸

In sum, nothing in *Landis*, or in any of the recent statutes, justifies the further prevention of discovery of directly relevant evidence, under Court supervision, where the burden of such discovery is vastly outweighed by the harm of not allowing it. The Court should grant the motion to lift stay, and allow discovery to proceed in this case.

Over a year ago, this Court noted that factual inquiry might be proper in these proceedings and stressed the flexibility of the *habeas* remedy. (Item 36.) These materials should be available and useful to petitioner to establish his right to liberty. Petitioner has sought this material in this proceeding. No comparable procedure is or would be available to petitioner in the Circuit remedy supplanting *habeas*.

⁸ Obviously, the burden of allowing the deposition of a serviceman on active duty overseas is substantially different from the burden of allowing the deposition of someone no longer in the service. The Court can judge and balance these factors as the case progresses.

Respectfully submitted,

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