## UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ABU BAKKER QASSIM, et al., : Civil Action No. 05-0497

Plaintiffs,

: December 12, 2005

V.

: 2:30 p.m.

GEORGE BUSH, et al.,

Defendants

:

TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE JAMES ROBERTSON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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1	PROCEEDINGS	
2	COURTROOM DEPUTY: Civil action number 05-0297, Qassim	
3	versus Bush. Sabin Willett present for the plaintiff, and Susan	
4	Manning, Terry Marcus Henry present for the defendant.	
5	THE COURT: Good afternoon, everybody. There are two	
6	recent pending motions in this case; one is for an order	
7	amending the access procedures for counsel under the protective	
8	order, the other is for access by the petitioners to	
9	representatives of the United Nations Commission on Human	
10	Rights.	
11	I issued a memorandum order nearly four months ago in	
12	this case laying out what seemed to me then and still seems to	
13	me to be a genuine dilemma. The petitioners in this case are	
14	two Uighurs, ethnic Chinese Muslims from the western part of	
15	China. They were apprehended somewhere in Afghanistan or	
16	Pakistan, taken to Guantanamo Bay, held at Guantanamo Bay as	
17	combatants for a long time, then went through the Combatant	
18	Status Review Tribunal procedure, and at some point declared to	
19	be, quote, "no longer enemy combatants," closed quote, a term of	
20	art invented by the military at Guantanamo to describe people	
21	who are not enemy combatants, without admitting or denying that	
22	they ever were enemy combatants to begin with.	
23	The government says it has no place to send them. At	
24	an early hearing in this matter I pressed the government for	

what power it had to hang on to them even another day longer,

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and the best that Mr. Henry could come up with at the time was,
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       quote, "The executive's necessary power to wind up wartime
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       detentions in an orderly fashion, " closed quote. That's the
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       government's power for hanging on to these people.
                I issued a memorandum order, as I said, nearly
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       four months ago on August the 19th declining to decide whether
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       the government really had such a wind-up power, because the
       parties were in agreement that both Hakim and Qassim should be
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       and would be released. But that hasn't happened. As far as I
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       can tell, nothing is happening.
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                My first instinct when I heard this case was I didn't
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       want to hear ex parte representations from the government. I
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       didn't really want to have a public/private part of this, and my
       suspicions, my instincts were correct for reasons that I didn't
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       expect. They were correct because what I heard ex parte wasn't
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       any different from what I was hearing in the courtroom. There
       isn't any -- the government, if it's making any progress at all,
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       doesn't even want to tell me about it ex parte.
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                So the petitioners insist that I should follow the
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       literal language of the habeas statute, 28 U.S.C. 2243, and
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       recently they have urged that I do so before Congress amends the
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       habeas statute, and order their bodies produced here for a
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       hearing. The government has opposed that suggestion all along,
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       arguing first that the scope of the habeas writ is still
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undecided by the Court of Appeals, and second that in any event,

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- only the executive can say who enters the United States.
- The most recent information I have from counsel about
- 3 their clients is that they met with their clients at Guantanamo
- 4 on November the 16th, that conditions are essentially unchanged,
- 5 that in the words of, I think, Ms. Manning's affidavit, they
- 6 have television but no reception, no radio, no telephone, cut
- 7 off from the world.
- 8 Now, let me address the two most recent pending
- 9 motions. The first is the motion for access to the UNCHR
- 10 representatives. The government first says, well, it's moot.
- 11 The motion was filed on the 15th; counsel went down there on the
- 12 16th, they had their meeting. The motion was that they be
- 13 permitted to go with counsel. The mootness point is rejected.
- 14 It's not moot, if for no other reason than hopefully counsel
- will have access to go down there again.
- 16 The government's more important argument is that the
- 17 petitioners don't have any authority for the motion that they
- 18 make, which I think is a correct -- I think they're correct on
- 19 that proposition. I also think they're correct that an order
- 20 like that would, in the words of several Supreme Court cases,
- 21 embarrass the executive in the conduct of foreign relations and
- 22 interfere with the executive foreign policy role. So the motion
- 23 for access to the UNCHR representative must be and will be
- denied. That's the motion number 44.
- 25 The motion to amend the access procedures asked for an

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overhaul of the protective order which petitioners say is built on the faulty premise that they are dangerous people.

Petitioners want to reverse the presumption that all communication with the petitioners are classified, they want to allow non-citizens who would otherwise be eligible for clearance to visit with the detainees, they want to allow counsel to provide petitioners with written materials, letters, books, newspapers, magazines, photographs of their children, electronic materials, et cetera.

They want a seven-day turnaround for mail instead of having mail disappear into a black hole someplace, they want to allow faxes, they want to allow visits by counsel to Camp Iguana, I think it is, where the detainees are housed, instead of in Camp Echo in chains.

They want the government to pay for travel and accommodation costs of counsel visits, since the government won't produce them in the United States; they want to provide a telephone line that will allow access to calls to and from counsel, family, and friends; and they want to allow the petitioners to be recorded, video and audio tape, so that other countries -- so that their family will know that they're safe.

I will hear some argument on this point, but I want you to know before I hear it that I'm more interested in another part of this, which I'll get to. Because it isn't that I'm not interested in this subject, it is first that this court has

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decided, as a court, that issues relating to the protective order should be handled by Magistrate Judge Kay. I could carve

this case out of that, but I'm a little reluctant to do that.

And furthermore, I just, as a matter of judicial philosophy, don't think that judges ought to get into the nuts and bolts, the daily details of managing individual detainees, prisoners, prisons, schools, institutions, anything else. We're not managers, we're not on the ground, we don't know the situation in Guantanamo Bay. The Defense Department has enough problem enforcing the security regulations it has for everybody without having to start making exceptions in individual cases. It doesn't seem to me like a subject that frankly is fit for the fashioning of decrees from Washington that will govern what happens in Guantanamo.

I am more interested today in the fundamental underlying question, which is the basic motion to vacate the stay order and issue a writ directing the immediate release of the petitioners. It is getting to be time, and it may be time now, to fish or cut bait on this motion. I think the premise on which I declined to decide this three or four months ago was that the government was making good faith efforts, and that something would happen, and that we were not thinking about indefinite detention of these people because the government wants them released.

The time has stretched out to the point where

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       indefinite is not an inappropriate word to describe what's
       happened, and the question is whether I or anybody can or should
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       tolerate that situation. And if it's intolerable, what I or
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       anybody else can do about it.
                From the standpoint of the petitioners at Guantanamo
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       Bay, it clearly is intolerable. It seems to me that I basically
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       have three options. There's a fourth option, and the fourth
       option is let's wait a few more months, and I don't frankly
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       think that's an option. I think we've had enough time.
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                I think I have three options. The first is to deny the
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       petition for habeas corpus because I don't have any power to do
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       anything, and at least free Mr. Hakim and Mr. Oassim to go to
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       the Court of Appeals with an appealable order; the second is to
       follow petitioners' suggestion that I order, in the words of the
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       statute, the bodies of Mr. Hakim and Qassim - the living,
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       breathing bodies, I hasten to say - before this court so we can
       have a hearing on the motion for their immediate release. The
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       third is simply to order them released and see what happens, see
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       how the government responds to it.
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                The government has its own set of options. It could,
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       as the petitioners suggested from the get-go, release them into
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       the general population at Guantanamo Bay. It refuses to do
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       that, and I declined to order them to do that. It could release
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detention facility which exists, as I understand, on the same

them, and I have to put the "release" in quotations, to the

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1 Guantanamo facility where there are other stateless persons or

2 persons who cannot be relocated wandering around in some state

3 of freedom.

to do it.

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It could bring them here in something like the status 4 of the Cuban Mariel boat prisoners, it could send them back to 5 6 I don't know what other options the government has, but 7 the government -- such an order, an order simply to release 8 them, would put it to the government as to how to release them and where to release them. But, of course, since the government 9 10 already accepts the proposition that they should be released, 11 you might say that the government considers itself already under 12 that order. It's a self-imposed order, it just doesn't know how

Moving back to the second option, bring them here, the government has made a number of arguments why I cannot do that, because it would violate a whole line of cases making clear that the courts have no authority to overrule exclusion orders.

This, of course, is not such a case, and an order to bring them here under the authority of the habeas statute would not violate or reverse an exclusion order, it would simply provide that the Uighur petitioners would have to be brought here to this courthouse in some sort of legal fictional bubble that would — that lawyers and judges have been inventing for centuries. The fact that their feet touch the ground in the United States has no significance, if, as a matter of law, they are deemed, as the

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1 Mariel boat people are deemed, never to have arrived in the

- 2 United States.
- 3 But my problem -- so I think I could do that. My
- 4 problem with that alternative, that middle alternative of the
- 5 three, is that I can't see where it goes from there. The
- 6 petitioners suggest that I would then hold a hearing to make a
- 7 determination whether the petitioners are, as the government
- 8 insists that they are, maybe no longer enemy combatants, but not
- 9 necessarily nice people and dangerous people, and that I would
- 10 then make a determination as to whether they should be released
- 11 to the general population in this country.
- 12 And that is where I have a real issue as to whether I
- have the legal power to do it. I would bring them to this
- 14 country and have a hearing, but I don't see that I've got power
- to carry out the result of the hearing.
- 16 So the word "dilemma," which is, I think, a Greek word
- 17 that implies a problem that has no obvious solution, applies
- 18 perfectly, I think, to the situation that's before me. The one
- 19 thing I am sure of is that one way or another, one side or
- 20 another has to have an appealable order, and that for the matter
- 21 to remain pending before me does no service to anybody, since
- obviously in some sense I'm just a weigh station to the Court of
- 23 Appeals anyway.
- Now, I invited you in to argue and I've been doing all
- the talking. Mr. Willett, I would like to hear from you.

- 1 MR. WILLETT: Good afternoon, Your Honor.
- THE COURT: Good afternoon.
- 3 MR. WILLETT: Let's start with option one. That's the
- 4 one where you deny our petition. The one thing that I think is
- 5 easiest to resolve in this dilemma is option one, because if we
- 6 ignore all the metaphysicians who have been arguing about what
- 7 Rassoul means and we go to what they told me in law school I'm
- 8 supposed to read, which is the mandate, the order, the order in
- 9 Rassoul is in the last sentence: "We reverse the judgment of
- 10 the Court of Appeals and remand for the District Court,"
- 11 footnote, not a lieutenant colonel somewhere, "the District
- 12 Court to consider in the first instance the merits of the
- 13 petitioners' claims." And they dropped a footnote to make
- 14 clear, merits doesn't mean test the pleadings, merits means what
- 15 we all know it means. It means facts.
- 16 So in a precisely parallel case, with the exception
- 17 that we didn't have the government's concession in that case
- 18 that in fact they're not enemy combatants, everything else is
- 19 parallel. We know that Your Honor has jurisdiction to decide
- 20 the case, and so we're back to -- I don't think you've decided
- 21 this, but I think we've talked about, is there a lawful basis
- for detention. There is none. If that is Your Honor's finding
- and ruling, then I don't see how you could deny the petition for
- habeas corpus.
- So we go to options two and three. Now, you might

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wonder why I don't leap at option three, and it's because I
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       think the most measured, the most legally clear course lies
       through option two, the one where you bring them here for
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       another hearing where they're present. And that's because we
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       can begin with a statute that makes the production of the body
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       mandatory, that says that the jailer shall produce the body.
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       All you're doing is applying an act of Congress. I don't think
       anybody could question this court in a case where the Supreme
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       Court has said you have jurisdiction, and an act of Congress
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       says that the presumption is that the bodies shall be produced.
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       No case ever says that the bodies shall not be produced.
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                So to go just to that limited next step of we're all
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       here with the petitioners present, there's no conceivable legal
       challenge that I could think of to that.
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                So then where do we go? Well, then we are in a dilemma
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       where the courts have actually been before in the somewhat
       analogous situation of deportation; what do you do when the
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       Attorney General rightly wants to deport someone but no one will
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       take them? And Zadvadus is that case.
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                Now, Zadvadus is a case where we've got a pretty
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       seriously bad guy, we have a career criminal, convicted thug.
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       He's been convicted of everything from attempted burglary to
       possession of cocaine. He's got a long rap sheet, and so Latvia
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       doesn't want him and Germany doesn't want him back, and they
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       have nowhere to send him.
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1 Even in that case, says the Supreme Court, you can't hold him in prison indefinitely. You've got to fashion some 2 3 kind of release until the day they find a Latvia or a Germany to 4 take him. So we get to that interim step in option two where 5 the men are present. We're kind of in that deportation situation where 6 Mr. Henry wants to effectively deport our clients, but there is 7 no appropriate country to take them. I hesitate to add, they 8 are in no way, shape, or form criminals. There's no accusation 9 10 of any wrong-doing. They're just unfortunates. 11 So then where do we go? Where we go is a very small 12 step, and that is to the interim release; in effect the parole 13 that Baker v. Sard and Mapp v. Reno spell out. The idea is that the habeas case is not over; Your Honor retains jurisdiction of 14 15 it, and one day when Mr. Henry can report that indeed they have 16 lined up Holland or Sweden or someone to take these men as 17 refugees, there's a case, they have to report to you, and 18 ultimately, in effect, they will be deported. 19 But the question is in the interim period what we do

But the question is in the interim period what we do with those men is we order some set of conditions that's appropriate for release. Mapp and Baker talk about this, and it's probably a scenario that Your Honor is familiar with, more familiar than I in criminal cases. So perhaps they need to report on a regular basis to the United States Marshal Service, perhaps there are limitations on travel, perhaps you need to be

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- 1 assured as to where they're going to be housed and how they're
- 2 going to work and be fed and things like that, all of which we
- 3 can do.
- 4 The case isn't over. It's still your case. And as I
- 5 say, if it takes Mr. Henry another year to solve this
- 6 diplomatically, ultimately it gets solved that way.
- 7 THE COURT: Well, I don't want to excessively
- 8 pigeonhole these cases, Mr. Willett, but Baker vs. Sard is a
- 9 criminal case.
- 10 MR. WILLETT: Indeed.
- 11 THE COURT: In a criminal case in the United States, a
- 12 criminal defendant has a constitutional right to bail, which is
- constrained, powerfully constrained, by the Bail Reform Act, and
- as a concession to the constitutionality of the right to bail,
- 15 Congress enacted this whole structure giving an accused person a
- 16 right to be released on appropriate conditions. Neither Qassim
- 17 nor Hakim is an American citizen, they're not accused of crime.
- 18 The Bail Reform Act doesn't apply. If you got them into this
- 19 courtroom and then argued to me that they had a right to be
- 20 released, I would ask you where that right comes from.
- 21 MR. WILLETT: And Your Honor, I would say, as I think
- 22 the Court of Appeals said in Baker, it is inherent in the common
- law writ, quote, "When an action pending in a United States
- 24 court," that's what we have, "seeks release from what is claimed
- to be illegal detention, "we have that, "the Court's

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- 1 jurisdiction to order release as a final disposition of the
- 2 action includes an inherent power to grant relief pendente lite
- 3 to grant bail or release pending determination of the merits,"
- 4 not, I believe, linked to any statutory right of bail or even to
- 5 any constitutional right.
- 6 THE COURT: Yeah, except that the defendant is
- 7 presumably putatively an American citizen already on American
- 8 soil.
- 9 MR. WILLETT: Perhaps. Although at least that was not
- 10 expressly necessary to the Court's reasoning in Baker.
- 11 Then if you go to Mapp, where you have an alien case,
- 12 not a citizen, a case that's more akin to what we have here,
- 13 where they are seeking to deport, I think to Tobago, a resident
- 14 alien, the Court again reviews authorities from the fifth
- 15 circuit, from this circuit, and concludes that you have that
- inherent power as a part of your power as the habeas judge to
- 17 enter that relief.
- 18 And I think it fair to say, Your Honor, that the
- 19 Supreme Court has also noted that habeas is a flexible remedy,
- one in which courts are encouraged to cut through the forms, I
- 21 think as Holmes said, to the tissue of the matter, and find a
- 22 way to alleviate the essential wrong, which is the unlawful
- imprisonment.
- I was going to start today by talking about what we're
- observing in our clients. I think Your Honor captures it from

- our papers, but we have proceeded from what was almost elation
- on their part in August after long years of, as one of them
- 3 said, feeling like he had evaporated from the world all of a
- 4 sudden there were hearings and lawyers, things were happening -
- 5 we've proceeded from elation to frustration. And that's
- 6 natural, and it's our job as lawyers to try to explain things to
- 7 our clients.
- 8 But I'm deeply concerned about the human impact of the
- 9 indefinite nature of this, and I do think that the remedy we ask
- 10 for is a limited one. As you say, it adds nothing to whatever
- 11 right they have today with respect to asylum. I mean, if they
- 12 have a right today to say that Rassoul's jurisdictional holding
- 13 gives them an entry to make an asylum petition, which I'm sure
- 14 Mr. Henry would say they don't, they're not going to get that
- 15 right because as an interim basis of habeas relief they've been
- 16 released from the prison. I think they'll have whatever rights
- 17 they have today.
- In any event, as I understand asylum, it's
- 19 discretionary anyway, so we're only talking about whether they
- 20 have standing to make an asylum petition. And then if there was
- 21 some basis for exercising discretion to deny it, the government
- 22 would do that.
- 23 So as a practical matter, I don't see how the interim
- 24 release while we wait for this diplomatic solution really causes
- 25 much problem to the government, and it's the only thing anyone

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1 has been able to come up with that alleviates this really
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- pressing harm that they're suffering.
- I should say, Your Honor, yesterday I sat in church,
- 4 and it occurred to me that yesterday my clients entered into
- 5 their fifth year of incarceration.
- 6 THE COURT: That's hard to imagine. Well, see, you've
- 7 got them in here -- I've postulated bringing them in here in
- 8 some legal cocoon --
- 9 MR. WILLETT: Whatever Your Honor orders.
- 10 THE COURT: -- but you say once they're here, they can
- 11 petition for asylum?
- 12 MR. WILLETT: I think that's the government's concern.
- THE COURT: Well, it's your intent, too, is it not?
- 14 MR. WILLETT: Your Honor, I don't have an intent beyond
- 15 getting beyond this hearing and getting them out of Guantanamo.
- 16 But the fact of the matter is if we're a year from
- 17 today and they're existing in a kind of parole limbo in the
- U.S., I mean, someone is going to have to figure out what to do.
- 19 And I suppose --
- 20 THE COURT: Well, what if they're in parole limbo in
- 21 some detention center someplace? How would you feel about that?
- 22 MR. WILLETT: I don't think we would like that very
- 23 much. I mean, that doesn't solve the problem of --
- 24 THE COURT: Or if they're in parole status with the
- 25 Mariel boat people?

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                MR. WILLETT: Your Honor, it's a continued
       incarceration. It doesn't solve the problem.
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                THE COURT: So when you say you want them brought here,
       what you're saying is you want them brought here and released?
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                MR. WILLETT: Well, yes. What I want is the
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       opportunity to show you conditions of release, of interim
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       release, which will satisfy you that there's no danger or harm
       to anyone and no risk that the government's ultimate effective
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       deportation could be achieved as long as it's not back to China.
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                I can bring into this courtroom resident alien Uighur
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       expatriates who have offered us bedrooms for these men, who have
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       offered us jobs, who have called us on the phone to say how can
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       we help. We can show you -- we can't have a hearing without
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       them coming, frankly, Your Honor. We can show you a community
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       of people who can make this work at a practical level, and leave
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       Your Honor with the power to allow for the ultimate
       deportation --
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                THE COURT: Now, this hearing that you postulate,
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       you're going to show me conditions. Is the government not going
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       to want to demonstrate why these people should not be released?
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                MR. WILLETT: I don't have any doubt that they'll want
       to do that.
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                THE COURT: I mean, you've moved to strike the
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       affidavit of, what was it, General Hood?
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MR. WILLETT: I did. Well, General Hood made

- 1 statements about what they were doing in Afghanistan, and no one
- 2 can cross-examine General Hood. He wasn't in Afghanistan.
- I don't care whether you strike the affidavit or not.
- 4 But if my clients were here, they could tell you what they were
- 5 doing in Afghanistan, and it had nothing to do with the Taliban.
- 6 Which is all sort of academic in light of the NEC finding.
- 7 But the point is, if they're here, they can address any
- 8 of these sort of innuendoes, I think as they put it, that
- 9 they're not benign people. I think that's what it said. If
- 10 that's a concern for the Court, we want to be able to address it
- 11 with the real guys.
- 12 THE COURT: Well, all of that begs the question of
- whether even if I thought they were the sweetest guys in the
- 14 world, I would have the power to order them released into
- 15 American society under any circumstances or any conditions.
- 16 MR. WILLETT: Well, I think it clear you do.
- 17 THE COURT: What I need from you is what your best case
- is for the proposition that you think I have the power to do
- 19 that.
- 20 MR. WILLETT: The first case is Rassoul, which says you
- 21 have jurisdiction to decide the merits. Well, the merits of a
- habeas case is, are we opening the jail or not.
- 23 THE COURT: Well, the only merits that are left to this
- 24 case, as I understand it, is the merits of the government's
- 25 assertion that their power to hang on to them at Guantanamo is

- 1 the power to orderly wind up a war.
- 2 MR. WILLETT: Right.
- THE COURT: That's a legal question.
- 4 MR. WILLETT: Well, I mean, Your Honor will make a
- 5 ruling on that. And if you find, as we've urged, that there is
- 6 no such power, then you would issue a ruling --
- 7 THE COURT: Then I'm right back where I started from.
- 8 Then I would issue a ruling saying what?
- 9 MR. WILLETT: That they have to be -- well, what you
- 10 would do is we would suggest that you would grant these interim
- 11 conditions of release until such time as the ultimate
- 12 resettlement is arranged.
- So Rassoul, first case. Second case --
- 14 THE COURT: Well, the dichotomy here is release from
- 15 custody in Guantanamo Bay is one issue; release them on American
- 16 soil where they then encounter rights to asylum and whatever
- 17 else is another question. You see those as the same issue?
- 18 MR. WILLETT: I think that once the Supreme Court says
- 19 you have jurisdiction over their case, they're here. They're in
- 20 this courtroom. So if the order is for release, then I think
- 21 it's that door we all walk out of, and we figure it out from
- 22 there. I don't think it's you bringing them here; I think
- they're here. They're here because the government brought them
- to Guantanamo, and all you can do, as Holmes said, is ignore the
- 25 forms and cut through the tissue. And the tissue here is --

- 1 THE COURT: You Boston guys keep quoting Holmes to me.
- MR. WILLETT: Well, he seems to age well, Your Honor.
- 3 But the point is, we look for a practical solution.
- 4 And when we talk about this interim release, it really is a very
- 5 limited solution; you still have the case, someone can run in
- 6 here and say there's a parole violation, and, in fact, if I
- 7 don't persuade you at that hearing that conditions for interim
- 8 release are appropriate, I suppose back they go to Norfolk and
- 9 Guantanamo.
- 10 THE COURT: Let's see. I want to give Mr. Henry a
- 11 chance to talk before it gets too long here, but if I see
- 12 there's a parole violation, the probation department isn't going
- 13 to have jurisdiction over these people, pretrial services isn't
- 14 going to have jurisdiction over these people. Who oversees this
- parole we're talking about?
- 16 MR. WILLETT: Well, there is not an elaborate
- 17 jurisprudence of parole in habeas cases, it's true. We're all
- 18 kind of making this up as we go along. But I suppose in the
- 19 worst case you suspend the release.
- THE COURT: Okay. Thank you, Mr. Willett.
- MR. WILLETT: Thank you, Your Honor.
- THE COURT: Mr. Henry?
- MR. HENRY: Thank you, Your Honor. As Your Honor has
- recognized, there are a number of difficult issues associated
- 25 with this case, and I'm happy to talk about them. I think the

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legal landscape is a little more cut and dry than Mr. Willett
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- 2 would make it seem.
- 3 But I did want to inform the Court that the diplomatic
- 4 efforts with respect to potential resettlement of the Uighurs is
- 5 ongoing, and we are prepared to report to the Court in camera as
- 6 to the progress of those efforts if you want to hear them.
- 7 THE COURT: The only report I want is if they've been
- 8 released. If you can't make that report to me, I don't want it
- 9 in camera. The last time I heard a report in camera -- I don't
- 10 want to be in that position. I just don't want to be in that
- 11 position. As I say, it's time to fish or cut bait.
- 12 MR. HENRY: Well, Your Honor, as you know, the
- 13 diplomatic situation does involve issues that we are not -- it's
- 14 not appropriate to discuss on the public record. And so we make
- the offer for Your Honor to hear an in camera report with
- 16 counsel, and should you change your mind on that, we're happy to
- 17 provide that.
- 18 But as to the legal landscape here, I think it is much
- 19 more straightforward than counsel would have you believe.
- 20 Counsel made the statement that we're all kind of making this up
- 21 as we go along. Actually, that's not the case, Your Honor. As
- 22 Your Honor previously indicated, our position is, of course,
- 23 that the Court does lack the authority to bring the petitioners
- to the United States.
- 25 And I would point out that currently the petitioners

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no.

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are not in the United States. According to the immigration
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       statutes, the United States is defined specifically, and it does
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       not include Guantanamo Bay. That's 8 USC 1101(A)38, where the
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 4
       U.S. is defined for purposes of entry, exclusion, deportation,
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       all those kind of things.
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                And so what this case is, it's not a deportation
       situation, it's not a removal situation. It does not involve a
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       statutory situation as was involved in the Zadvadus case, but
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       rather the question of bringing the petitioners here involves a
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       question of entry into the United States.
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                And there is a Supreme Court case that is as close as
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       we've found to be on point. It's Shaughnessy vs. Mezei,
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       345 U.S. 206 from 1953. That case involved an alien who had --
14
       who was refused entry into the United States, and according to
15
       the Court, he was stranded - and the Court used that term,
16
       "stranded" - on Ellis Island for it looks like, reading the
17
       opinion, a matter of years, because other countries would not
       take him.
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19
                The question before the Supreme Court was whether
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       habeas would afford the detainee some sort of relief, whether
21
       his continued indefinite detention there on Ellis Island was
       unlawful so as to permit his entry into the U.S. temporarily on
22
23
       bail, if you would, pending the government's efforts to find a
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place for resettlement for him. The answer there was clearly

And as I said, that case seems to be the most analogous
to this case, far more analogous than a Zadvadus type case that
involves deportation or removal, where there are specific
statutes governing the situation.

2.2

And as we've pointed out in our briefs back in August on this, there's a long line of case law as well as statute saying that entry into the United States is an executive matter, it's a decision, a discretionary decision, that is reserved to the executive, and Congress has specifically precluded judicial review even through habeas with respect to those discretionary decisions regarding the entry of an alien into the U.S.

But beyond the situation of the power of the Court to do as the petitioners request and bring the petitioners here for some sort of hearing, I think if you take a look at the legal standards in the cases that the petitioner cites - for example, the Mapp case - and if you kind of get beyond the analogies or general principles that the petitioners argue and look at the actual legal standards that apply in a request for interim release in a habeas context, like I said in Mapp, you'll see that in order to attain interim release, number one, that relief under Baker vs. Sard is tied to the Court's ultimate authority to award whatever the final relief would be. And I think Your Honor reflected that there were some serious issues with that.

But even beyond that, on the question of interim release, under the Mapp case you have to have a showing of

1 extraordinary circumstances, and the interim relief, the release

on bail, whatever you want to call it, has to be necessary to

3 make the final habeas remedy effective.

2.2

And what that means is a situation such as in a case called Boyer vs. City of Orlando, which 402 f 2nd, 966. It's the fifth circuit, 1968. There you had a petitioner who had been sentenced to a 120-day sentence; the Court ordered interim relief because it was going to take a lot longer than 120 days for his habeas petition to be resolved. In other words, his case would have been moot before it could have been heard, so the Court decided that interim relief was appropriate. But we don't have anything like that here.

And again, I think Your Honor hit on the point, you've got to think about what the purpose of such a hearing would be and what the end game would be. The legal cocoon idea that was floated a little bit earlier, I think there's serious question as to whether the Court would have the power to create such a cocoon. We certainly would have some arguments, you know, with respect to that, but the statutes in the immigration context are almost always keyed on the presence of an individual within the United States.

So were you to bring petitioners here, there would be a significant argument that their standing under the various immigration statutes, under asylum law, that sort of thing, had been inalterably changed such that they could be invested with a

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1 status that would not otherwise be available to either aliens
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- who had never entered the United States, or especially in kind
- 3 of the unique circumstances of this case, wartime detainees that
- 4 the executive is trying to find a place for resettlement.
- 5 THE COURT: Am I not correct that the Mariel boat
- detainees are deemed never to have set foot in the United
- 7 States, even though they're locked up somewhere in Pennsylvania?
- 8 MR. HENRY: I'm not exactly sure about that, Your
- 9 Honor, quite frankly. I know that a lot of those individuals
- 10 for a number of years were held in prison.
- 11 Just as a practical matter, our position would be that
- 12 the conditions in Guantanamo Bay and Camp Iguana -- and let me
- 13 point out just a couple of facts on the side. Counsel are
- 14 permitted to meet with their detainees in Camp Iguana. There
- 15 are no security restraints during those meetings, they meet with
- 16 them in a rec hall.
- 17 And also there was a representation that somehow these
- 18 guys had entered their fifth year of detention, unless I
- 19 misheard. I'm not quite sure how that's possible, since the war
- 20 in Afghanistan didn't start until late in 2001. I believe
- 21 these individuals --
- THE COURT: Well, it's late in 2005. That's four years
- 23 ago. Entering the fifth year means finished four, starting the
- 24 fifth.
- 25 MR. HENRY: I think these individuals were captured in

1 2002.

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2 But in any event, again the Mariel boat people, I don't

3 have a specific answer on that. I can certainly find out. But

I know for a number of years those folks were kept in a

5 penitentiary, and we believe that the conditions in Camp Iquana

6 are much better.

7 And again, we are -- the government is serious about

8 finding a place for resettlement of these petitioners. Its

9 diplomatic efforts are ongoing, and we're happy to report those

10 to the Court whenever you would like to hear them.

But in the meantime, for the reasons that we've argued

12 in our brief, based on the Shaughnessy case, we don't believe

13 the Court has the power to bring the petitioners here. And even

if the Court did have the power, I think if you look at the

15 factors in the Mapp case, there's not a good reason to exercise

16 your power to do it, and lots of reasons not to.

If I could just comment, in closing, on a couple of

points. As far as the legal authority that the petitioners

19 cite, they refer to footnote 15 in the Rassoul case, they refer

20 to kind of these common law rights to be released, that sort of

thing. I just point out that all of those are involved in the

22 Court of Appeals case, and so hopefully sometime soon we'll get

a decision from the Court of Appeals on that. I had hoped to

have it sooner rather than later, but given that the

25 government's diplomatic efforts are serious and ongoing, and for

- all the reasons I've talked about, I don't believe that it would
- 2 be appropriate for Your Honor to order that the petitioners be
- 3 brought here.
- 4 THE COURT: What about alternative three?
- 5 MR. HENRY: Alternative three would be to --
- 6 THE COURT: Order you to release them.
- 7 MR. HENRY: Well, Your Honor, I guess that presents a
- 8 number of problems. You order us to release them; we certainly
- 9 are not at liberty to release them to a foreign sovereign that
- 10 has not agreed to take them. Again, we think there's serious
- 11 problems with the Court ordering that they be released into the
- 12 United States, so --
- THE COURT: I didn't say into the United States, I said
- release them, hypothetically.
- 15 MR. HENRY: Well, Your Honor, I'm having problems
- 16 thinking of other options. I suppose they could release them on
- 17 Guantanamo Bay, but that presents its own problems that were
- 18 addressed, I believe, in our prior filings as far as security
- 19 both of the detainees themselves and other security issues,
- 20 since Guantanamo Bay is a military reservation.
- 21 So as Your Honor pointed out, the authority that we
- 22 claim to continue to hold these individuals in a Camp Iguana
- 23 type affair is the authority to wind up these detentions as
- 24 quickly as possible in an orderly fashion. The Court's order to
- 25 release them potentially could, I suppose, throw that into

- 1 somewhat of a disarray.
- 2 But I'm really not sure what else could be done; the
- 3 option of releasing them on a military base is not a good one,
- 4 we can't get them to a foreign sovereign, certainly the
- 5 executive is highly unlikely to admit them to the United States
- of its own accord. And so again, it presents some serious
- 7 problems which I think counsel that the case, as far as those
- 8 kind of proceedings, continue to be stayed until we get some
- 9 guidance from the Court of Appeals or we find a place to
- 10 resettle them, given that the efforts are serious and ongoing.
- 11 THE COURT: All right, sir. Thank you. Mr. Willett,
- 12 anything further?
- MR. WILLETT: Yes, sir. A couple of points in
- 14 response. According to Mr. Qassim, he was taken into custody by
- U.S. forces in Pakistan on December 11, 2001.
- 16 While Mr. Henry was speaking, I leafed through to
- 17 Justice Kennedy's concurring opinion in Rassoul. Everybody
- 18 talks about whether or not you can bring them here, as though
- 19 they're not already here, here in the United States. Justice
- 20 Kennedy says, first, "Guantanamo Bay is in every practical
- 21 respect a United States territory." He goes on, "From a
- 22 practical perspective, the indefinite lease of Guantanamo Bay
- has produced a place that belongs to the United States,
- 24 extending the implied protection of the United States."
- 25 So that is, I think, authority for the proposition that

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- they're already here in the law. I don't know why Your Honor
- 2 couldn't fashion an order that says your order shall not be
- deemed an entry to the extent one hasn't been made already, and
- 4 people may fight about what that means one day.
- 5 Mezei, the Shaughnessy case, is one that Zadvadus
- distinguishes because he was a guy who had come here voluntarily
- 7 to Ellis Island. I apologize, I don't have the cite, but
- 8 there's an interesting book, and I'll try to find the cite about
- 9 that case, and it is speculated that somebody simply opened the
- 10 door, because he disappeared from Ellis Island. The case
- 11 ultimately was dismissed, and presumably he's here, his children
- 12 are alive and well in the United States today. I think there
- was a movie like that not so long ago.
- 14 THE COURT: That quy was in the airplane terminal,
- 15 wasn't he?
- 16 MR. WILLETT: In the airport they tried to open the
- 17 door and he wouldn't do it.
- 18 The point is here that these guys were brought to
- 19 Guantanamo, they didn't volunteer, so we say they're here.
- 20 They're in what Justice Kennedy says is in every practical way
- 21 the United States. And then when you go through the little baby
- 22 steps, I don't think we're asking for very much to get from that
- 23 to this interim release.
- Thank you.
- 25 THE COURT: All right, counsel. You've done your best.

Τ	I can't pretend to be pleased at having learned a whole lot that
2	I didn't know when I came in here, but counsel have done their
3	best with what I think is really classically a dilemma.
4	The one thing that I am sure of is that I'm going to
5	act on this motion within the next week or two one way or
6	another. There isn't going to be any more waiting. So if
7	anybody has anything to say to me by way of augmenting the
8	record I don't thank you, Mr. Henry, for your offer to
9	speak to me off the record, but I don't want that. I'm just not
10	going to be in that position. If you can tell me that they're
11	going to be released on X date, you can tell me that publicly.
12	Or if you can tell me that they're going to be released on X
13	date and you have a date, I'll accept that. But "diplomatic
14	efforts are proceeding, " no thank you.
15	Within two weeks, at the most, I'm going to act on this
16	motion. So the matter is submitted, unless anybody has anything
17	else to submit either orally today or in writing in the next
18	week or 10 days. Thank you very much. We're adjourned.
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CERTIFICATE OF OFFICIAL COURT REPORTER				
I, Rebecca King, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.				
SIGNATURE OF COURT REPORTER	DATE			