

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

ABU BAKKER QASSIM, et	:	Civil Action No. 05-497
al.,	:	
Plaintiffs,	:	August 1, 2005
v.	:	
GEORGE BUSH, et al.,	:	4:00 p.m.
Defendants	:	
.....	:	.....

TRANSCRIPT OF MOTION HEARING  
BEFORE THE HONORABLE JAMES ROBERTSON  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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1 PROCEEDINGS

2 COURTROOM DEPUTY: Civil action number 05-497, Abu  
3 Bakker Qassim, et al., versus George Bush, et al.

4 Counsel, could you identify yourselves for the record.

5 MR. WILLETT: Good Afternoon, Your Honor. Sabin  
6 Willett of Bingham McCutchen. With me, Jason Pinney, my  
7 colleague; Barbara Olshansky and Tina Foster from the Center For  
8 Constitutional Rights, for the petitioners.

9 MR. HENRY: Good afternoon, Your Honor. Terry Henry  
10 with the Department of Justice, and with me at counsel table is  
11 Joseph Hunt, Vincent Garvey, and Mr. Robert Katerberg.

12 THE COURT: Okay. Well, there are a lot of people in  
13 this courtroom, and I don't know the extent to which everybody  
14 knows what the background of this matter is, but the proposition  
15 of this case is quite simple. The petitioners in this case have  
16 petitioned for writs of habeas corpus.

17 I did with this case as I have done with all of the  
18 Guantanamo cases that I have handled, which is quite a number.  
19 I issued a stay order at the request of the government. In the  
20 stay order I said, however -- and I'm not quoting what I said,  
21 but in general I said, I now have jurisdiction of this matter,  
22 so the government can't do anything to these people without  
23 advanced notice to opposing counsel and to me.

24 Both sides have appealed that order to the Court of  
25 Appeals; the appeal has just recently perfected, I think. And I

1 received, I think last week, a rather startling motion from the  
2 petitioners to the effect that when their counsel finally had a  
3 chance to go talk to them in July in Guantanamo, middle of July,  
4 they found out that the petitioners have been found by the  
5 Combatant Status Review Tribunal to be noncombatants. And that  
6 this happened sometime in -- I don't know, a long time ago, and  
7 that nobody bothered to notify either petitioners' counsel or  
8 me.

9 And not only that, but when petitioners' counsel asked  
10 questions of the government, they were ignored and the questions  
11 were not answered.

12 Now the petitioners have asked since these men have  
13 been found not to be combatants, that they be released into the  
14 non-prison side of the Guantanamo compound until or unless they  
15 are relocated by the government.

16 The government resists that notion, and that's why  
17 we're here, to have a hearing and find out what on earth is  
18 going on here.

19 I will hear from the petitioners.

20 MR. WILLETT: Thank you very much, Your Honor. Again,  
21 Sabin Willett for the petitioners.

22 I was about to start with a little excursus on the law,  
23 because I think that the government in its brief filed Friday  
24 has asked you the wrong question. The question is not, what  
25 justification have my clients for release, the question in a

1 habeas case is what justification does the executive proffer for  
2 imprisonment.

3 And it has always been the case in the common law writ  
4 of habeas, as well as the way it's drafted into the statute,  
5 that the very first thing that must happen is that the  
6 government must show cause.

7 Now, if they make a showing of cause, if they point to  
8 an adjudication or a statute or something in law, then we have a  
9 hearing. But I will tell you candidly, we waited with some  
10 anxiety for their brief, thinking there must be some other  
11 cause, because the cause they've always asserted to you and the  
12 other judges of this court is that they may rest upon Deputy  
13 Secretary of the Defense memo that defines enemy combatants and  
14 creates the CSRT.

15 Indeed, it appears from their brief, that remains their  
16 only lawful justification. They point to no other statute or no  
17 other doctrine that we could determine.

18 So this is not a case that presents a question that's  
19 now before the Court of Appeals as to whether it's indeed lawful  
20 for a Deputy Secretary to declare a war that Congress never did,  
21 or all of those other questions. This question says what any  
22 habeas case says at the outset to the respondent: What is the  
23 justification for imprisonment? And there is, as I read their  
24 brief, no answer to that.

25 Now, I might -- Your Honor has adverted to how we got

1 to where we are, and so I won't dwell on that. It was of  
2 concern to us as well.

3 But I would highlight one point for Your Honor.  
4 According to the brief that they filed on the 26th -- excuse me,  
5 that they filed Friday of last week, the CSRT proceedings were  
6 completed on the 26th of March.

7 Now, three days later they filed in this court an  
8 opposition to a motion that we have made, and the opposition  
9 was, among other things, attempting to persuade you not to  
10 require them to come up with returns on the CSRTs.

11 THE COURT: Yes, that's right.

12 MR. WILLETT: And in that paper, which was not a form  
13 brief filed in 50 habeas cases, it was only filed in this case,  
14 in that paper they said -- I want to get the quote right. They  
15 said, "A factual return for a petitioner in a Guantanamo  
16 detainee case typically has consisted of the record of  
17 proceedings that confirmed petitioner's status as an enemy  
18 combatant."

19 Now, they knew that they weren't enemy combatants when  
20 they wrote that. They then wrote a full page about the burden  
21 to the government of producing returns in redacted form and  
22 carving out all of the classified information and so on.

23 Now, Your Honor, if I might direct your attention to  
24 the Navy regulations on this, I have a copy that I can hand to  
25 the clerk if that's of help. To be clear about what this is,

1 this is Navy Secretary England's 2004 set of regulations that  
2 govern the conduct of CSRTs.

3 And if I can invite Your Honor to turn to the very last  
4 page, this is the official one-page Combatant Status Review  
5 Tribunal decision report cover sheet. This is what the tribunal  
6 president must sign when the hearing finishes, and you will see  
7 that all it says is that the tribunal has determined that he,  
8 meaning the detainee, is or is not designated as an enemy  
9 combatant. That's it. They could have produced one page.

10 That same day that they filed that brief, I sent them  
11 another e-mail saying, do you contend that these people are a  
12 security threat to the U.S.? And we specifically said, because  
13 if you don't, maybe we can work together in some way to try to  
14 talk about their release. Which is an important point when they  
15 start to talk about the interference they perceive we're now  
16 bringing to them, now that it's August.

17 The other thing I would like to mention about the Navy  
18 regulations is, first of all, they still haven't turned over the  
19 CSRT. I asked them again on Friday, twice. You refer to it in  
20 your brief; apparently it's a finding of noncombatant. Can you  
21 turn it over? I was told that request was not appropriate. So  
22 I don't have it.

23 But I do have the regulations, and what the regulations  
24 make clear is that what happened on March 26th was the last step  
25 in a three-step process. First the tribunal meets, it

1 deliberates and it makes a determination. These are all in the  
2 regulations, Your Honor.

3 It then goes to the legal officer for a review. When  
4 he's done or she's done reviewing, it goes up to the director of  
5 CSRT, which I believe to be Admiral Magera.

6 So what happened on the 26th was the last step. They  
7 must have known for a long time before that -- at least that the  
8 tribunal had made a determination of noncombatant status. How  
9 long, we don't know. They know, but they're not telling.

10 Now, the only thing I know is that one of my clients  
11 recalled that his tribunal might have occurred in 2004. He  
12 wasn't sure. Late 2004, early 2005. So that's what we know  
13 about how long non-enemy combatants have been imprisoned at  
14 Guantanamo.

15 Now, the government wants to talk about what's  
16 practical, and Colonel Baumgartner talks about basically how you  
17 can't have these fellows walking around the base. I think in a  
18 habeas case, the question is simply whether Your Honor orders  
19 they be released, but we're trying to be productive and talk  
20 about the practical consequences of that.

21 One, but by no means the only one, is that they would  
22 be accommodated in the civilian population at the base. And  
23 indeed, I think a hearing would show that in addition to  
24 civilians working at McDonald's, you've got actual noncitizens  
25 who are working at the base. This is on information and belief,

1 and we would need a hearing to know with certainty. But I  
2 believe that to be the case, Your Honor.

3 But if the colonel is unwilling to extend that courtesy  
4 or he thinks it somehow compromises the mission, I mean, I can  
5 tell Your Honor that the secure facility, the prison, is a long  
6 way away from the McDonald's. You drive down a road between two  
7 arroyos, and nobody is getting near that place that doesn't  
8 belong there.

9 But if it makes him uncomfortable, I will point out  
10 that we learned over the weekend -- and I'll follow up with a  
11 declaration on this, but there is a quasi precedent for what  
12 we're asking for. Apparently, sometime in the '90s, Haitian  
13 refugees were interdicted on the high seas by the Coast Guard.  
14 These people had committed no crime and they had violated no  
15 immigration law of the United States.

16 They were brought to Guantanamo, and I am told --  
17 again, this is information and belief. I am told that they were  
18 billeted in a Marine barracks, that they received mess  
19 privileges, and they found some sort of work at a fast-food  
20 restaurant while their asylum petitions to various countries  
21 were pending. Again, a hearing would determine whether this  
22 information is correct, but I don't believe it accurate that  
23 there has never been this kind of thing on the base before.

24 The second thing I would say, Your Honor, is that we  
25 threw that out as an alternative to imprisonment, but I believe

1 there's another alternative, at least one, which is that as the  
2 habeas judge in this case, it lies within your power to require  
3 that they bring the person, I think it says the body of the  
4 petitioner, to your courtroom.

5 Now, at a hearing where that occurred, you could  
6 satisfy yourself as to whether you think there's any risk to the  
7 community or to the petitioner or anyone through some kind of  
8 release terms.

9 THE COURT: Then when they're on American soil, they  
10 can apply for asylum?

11 MR. WILLETT: Evidently. And I'm not in immigration  
12 law, but evidently this is not actually that kind of dodge,  
13 because if they are paroled here, they are not deemed to make an  
14 entry. At least that's my understanding. The immigration  
15 lawyers could clarify that.

16 And again, an asylum petitioner is purely discretionary  
17 with the Attorney General. There's no way to make it happen,  
18 although many of the Uighur expatriate people you see in the  
19 courtroom have indeed been granted asylum petitions.

20 The point is that they could be brought here, and while  
21 the State Department process is ongoing, with which we do not  
22 wish to interfere, they could be released under supervisory  
23 conditions. There is, again, a precedent -- not a precedent,  
24 but there is an analogy for this in 8 U.S. Code dealing with  
25 asylum and deportation cases. Indeed, after someone has been

1 deported, they can actually be released into the population  
2 under various conditions of supervision, depending on the  
3 circumstances of the case.

4 So you could have a situation where these petitioners,  
5 who would be welcomed into the Uighur community that is here  
6 today, they could be required to report to the Marshal Service  
7 or whatever the appropriate conditions are, or indeed, Your  
8 Honor could determine that you're not comfortable at all after  
9 you conduct a hearing. I'm not attempting to prejudge anything.  
10 But there are solutions short of this continuing imprisonment.

11 Your Honor, I've been focused on the practical  
12 dimension from the point of view of the government, but I think  
13 it only fair to spend just a moment on the practical dimension  
14 of continued imprisonment to my clients. They're not soldiers,  
15 they're not criminals, they're just Uighur people. And I've  
16 never heard of Uighurs either before this case, but come to find  
17 out there might not be a more pro-U.S. Muslim group in the  
18 world. The Uighurs have traditionally suffered under religious  
19 and political oppression at the hands of the communist Chinese,  
20 and I can remember a time when that made a person someone we  
21 liked in this country.

22 My two clients, Abu Bakker and Adel, fled from such  
23 persecution originally to Kyrgyzstan, and were trying to make  
24 their way to find work in Turkey when they found themselves in  
25 the wrong place at the wrong time. They are husbands, they are

1 fathers, they are sons.

2 Now, Colonel Baumgartner says it isn't a bad prison,  
3 it's only medium security. You can play ping-pong, you can eat  
4 your meal family style, but not with your family. And it's  
5 true: Compared to some of the other horrors that have happened  
6 at Guantanamo and that we've heard about most recently from  
7 Fort Meade and the Courts Martial going on down there last week,  
8 Camp Four is pretty good, but it's still a prison.

9 Here's what I saw on July 14th: A slight, gentle man  
10 with a shy smile chained to the floor, a man sitting in a box  
11 that had no windows. As far as the guards were concerned, he  
12 has no name. They refer to him by his number. When he wanted  
13 to go to the bathroom, a guard had to come in and put on green  
14 rubber gloves --

15 THE COURT: You're not talking about your client?

16 MR. WILLETT: I'm talking about my client.

17 THE COURT: He was chained to a floor?

18 MR. WILLETT: He had a leg shackle that was chained to  
19 a bolt in the floor, Your Honor, in Camp Echo. Both of my  
20 clients.

21 I thought I knew something about what this imprisonment  
22 meant, but I was wrong. I really found out Friday of last week.  
23 You see, there had been a newspaper article that had been  
24 written about this story, and it had been picked up by the  
25 Uighur Diaspora and made its way to Europe.

1           And late Thursday came an extraordinary telephone call,  
2 and on Friday, through an interpreter, I spoke by telephone to  
3 Kabsur Abdul Hakim, who is a refugee living in Sweden, and she  
4 is Adel's sister. And while Nury Turkel, the interpreter who  
5 was in the room, and I listened to her weep, she told us that  
6 she thought her brother was dead.

7           You see, she was right. These people are dead to the  
8 outside world. They're dead to their children, they're dead to  
9 their wives, even their names are a secret. And but for the  
10 fortuity that my clients happen to have outside lawyers, the  
11 fact of their acquittal, or whatever you call this, that would  
12 be a secret.

13           You can't send them a photograph or a box of cookies,  
14 you can't visit them without a law degree and a U.S. passport.  
15 They write us letters but they never come out.

16           Your Honor, I submit that in a habeas case, the delay,  
17 the time lost, is the harm itself, and every single day this  
18 continues is another small death.

19           THE COURT: Before you sit down, let me ask you a  
20 question that I didn't want to interrupt you with. But are  
21 there limits to my jurisdiction here, now that this matter is on  
22 appeal?

23           MR. WILLETT: I don't think so, Your Honor. There's  
24 two matters -- actually only one matter on appeal. The  
25 government took an appeal of your order with respect to what I

1 might call rendition. It might be that that is on appeal --  
2 although I believe someone has made a motion to dismiss that  
3 appeal, so I'm a little murky about that, at least in one of the  
4 other habeas cases.

5 What we did was, we filed a mandamus petition seeking  
6 to require that you hold a hearing. That, as I understand the  
7 jurisprudence, doesn't create an appeal unless the Court of  
8 Appeals accepts it and notifies the government that they need to  
9 respond, which they have not done.

10 In any event, it would become moot and we would  
11 withdraw it upon any of the relief that we're asking for here.

12 THE COURT: All right. Let me hear from the  
13 government.

14 Thank you, sir.

15 MR. HENRY: Your Honor, may it please the Court, what  
16 we're dealing with here ultimately is two requests: One is  
17 whether the stay should be lifted in this case; and the second  
18 is whether the living conditions of the petitioners in the case  
19 should somehow be altered.

20 Neither of those requests is appropriate, and we  
21 believe petitioners' motion should be denied.

22 If I may, let me just deal with the legal issue first.  
23 The petitioners have argued that there is no legal basis for the  
24 current detention of the petitioners, and that that somehow  
25 gives them and this Court the authority to deal with the issue

1 of the current living conditions of the petitioners.

2 Actually, Your Honor, the executive's authority to make  
3 war includes the power to detain individuals as enemy combatants  
4 or individuals suspected of being enemy combatants. That legal  
5 authority would necessarily include the authority to wind up  
6 that detention in an orderly fashion, and that's exactly what  
7 has gone on here.

8 As we indicated in the brief that we filed on Friday,  
9 these folks have been determined to be no longer enemy  
10 combatants, and I would point out that the determination of the  
11 CSRT is that the petitioners are no longer enemy combatants.  
12 Prior to that final determination, they were held under the  
13 enemy combatant categorization.

14 During the time that they have -- since they have been  
15 determined to no longer be enemy combatants, there has been a  
16 diplomatic process under way to find a suitable country for  
17 transfer of these individuals consistent with the United States  
18 policy not to transfer people to countries where it's more  
19 likely than not that they will be tortured. That process is  
20 ongoing, those efforts are diligent, multifaceted, and it's our  
21 hope that soon there will be an option available for transfer of  
22 these petitioners and they can ultimately be released.

23 But since we're dealing with a situation where you have  
24 kind of an interim, a transitional detention situation, it's our  
25 position that the petitioners shouldn't be permitted to

1 interject themselves into that detention at this time, since the  
2 detention is really just an extension of the detention, to  
3 detain individuals generally as enemy combatants.

4 Now, I would point out as far as the legal basis of the  
5 relief that the petitioners seek here, the only thing that they  
6 claim is a Constitutional right to have the Court step in and  
7 deal with their living conditions. But the Constitutional right  
8 of detainees at Gitmo vis-a-vis the government and its power to  
9 detain individuals, that is a subject of the ongoing appeal in  
10 the D.C. circuit, and that, we believe, points to the continued  
11 propriety of the stay in this case.

12 The case is not moot; the finding that these  
13 individuals are no longer enemy combatants did not moot the  
14 case. It's on the way to being moot pending the working out of  
15 this diplomatic process, but it's not there yet.

16 And I would point out along these lines that in all the  
17 Guantanamo Bay cases, we have moved for stays, we have opposed  
18 having to conduct any kind of proceedings in the litigation  
19 regarding the merits of these petitioners, other petitioners,  
20 all the petitioners in the Guantanamo cases' detention. And  
21 we've also opposed having to produce any factual records with  
22 respect to the detention.

23 Just as an aside, the petitioners' counselor complains  
24 about us not responding to his requests for information --

25 THE COURT: I don't think that was an aside. What's

1 your response to that?

2 MR. HENRY: Your Honor, basically we have 120 cases on  
3 behalf of more than 230 detainees. We receive requests for  
4 informal discovery as to the status, all the kinds of aspects  
5 with respect to petitioners, and we generally do not respond to  
6 those simply because we're not in a position to do it,  
7 especially when these cases should be stayed because the legal  
8 issues involved are before the Court of Appeals.

9 And I should point out that in this case, given that  
10 the detention is ongoing and that petitioners -- the only legal  
11 authority they're citing for relief with respect to that  
12 detention is a Constitutional right, and that very issue  
13 continues to be before the Court of Appeals.

14 THE COURT: Well, the Constitutional right, I suppose,  
15 if you're talking about the writ of habeas corpus, which is  
16 enshrined in the Constitution, yes. But if the Supreme Court  
17 has held that there is a right of habeas corpus for people at  
18 Guantanamo, what can it mean? Are you saying that you've got a  
19 right to file a writ of habeas corpus, but that's all? Nothing  
20 can ever happen because of it?

21 MR. HENRY: Well, Your Honor, essentially yes. The  
22 writ of habeas corpus brings the matter before the Court, but  
23 the issue of whether --

24 THE COURT: But the Court can't do anything about it?

25 MR. HENRY: Well, the issue of whether they are

1 substantive rights that a petitioner can assert against his  
2 detention, whether that be detention as an enemy combatant or as  
3 here, a detention on the tail end of an enemy combatant  
4 detention --

5 THE COURT: Well, turn it around and answer the  
6 question that petitioner put. Because he's right. What habeas  
7 corpus does is to bring the petitioner before the Court, or to  
8 require you to bring the petitioner before the Court, and  
9 explain by what right you're holding him.

10 Now, explain that. Is it, as you said earlier, the  
11 power to wind up in an orderly fashion? Is that it?

12 MR. HENRY: Yes, Your Honor.

13 THE COURT: That's the right that you assert for  
14 hanging on to these people?

15 MR. HENRY: That is correct, Your Honor. Once a  
16 petitioner or a detainee generally is determined, you know, no  
17 longer to be an enemy combatant, it's not a question of you just  
18 open the gates of Guantanamo and let them walk out.

19 THE COURT: Of course not. You could let them swim, I  
20 suppose, but that doesn't make any sense.

21 MR. HENRY: Well, the executive's power with respect to  
22 the detention of individuals, it necessarily includes the  
23 authority to wind up that detention in an orderly process.

24 THE COURT: You're making that argument as a matter of  
25 your assertion of the logic of the situation.

1 Do you have any case support for it except for your  
2 logic?

3 MR. HENRY: I do not have case support, but I do have  
4 historical precedent. At the end of World War II, at the end of  
5 the Korean War, at the end of the Gulf War, there were  
6 significant numbers of individuals who could not be repatriated  
7 consistent with the laws of war due to concerns about the laws  
8 of repatriation. That's essentially what we have here.

9 That took time to wind up those issues. In the case of  
10 World War II, it was several years. That's the kind of  
11 situation we have here. A determination has been made that  
12 these folks are no longer enemy combatants and should be  
13 transferred, released. The problem is, as of yet there is not a  
14 country that has agreed to accept them where there's not this  
15 concern about torture or mistreatment.

16 So it's based on the necessary logic of the situation.  
17 I don't think the executive could be in the business of making  
18 war and detaining individuals if he did not have the concomitant  
19 authority to wind up that detention in an orderly fashion.

20 And it's based on historical precedent because, in  
21 these large conflicts in the past, there have been significant  
22 numbers of individuals where there have been repatriation  
23 concerns. As you may know, Your Honor, the Geneva Convention  
24 requires combatants, POWs, whatever, to be repatriated as soon  
25 as possible after the end of hostilities, but there are other

1 concerns that enter into that.

2 THE COURT: We all know that I've got no power under  
3 the Geneva Convention.

4 MR. HENRY: According to the D.C. circuit, the  
5 Convention was not judicially enforceable.

6 But the issue here is not -- well, that issue is  
7 repatriation. Here the issue is repatriation of sorts, except  
8 these folks are not going to be repatriated due to the concerns  
9 about the treatment they would receive on that end.

10 And so the executive is in the process of undertaking  
11 diligent efforts to try to locate an alternative third country  
12 to which these folks can be sent.

13 THE COURT: But you're not at liberty to explain that  
14 to this courtroom, to opposing counsel, or even to me. That's  
15 your position?

16 MR. HENRY: Your Honor, I'm not in a position to  
17 explain it definitely to this courtroom or to opposing counsel.  
18 With respect to some sort of ex parte in-camera discussion with  
19 you, I'm more than happy to go back to the client and see if  
20 that could be arranged.

21 THE COURT: I'm not sure I want to hear that ex parte.

22 MR. HENRY: Your Honor, as you understand, diplomatic  
23 negotiations, especially on sensitive issue like this, are very  
24 delicate, and a public disclosure of those could well adversely  
25 affect that.

1 THE COURT: Yes, I can understand that. And there is  
2 certainly a practical conundrum that is posed by this situation  
3 because of the -- because the petitioners are Uighurs, and we've  
4 all read up enough on their status in China to know that that's  
5 a serious problem.

6 I must say, though, that I would like to hear you  
7 respond to why -- maybe I can understand that you blow off  
8 e-mails and don't answer e-mails, but why did you not tell  
9 petitioners' counsel what the situation was? And why did you  
10 file a piece of paper in this court three days after the CSRT  
11 proceeding implying that they were combatants?

12 MR. HENRY: Well, Your Honor, a couple of responses to  
13 that. First of all, as to the general matter, we have not been  
14 providing notice of an intent to release individuals. That  
15 issue is on appeal to the D.C. circuit. We've opposed numerous  
16 motions seeking some sort of advance notice of release and that  
17 sort of thing, and until we are ready to release someone, we  
18 have not been giving advance notice.

19 We have also --

20 THE COURT: Are you telling me that there are lots of  
21 NLECs down there who nobody knows are NLECs?

22 MR. HENRY: Your Honor, the numbers of NLECs have been  
23 publicly released by DOD. You know, as particular individuals  
24 in situations where we've had to file factual returns or  
25 whatever, obviously, we comply with that order and that is

1 provided to counsel.

2 In situations where factual returns have not been  
3 required, and as we've argued in the stay motions we've filed in  
4 all these cases, the petitioners have an opportunity to meet  
5 with, correspond with counsel and all that sort of thing.

6 THE COURT: I'll tell you one thing, Counsel. You've  
7 talked me early on into not requiring returns to be filed in the  
8 cases. But I'm going to go back to all of my habeas cases this  
9 afternoon and change those orders. Because if you're telling me  
10 that it's only an order to file a return that will allow you to  
11 tell opposing counsel that their clients are no longer enemy  
12 combatants, that's a little hard for me to understand.

13 MR. HENRY: But, Your Honor, until we're ready to  
14 release someone, I mean, we continue to detain them. The case  
15 is not moot. The grounds for the detention are, if not the  
16 exact subject of, certainly will be affected by what's going on  
17 in the Court of Appeals.

18 So the same grounds that animate the stay with respect  
19 to proceedings apply across the cases. And I would also point  
20 out that as a practical matter, we have new cases filed  
21 virtually every day. How many of those that we know of right  
22 off the bat involve NLECs? I can't tell you.

23 THE COURT: Oh, I think you've got a database. How  
24 many people are down there?

25 MR. HENRY: A little over 500. Your Honor, I'm telling

1 you as --

2 THE COURT: It's easy, isn't it? It's a spreadsheet.  
3 It's a spreadsheet, isn't it?

4 MR. HENRY: I don't know, Your Honor. It involves our  
5 inquiry to the client and that sort of thing.

6 But, you know, all I'm intending to point out is that  
7 it is a logistical undertaking that is significant, and...

8 In any event, as I've pointed out, the same issues that  
9 animate the stay apply across the board in all the cases until  
10 we're at a point where we're ready to release someone.

11 Obviously, at that point, the case becomes moot and we notify  
12 everyone appropriately, or we comply with whatever orders the  
13 Courts may issue with respect to advance notice or, in your  
14 case, coming to the Court for advanced permission.

15 THE COURT: Go back to your repatriation cases after  
16 World War II. The people you're talking about that took a long  
17 time to get repatriated were repatriated from where? POW camps  
18 in Michigan?

19 MR. HENRY: They were POWs, I'm not sure of their exact  
20 location.

21 THE COURT: They were POWs. They weren't people who  
22 had been determined not to be enemy combatants.

23 MR. HENRY: Well, a cessation of hostilities had  
24 occurred, so they were no longer enemy combatants in that sense.  
25 This was after the end of the war.

1 THE COURT: And where were they kept? Were they kept  
2 in prisons?

3 MR. HENRY: They were kept in prisons, I believe. I  
4 don't know if any were here in the U.S. I know some were in  
5 Europe. They were kept in prisons, and -- until the issues were  
6 worked out.

7 They involved citizens of other countries who had been  
8 fighting for the Germans, and they claimed our enlistment or our  
9 fighting for them had been compelled under various threats of  
10 violence. But they couldn't be sent back to their home country  
11 because they would be shot as traitors, that sort of thing, and  
12 it took several years to work that out.

13 Like I said, same kind of concerns at the end of the  
14 Korean War, same kind of concerns at the end of the Gulf War for  
15 significant numbers of individuals, and that's the same kind of  
16 situation that we have here.

17 THE COURT: What about counsel's example of the  
18 Haitians?

19 MR. HENRY: What he's referring to is the Migrant  
20 Operations Center; it's a facility at Guantanamo. It's not a  
21 detention facility, but it's a facility where immigrants who are  
22 interdicted on the high seas that claim a protected status -- in  
23 other words, they can't be immediately repatriated because of  
24 fears of torture or whatever.

25 And after an interview process they go through -- like

1 I said, they go through multiple interviews, they go through a  
2 background check, that sort of thing. And if they can't be sent  
3 back, they are temporarily housed at this Migrant Operations  
4 Center pending finding a third country that will take them.

5 After there are various background checks and that kind  
6 of thing that goes on, they are permitted to seek work at the  
7 various retail establishments and that sort of thing at  
8 Guantanamo. But again, that's after they go through background  
9 checks and that sort of thing.

10 THE COURT: But they're placed in the center before the  
11 background checks, aren't they?

12 MR. HENRY: My understanding is, and my understanding  
13 is not complete, but my understanding is that they are in the  
14 center, but they can't leave the center. They're under certain  
15 sort of monitoring pending their --

16 THE COURT: But they're not chained to floors, are  
17 they?

18 MR. HENRY: Well, Your Honor, what happens is, when  
19 counsel meet with the detainees at Gitmo --

20 THE COURT: There's a yes-or-no answer to that  
21 question. Are they chained to floors in the immigrant detention  
22 center?

23 MR. HENRY: The detainees are not chained to floors in  
24 their normal detention center either, Your Honor.

25 THE COURT: But in the immigrant center. If lawyers go

1 down to talk to people in that immigrant center, are they  
2 chained to floor?

3 MR. HENRY: It's my understanding that lawyers are not  
4 permitted to go down to the Migrant Operations Center.

5 THE COURT: So if lawyers show up, they have to chain  
6 people to floors. Is that the rule?

7 MR. HENRY: I don't believe so, Your Honor. I don't  
8 know what the rule is.

9 Let me tell you what the rule is at Guantanamo with  
10 respect to the detention operations, the enemy combatant-related  
11 detention operations. As we pointed out in our filing, and as  
12 detailed in the declaration of the commander of the Guantanamo  
13 joint task force detention operations, the detainees here are  
14 housed in a communal living arrangement, 10-man bays, with other  
15 NLECs. They have all-day access to the exercise yard, they have  
16 various recreation activities, that sort of thing.

17 When counsel come down to meet with any detainee  
18 petitioner at Guantanamo, the detainee is moved to a special  
19 camp called Camp Echo that has huts where a detainee has a cell  
20 he's kept in, and there then there's a room where counsel and  
21 the detainee can talk.

22 It's standard operating procedure that whenever the  
23 detainee is in the presence of counsel, or, like, if there's an  
24 interrogation -- if they're moved to an interrogation room or  
25 whatever, if it's someone besides the detainee there, the

1 detainees are shackled and the chain is bolted to the floor.  
2 And we've had situations where the detainee has basically -- not  
3 these petitioners, but other petitioners have lunged at,  
4 attempted to do violence to, the attorneys.

5 So the chaining to the floor is for everyone's  
6 protection; it's a standard operating procedure. They don't  
7 make exceptions based on, well, I think this guy is okay. I  
8 mean, you can see the potential danger of that kind of  
9 situation, given that they've got 500 people down there and  
10 rotating guard staffs and that sort of thing.

11 So the chaining to the floor, while I certainly  
12 understand is an unpleasant image, it happens with respect to  
13 all counsel visits or visits from any individuals that are not  
14 the detainees themselves. And it's done for the safety of all  
15 concerned.

16 But the detainees are not kept chained in their normal  
17 detention facility; in fact, it's quite the opposite. They're  
18 allowed to freely move around the bay where they live with other  
19 individuals. They have all-day access to the exercise yard,  
20 they eat their meals communally, they have recreation  
21 activities.

22 THE COURT: Let me ask you the same jurisdictional  
23 question I put to petitioners' counsel. Is there any  
24 jurisdictional -- well, I know that you have jurisdictional  
25 issues, but, I mean, based on -- is there any jurisdictional

1 limits on this proceeding based on what is currently on appeal  
2 in this case?

3 MR. HENRY: Let me say, I don't think so. But let me  
4 just correct something that petitioners' counsel said. They not  
5 only filed a petition for mandamus, they filed a notice of  
6 appeal with respect to Your Honor's --

7 THE COURT: Cross-appeal.

8 MR. HENRY: -- cross-appeal with respect to Your  
9 Honor's stay motion. But I don't think an appeal of a stay  
10 affects the Court's jurisdiction to modify the stay or do  
11 whatever in appropriate circumstances. And the petitioners'  
12 counsel is correct that as far as I know, the Court of Appeals  
13 has not required any kind of response to the mandamus petition.

14 THE COURT: Who operates this immigrant detention  
15 center? I suppose that's the State Department.

16 MR. HENRY: The Department of Homeland Security.

17 THE COURT: Oh, Homeland Security.

18 MR. HENRY: And that is an issue with respect to  
19 providing asylum or transfer to third countries, that sort of  
20 thing, issues that are well beyond the issues that have been  
21 vetted in these cases so far.

22 THE COURT: Well, are -- those people in that  
23 immigration detention center, the reason they've been  
24 interdicted on the high seas so they don't touch foot on  
25 American soil so they don't have the right to seek asylum.

1 That's why they're not at Guantanamo. Right?

2 MR. HENRY: I'm not sure I would characterize it that  
3 way, Your Honor. They interdict people on the high seas in  
4 various circumstances, in a boat sinking, whatever. I mean, the  
5 duty of the Coast Guard --

6 THE COURT: That's called a rescue. Interdiction is a  
7 different concept entirely, isn't it?

8 MR. HENRY: They overlap, Your Honor, is my  
9 understanding.

10 THE COURT: Well, I'm not through with this point. I'm  
11 trying to figure out why it wouldn't make sense or why it would  
12 be unlawful for these people to be placed in a facility like  
13 that instead of where they are.

14 MR. HENRY: Well, Your Honor, if you take a look at the  
15 commander's declaration, he's explained the reasons why the  
16 petitioners are where they are.

17 Let me just say --

18 THE COURT: I did take a look at it. He spoke of his  
19 concerns. He said --

20 MR. HENRY: Yes.

21 THE COURT: -- because they might be unhappy with where  
22 they were finally sent.

23 MR. HENRY: That's one concern. There have been issues  
24 with respect to detainees unhappy with their country of ultimate  
25 transfer who -- and there are concerns that they could take some

1 action against themselves or others to try to avoid going there.  
2 There's concerns along those lines.

3 There are concerns about -- you know, the fact that  
4 someone has been determined to no longer be an enemy combatant  
5 doesn't make them benign in all circumstances. There are  
6 concerns -- you know, you drop these folks into the general  
7 population of Guantanamo, there are concerns about their own  
8 safety with respect to potential threats from the outside.

9 In a situation --

10 THE COURT: I thought that's what this whole background  
11 investigation thing was for.

12 MR. HENRY: Well, Your Honor, the background  
13 investigation is for immigrants, it's not for folks who are  
14 detained as enemy combatants or have been detained as enemy  
15 combatants in --

16 THE COURT: I'm sorry. I thought you said it was for  
17 people who had been interdicted and who were not going to be  
18 permitted to be immigrants and were going to be sent somewhere  
19 else.

20 MR. HENRY: I'm sorry. I used the word "immigrant," I  
21 guess, incorrectly, Your Honor. They have been interdicted but  
22 they're not -- they weren't detained as enemy combatants. So  
23 you have a completely different situation.

24 THE COURT: It sounds like that comment and a few  
25 others you've made, like they might be harmful to others, they

1 might be harmful to themselves, they might be violent if they  
2 didn't like where they were going, it sounds like the fact that  
3 they have been detained as enemy combatants creates some sort of  
4 presumption in your mind or in the government's mind about them.

5 MR. HENRY: Your Honor, it's more a situation  
6 concerning the finding that someone is no longer an enemy  
7 combatant. As explained in the Navy regulations, the order that  
8 petitioners' counsel handed up, an enemy combatant is defined as  
9 someone, and I'm paraphrasing, that's a member of or associated  
10 with Al-Queda or the Taliban, and includes people who committed  
11 belligerent acts against the United States and its coalition  
12 partners.

13 If you've determined that a detainee is no longer that  
14 kind of person, that's all the decision is. It's not a decision  
15 that they're wonderful people who should be integrated into any  
16 available society as soon as possible. So the commander at  
17 Guantanamo has to make his decisions concerning the security of  
18 the detainees and of the base, based on his experience and what  
19 he knows.

20 And as explained in the declaration, you know, he's  
21 made a determination based on the good order, safety, and  
22 security of the base and the detainees. And that's what's going  
23 on here.

24 Again, this is part and parcel with enemy combatant  
25 detention and winding this up in an orderly process. I mean,

1 the historical examples that I gave you, just because there were  
2 repatriation concerns, my understanding is they didn't turn  
3 these folks loose to run around until they found a country  
4 suitable for them, and that's what's going on here. The  
5 petitioner is being detained in the least-restrictive conditions  
6 available at the detention facility.

7 I might add, you know, if they were moved outside the  
8 detention facility, I think all that would mean is a relocation  
9 of the security force situation, because the commander would  
10 still feel an obligation to monitor -- you know, to provide the  
11 care and emergency and security services that they do at the  
12 detention camp. It would just mean that it's done somewhere  
13 else on the base.

14 THE COURT: Yeah. The petitioners' notion that he  
15 should be placed in the civilian and military side of the  
16 detention facility to live with the Marines is a nonstarter as  
17 far as I'm concerned. I agree that that doesn't make sense.

18 But I haven't quite let loose of the immigrant facility  
19 that you've been talking about, or some sort of other -- you  
20 said early on, Counsel, you said that -- you used the word  
21 "soon" to describe when you thought that this might be resolved.  
22 Define "soon."

23 MR. HENRY: I don't know when that is. I apologize if  
24 I misspoke. I mean, I think I said "soon" in kind of the  
25 hopeful sense of the word. Like I said, the diplomatic efforts

1 are ongoing, multifaceted, and I think the government would like  
2 nothing better than to find suitable countries of transfer for  
3 these individuals, as well as other NLECs that have similar  
4 concerns.

5 But I am not in a position, because I can't, not -- I  
6 simply lack the knowledge to be able to give you any kind of  
7 estimate as to when someone could be found. And obviously, a  
8 foreign country's decision to take these folks is up to that  
9 country, and we can't really predict for sure what they're going  
10 to do.

11 But I would say that these folks -- since they've been  
12 determined to be NLECs, the diplomatic process is ongoing and  
13 the government is trying its best to find a suitable country to  
14 send these folks to.

15 THE COURT: All right. I'll hear from the petitioner  
16 again by way of brief reply.

17 MR. WILLETT: Thank you, Your Honor.

18 Let me start at the end. We don't know what the State  
19 Department is doing, but I can tell you, here are the facts that  
20 are in the record: One of my clients was told in Khandahar that  
21 they already knew it was a mistake. That's some time before  
22 June of '02.

23 Then-Secretary of State Powell was quoted in press  
24 accounts in August of '04 saying, yeah, we know about the  
25 Uighurs. It's a problem. They're not going to be sent back to

1 China.

2 We, on our side, have made efforts such as we can.  
3 We've been on the phone to Sweden, we've been on the phone to  
4 Turkey, we've been on the phone to the U.N. High Commissioner  
5 for Refugees. All I can tell the Court is we have yet to trip  
6 over the State Department's trail. When we call people, they  
7 don't tell us, we can't talk to you, we're already talking to  
8 other people.

9 So what they're doing, who knows? All we can really  
10 say is they kept it secret that they made this determination and  
11 who knows whether they've done anything.

12 I do want to talk about -- Your Honor asked questions  
13 of counsel about the legal basis of this wind-up concept, and I  
14 agree that there is none. There is a case we cited called  
15 Zadvydas, which is a case about what happens when someone is  
16 deported and no one will take them. There, Justice Bryer held  
17 for the Supreme Court that there's a rebut-able presumption that  
18 six months is about as far as you can go detaining somebody,  
19 even when there was a Congressional statute authorizing it.

20 And Zadvydas was a case involving convicted criminals.  
21 The two people at issue there had been convicted of serious  
22 crimes. So I believe there is no lawful basis for what is  
23 clearly indefinite imprisonment.

24 I would point out as well, that with respect to the  
25 wind-up of World War II, what you had then was prisoners of war

1 held in a fully Hague Convention-compliant prisoner of war  
2 facility. So far as I know, at least so far as the record  
3 shows, the case reports, no one was contesting his being held  
4 there at the time, because the alternative, I suppose, was to be  
5 sent back to some crater in Germany.

6 So there's no -- I don't think any legal rule comes out  
7 of those situations that would deal with the situation where  
8 someone who has been adjudged not to be a prisoner of war, even,  
9 is held indefinitely.

10 I do apologize that I was mistaken. We did  
11 cross-appeal, and Mr. Henry is correct about that. I agree,  
12 though, I think we both agree there's no jurisdictional problem  
13 here.

14 And I wanted to re-emphasize, we do not rest on some  
15 Constitutional right. We think we have them, but we don't need  
16 to rest on them. It's their burden to proffer a legal basis for  
17 detention, which they haven't done.

18 All of the solutions are imperfect. The Migrant  
19 Operations Center may be better than some. It's not perfect,  
20 but I would ask the Court to consider the alternative of  
21 bringing the body here.

22 And then last, if I could ask --

23 THE COURT: Well, bringing the body here would entail  
24 bringing the body here in chains, number one, locking him up in  
25 some local facility which is probably not as pleasant as the

1 facility in Guantanamo, and then what? Then you would hope for  
2 some parole to the community.

3 MR. WILLETT: Yes, Your Honor.

4 THE COURT: That's not even close to a foregone  
5 conclusion.

6 MR. WILLETT: I don't expect that it would be. Your  
7 Honor's decision might be that they had to be returned. I don't  
8 know what it would be. But at least you would be able to assess  
9 these sort of vaporous allegations that somebody might be  
10 harmful to someone else.

11 THE COURT: Well --

12 MR. WILLETT: That is an option. And I think it's  
13 really the government's problem to come up with a solution.

14 THE COURT: I didn't hear counsel say that there's an  
15 individual determination being made that any of these  
16 petitioners might be harmful. I heard him say that it's sort of  
17 a -- my word, not his, sort of a bureaucratic determination made  
18 by a commander who is trying to keep the whole place under  
19 order. I mean, that's the excuse given for locking him up when  
20 he was -- or for shackling him when he was brought to see you.

21 MR. WILLETT: Yes, I understand, Your Honor.

22 THE COURT: And at some level we can all understand  
23 that, whichever side we're on. He's got to -- I don't think the  
24 commander of the base can be charged with making individual  
25 harm/not harm decisions about people under his control.

1 MR. WILLETT: Well, I agree with Your Honor. But I  
2 don't also think that the commander of the base therefore gets a  
3 lawful basis to imprison. If it's not convenient for these  
4 people to be at the base, and it may not be, they have to be  
5 released somewhere else. I mean, this is the Pottery Barn rule.  
6 They broke it, they have to fix it. And if they can't be  
7 repatriated to China, and they can't, then maybe they have to  
8 sit here while this problem gets solved.

9 Your Honor, I want to ask, if I can, for two things  
10 more while you ponder what you're going to do. The first is  
11 that the protective order in this case forbids telephone contact  
12 with detainees except in unusual circumstances. I think this  
13 qualifies. We would like to have telephone contact with our  
14 clients. It's particularly important to help us try to develop  
15 a repatriation solution, to identify Uighur communities abroad  
16 where we might be able to make an asylum petition. Sweden is an  
17 example, but there might be others.

18 We would like for their families to be able to talk to  
19 them by telephone. That's my first request.

20 The second is that I can't tell you how difficult it is  
21 to get to Guantanamo with a DOD-approved Uighur-speaking  
22 translator. Their rule is, you've got to be a U.S. citizen and  
23 you've got to speak Uighur; and my rule is you can't have shown  
24 up before for the interrogators because then they won't know if  
25 I'm a lawyer or interrogator. That subset gets you down to

1 zero.

2 Now, I have in the room Mr. Nury Turkel, who is a  
3 lawful alien resident in the Washington, D.C. area. He is a  
4 Uighur, he speaks Uighur. He is a graduate of the American  
5 University Law School. I have been asking for months for the  
6 government to approve Mr. Turkel as an interpreter so that we  
7 could take him with us to Guantanamo, and there is no response.  
8 It would be helpful if we could have Mr. Turkel on the telephone  
9 with our clients, and as well if he could come with us to  
10 Guantanamo.

11 THE COURT: Is Mr. Turkel a member of any bar?

12 MR. WILLETT: May I have just a minute, Your Honor?  
13 Your Honor, his admission to the New York bar is  
14 pending.

15 THE COURT: He's passed the New York bar exam?

16 MR. WILLETT: Yes, he has.

17 THE COURT: Okay. Mr. Henry, do you want to respond to  
18 those two requests?

19 MR. HENRY: Yes, Your Honor. Thank you.

20 With respect to the interpreter situation, my  
21 understanding is that petitioners' counsel submitted a security  
22 clearance application with respect to him, and that that's under  
23 consideration by -- you know, there's a background investigation  
24 the FBI does, that sort of thing.

25 That's all being handled through the Court security

1 officers that are assigned to this case. All counsel, all  
2 interpreters that go down to Guantanamo have to possess a  
3 security clearance, and the situation is his clearance hasn't  
4 come through. That typically has taken in the past anywhere  
5 from six weeks to, you know, eight, ten weeks, things like that.

6 So I don't know the exact status of the security  
7 clearance situation because that's not in our control. It's  
8 handled through the court security office.

9 With respect to telephone contact -- let me just add, I  
10 assume that if the gentleman obtains his security clearance,  
11 then, like many other translators for the other counsel in the  
12 other cases have gotten their security clearance, they go down  
13 and do their thing.

14 With respect to the issue of telephone situation, the  
15 telephone contact, you know, Your Honor, we went through a  
16 carefully crafted and very contentious process back last fall  
17 coming up with this protective order that applies in all of  
18 these Guantanamo cases so far. These issues of telephone  
19 contact and those kind of things were all presented to Judge  
20 Green, and she signed off on this. It has worked so far, you  
21 know, not without some complaint from both sides, but it appears  
22 to be working.

23 And if Your Honor starts making special exceptions for  
24 telephone contact and that sort of thing, I think, since it's on  
25 a slippery slope, we'll get all kinds of requests and motions

1 for exceptions based on individual circumstances of individual  
2 detainees, and it will significantly undermine what has been a  
3 very difficult process to manage these counsel visits and  
4 counsel communications with clients in a fashion that, you know,  
5 maintains the various equities of each side that's involved.

6 Thank you.

7 THE COURT: If I study the briefs that you-all have  
8 submitted very carefully, am I going to find all that you have  
9 to tell me on the question of whether I have the power to order  
10 the petitioners brought to the United States, where presumably  
11 the clearance of an interpreter would not be required and the  
12 telephone restrictions would not be imposed?

13 MR. WILLETT: We can very quickly supplement the brief,  
14 Your Honor.

15 MR. HENRY: Your Honor, we, too, can submit a brief  
16 addressing that issue. I would point out that under the  
17 statutory scheme, the way I understand it, the bringing the body  
18 before the Court is in habeas practice a rare circumstance.  
19 It's usually done to try to resolve factual issues having to do  
20 with the -- typically the grounds, in most cases the criminal  
21 trial situation.

22 THE COURT: Clearly in modern habeas practice, it has  
23 not been thought that bringing the body before me is -- although  
24 that is -- you know, "You have the body, bring it to me" is the  
25 first language -- the first words of the Latin phrase of the

1 classical writ of habeas corpus. But I agree with you that in  
2 modern practice that has not been thought to be the function of  
3 a writ of habeas corpus.

4 But I am -- just as the commander in Guantanamo has  
5 expressed concern, I have concerns about two people who are not  
6 any longer enemy combatants who can't talk to their family on  
7 the telephone or even have an interpreter. That's a problem,  
8 Counsel.

9 MR. HENRY: Well, Your Honor, the family communication  
10 situation, again, was vetted before Judge Green.

11 THE COURT: Who I don't think was thinking about NLECs,  
12 was she?

13 MR. HENRY: Your Honor, the order was developed I think  
14 before that became an issue.

15 I would point out that, you know --

16 THE COURT: Look, I don't want to -- I don't want to  
17 argue that any further. My question was, if I study the briefs  
18 that have been filed before me, will I find everything you have  
19 to tell me on that subject. You both answered no.

20 MR. HENRY: That's correct.

21 THE COURT: So I'll see whatever you have to tell me  
22 in, what, five days?

23 MR. WILLETT: We'll get it before that.

24 THE COURT: All right. Anything further from either  
25 side?

1 Thank you very much.  
2 We're adjourned.  
3 (Proceedings adjourned at 5:11 p.m.)  
4  
5

6 CERTIFICATE OF OFFICIAL COURT REPORTER  
7

8 I, Rebecca King, certify that the foregoing is a  
9 correct transcript from the record of proceedings in the  
10 above-entitled matter.  
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15 SIGNATURE OF COURT REPORTER

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