

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
MAJID ABDULLA AL JOUDI, <i>et al.</i> ,)	
)	
Petitioners,)	
)	
v.)	Civil Action No. 05-CV-0301 (GK)
)	
GEORGE W. BUSH,)	
President of the United States, <i>et al.</i> ,)	
)	
Respondents.)	
_____)	

**RESPONDENTS’ RESPONSE TO
PETITIONERS’ RESPONSE TO ORDER TO SHOW CAUSE**

In accordance with the Court’s March 3, 2008 Order (dkt. no. 116), respondents hereby respond to petitioners’ submission (dkt. no. 114) objecting to any dismissal of this case despite the fact that all of the petitioners in the case have been released from United States’ custody and repatriated from Guantanamo Bay¹ to the Kingdom of Saudi Arabia. As explained below, dismissal of this case is required because jurisdiction is precluded under the Military Commissions Act of 2006 (“MCA”), Pub. L. No. 109-366, § 7, 120 Stat. 2600, and the law of the Circuit. Furthermore, this case is moot in light of petitioners’ release and petitioners’ failure to demonstrate collateral consequences sufficient to overcome mootness.

¹ All of the detainee-petitioners were previously held by the Department of Defense (“DoD”) as enemy combatants. *See* dkt. nos. 32, 33, 34, 35.

ARGUMENT

I. THIS CASE SHOULD BE DISMISSED BECAUSE THE COURT LACKS JURISDICTION PURSUANT TO THE MILITARY COMMISSIONS ACT AND THE LAW OF THE CIRCUIT.

This *habeas* action should be dismissed because jurisdiction is precluded under the MCA and the law of this Circuit, *see Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *cert. granted*, 127 S. Ct. 3078 (June 29, 2007). The MCA amended the *habeas* statute, 28 U.S.C. § 2241, adding a subsection (e) to provide that “[n]o court, justice, or judge shall have jurisdiction” to consider either (1) *habeas* petitions filed by aliens detained by the United States determined to be enemy combatants or awaiting such a status determination, or (2) any other action “relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement” of an alien who is or was so detained, except for the exclusive review mechanism in the Court of Appeals created under the Detainee Treatment Act of 2005 (“DTA”), Pub. L. No. 109-148, Tit. X, 119 Stat. 2680, for addressing the validity of the detention of such an alien.² *See* MCA § 7(a) (emphasis added). This new amendment to § 2241 took effect on the date of enactment, October 17, 2006, and applies specifically “to all cases, without exception, pending on or after the date of the enactment of this Act which relates to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.” *Id.* § 7(b).

² *See* DTA § 1005(e)(2)-(3) (as amended by MCA §§ 9-10). Section 1005(e)(2) of the DTA, as amended, states that the D.C. Circuit “shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant,” and it further specifies the scope and intensiveness of that review.

On February 20, 2007, the Court of Appeals held in *Boumediene* that the MCA plainly applies to all cases filed by aliens detained as enemy combatants, including pending *habeas* petitions such as this one, and withdraws all District Court jurisdiction over such cases, including both *habeas* and non-*habeas* claims.³ See 476 F.3d 981, 986-88 & n.1; *id.* at 994 (“Federal courts have no jurisdiction in these cases.”). The Court of Appeals also held that the withdrawal of *habeas* jurisdiction over pending cases did not violate the Suspension Clause because the alien detainees held at Guantanamo have no constitutional rights and because the constitutional right to seek *habeas* review does not extend to aliens held at Guantanamo. *Id.* at 988-94. Consequently, the Court of Appeals (1) ordered that the district courts’ decisions on appeal be vacated and (2) dismissed the cases on appeal for lack of jurisdiction. *Id.* at 994.

The Supreme Court granted *certiorari* in *Boumediene* on June 29, 2007, see *Boumediene v. Bush*, 127 S. Ct. 3078 (June 29, 2007), and heard argument on December 5, 2007.

³ Even prior to enactment of the MCA, the DTA invested the Court of Appeals with the same “exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant.” See DTA § 1005(e)(2)-(3). This investment of exclusive jurisdiction in the Court of Appeals, independent of the MCA, deprived the district court of jurisdiction in cases challenging the detention of enemy combatants. See, e.g., *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207-09 (1994) (“exclusive” jurisdiction under federal Mine Act precludes assertion of district court jurisdiction); *Laing v. Ashcroft*, 370 F.3d 994, 999-1000 (9th Cir. 2004) (“§ 2241 is ordinarily reserved for instances in which no other judicial remedy is available”); *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 75, 78-79 (D.C. Cir. 1984) (request for relief in district court that might affect Court of Appeals’ future, exclusive jurisdiction is subject to the exclusive review of the Court of Appeals); *cf. id.* at 77 (“By lodging review of agency action in the Court of Appeals, Congress manifested an intent that the appellate court exercise sole jurisdiction over the class of claims covered by the statutory grant of review power.”). In any event, with the enactment of the MCA, as the D.C. Circuit made clear in *Boumediene*, district court jurisdiction has been unambiguously withdrawn.

Nonetheless, *Boumediene* remains for now the law of this Circuit.⁴ *See Rasul v. Myers*, 512 F.3d 644, 665 (D.C. Cir. 2008) (“*Boumediene* . . . remains the law of this Circuit”); *id.* at 665 n.15 (“*Boumediene* is currently before the Supreme Court on certiorari review. Nevertheless, we must follow Circuit precedent until and unless it is altered by our own *en banc* review or by the High Court.”) (citation omitted).

When these petitions were filed, they challenged the alleged detention of individuals who were “determined by the United States to have been properly detained as an enemy combatant.” MCA § 7(a); *see supra* note 1. Pursuant to the MCA and the DTA, therefore, the Court lacks jurisdiction over the petitions as-filed, regardless of the subsequent release of petitioners,⁵ and

⁴ In *Belbacha v. Bush*, No. 07-5258, 2008 WL 680637 (D.C. Cir. Mar. 14, 2008), the D.C. Circuit held that, during the pendency of review on *certiorari* of a jurisdictional issue, and in the absence of a mandate, a court retains the power to enter a preliminary injunction to prevent action that would defeat the court’s jurisdiction, where the standards for obtaining such injunctive relief are met. *See id.* at *3. That holding has no application here, however, where the Court is not being asked to enter injunctive relief preserving its jurisdiction, but rather to decide whether jurisdiction over this case exists in light of petitioners’ release from United States’ custody. *See* Order of Jan. 7, 2008 (dkt. no. 112). On that issue, *Boumediene* remains the law of this Circuit. *See also Belbacha*, 2008 WL 680637 at *3 (“[a] decision of this court is binding upon a later panel and upon the district court”).

⁵ As the Supreme Court has repeatedly instructed, “subject-matter jurisdiction turns on the facts upon filing.” *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993) (*quoted in Dole Food Co. v. Patrickson*, 538 U.S. 468, 478 (2003)); *see also Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989) (“The existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed.”) (*quoted in Lujan v. Defenders of Wildlife*, 504 U.S. 555, 569 n.4 (1992)).

Jurisdiction is lacking for the additional reason that any challenge to a detainee’s status as an enemy combatant rests *exclusively* in the Court of Appeals. *See* DTA § 1005(e)(2)-(3); *supra* notes 2-3. Notably, that exclusive jurisdiction of the Court of Appeals to review an enemy combatant determination under the DTA “cease[s] upon release of such alien from custody of the Department of Defense.” DTA § 1005(e)(2)(D). Thus, Congress clearly has withdrawn jurisdiction over the claims of these released petitioners.

the cases should be dismissed. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (“Without jurisdiction [a] court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.” (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868))).

II. THIS CASE SHOULD BE DISMISSED BECAUSE THE CASE IS MOOT IN LIGHT OF PETITIONERS’ RELEASE, AND PETITIONERS HAVE NOT DEMONSTRATED COLLATERAL CONSEQUENCES SUFFICIENT TO OVERCOME MOOTNESS.

Release from United States custody usually resolves the controversy raised by a *habeas* petition because “the traditional function of the writ [of *habeas corpus*] is to secure release from illegal custody.” *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973); *see Qassim v. Bush*, 466 F.3d 1073, 1076-78 (D.C. Cir. 2006) (*per curiam*) (granting motion to dismiss because petitioners’ *habeas* petition was rendered moot when petitioners were released from Guantanamo) (citation omitted). “[F]or a court to exercise habeas jurisdiction over a petitioner no longer in custody, the petitioner must demonstrate that . . . his subsequent release has not rendered the petition moot, i.e., that he continues to present a case or controversy under Article III, § 2 of the Constitution.” *Qassim*, 466 F.3d at 1078 (D.C. Cir. 2006) (quoting *Zalawadia v. Ashcroft*, 371 F.3d 292, 297 (5th Cir. 2004)). Such a petitioner, then, bears the burden of establishing that the case or controversy underlying his *habeas* petition persists because he continues to face “some concrete and continuing injury,” so-called collateral consequences, directly related to his previous detention. *See Qassim*, 466 F.3d at 1076; *Idema v. Rice*, 478 F. Supp. 2d 47, 51 (D.D.C. 2007) (Sullivan, J.) (citing cases). Indeed, Article III standing requires concrete and

particularized injury that is actual or imminent and not conjectural or speculative. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Furthermore, even injuries or repercussions that are present or imminent, but that result from the independent judgments of third parties – such as claimed stigma or actions taken by a foreign government – do not establish a case or controversy in a *habeas corpus* action. *See id.* at 562 (when the issue of justiciability “‘depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict,’ . . . it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury”) (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (plurality opinion)).⁶ *See Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (“This means that, throughout the litigation, the plaintiff ‘must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.’”) (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990)).

Petitioners in this case, relying on media reports concerning former detainees other than petitioners, allege that they may suffer collateral consequences in the form of possible monitoring by the Saudi government, Petrs’ Response at 3; possible imposition of travel restrictions by the Saudi government, *id.* at 3; and possible investigation and prosecution by the Saudi government, even though there have been no such prosecutions of former detainees by the Saudis so far, *id.* at

⁶ *Cf. Greater Tampa Chamber of Commerce v. Goldschmidt*, 627 F.2d 258, 263 (D.C. Cir. 1980) (holding that a challenge against an executive agreement was not a justiciable case or controversy in part because redress of the plaintiffs’ alleged injuries would depend on the independent response of the United Kingdom).

4. Petitioners “do not challenge the authority of the Saudi government to establish conditions governing the release of individual[s] from custody in Saudi Arabia,” *id.* at 4; rather, they contend that the “*possibility* of a trial and further jail time, travel restrictions[,] and constant government monitoring” constitute collateral consequences sufficient to save this case from mootness, *see id.* (emphasis added).

Petitioners’ allegations, however, do not constitute collateral consequences sufficient to establish that this case is not moot. As an initial matter, the alleged collateral consequences cannot be said to be certain or concrete; rather, they are speculative. Petitioners offer no direct evidence about consequences they themselves presently continue to suffer as a result of their prior detention by the United States. Nor do they offer any competent evidence of consequences they may suffer, if any.⁷ *Cf. United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375, 1380 (1984) (even where a party is at greater risk than the public at large of being subjected to challenged surveillance activity, that “still fall[s] far short” of establishing concrete harm that might arise from the party being actually subjected to surveillance).

Moreover, the collateral consequences alleged by petitioners are dependent upon the choices and decisions of a nonparty— the Saudi government. As respondents have explained in prior submissions in the Guantanamo cases in connection with oppositions to motions for

⁷ A court cannot presume the existence of collateral consequences, except perhaps in the limited context of *habeas* challenges to criminal convictions that typically carry with them civil disabilities imposed by law. *See Spencer*, 523 U.S. at 7-14 (declining to presume adverse collateral consequences from revocation of parole); *Lane v. Williams*, 455 U.S. 624, 631–33 (1982) (declining to presume adverse collateral consequences from determinations that the respondents had violated parole). Of course, an “enemy combatant” designation is not a criminal conviction; the identification and detention of enemy combatants is a preventive measure taken “to prevent captured individuals from returning to the field of battle and taking up arms once again.” *See Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion).

advance notice of transfer of detainees from Guantanamo, in cases such as this in which Guantanamo detainees are transferred to the control of another government, the detainees are transferred entirely to the custody and control of the other government; once transferred, the individual is no longer in the custody or control of the United States, and the measures taken by the receiving country with respect to the detainees are pursuant to that country's own laws and independent determinations. *See* Declaration of Joseph Benkert (Principal Deputy Assistant Secretary of Defense for Global Security Affairs) ¶ 5 (copy attached as Exhibit 1).⁸ Thus, any measures taken by Saudi Arabia respecting petitioners after their transfer out of United States custody is based on decisions and choices made by the Saudi government; even if petitioners

⁸ Paragraph 5 of the Benkert Declaration provides,

When the DoD transfers GTMO detainees to the control of other governments for continued detention, investigation, and/or prosecution, the DoD does so after dialogue with the receiving government. Such dialogue may be initiated by the receiving government or may be initiated by the United States. In either situation, the purpose of the dialogue is to ascertain or establish what measures the receiving government intends to take, pursuant to its own domestic laws and independent determinations, that will ensure that the detainee will not pose a continuing threat to the United States and its allies. In all such cases of transfer for continued detention, investigation, and/or prosecution, as appropriate, as well as situations in which the detainee is transferred for release, the detainee is transferred entirely to the custody and control of the other government, and once transferred, is no longer in the custody and control of the United States; the individual is detained, if at all, by the foreign government pursuant to its own laws and not on behalf of the United States. When detainees are transferred to the custody or control of their home governments, it is frequently the case that the home government takes the detainee into its custody, at least for an initial period. In some cases, the home government has subsequently released the detainee, sometimes after a period of questioning or investigation, while in other cases, the detainees have remained in confinement or subject to other restrictions in their home countries for various reasons based on the determinations and laws of the home government. Of the GTMO detainees who have been transferred by the DoD to the control of their home countries, most have subsequently been released from detention.

were subject to monitoring, travel restrictions, or prosecution, such matters would be the result of determinations made by the Saudi government pursuant to its own laws and practices. Such actions by the Saudi government, therefore, do not give rise to an injury that is redressable in this *habeas* action against respondents. Any relief or protection for petitioners from the alleged consequences, were they to be imposed by the Saudis, would be dependent upon the independent response of the Saudi government, and, thus, would not be redressed by a judicial decision in petitioners' favor on the merits of their claims in this case. *See Lujan*, 504 U.S. at 562; *Spencer*, 523 U.S. at 7; *see also Worldwide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1164-65 (D.C. Cir. 2002) ("The act of state doctrine precludes the courts of this country from inquiring into the validity of the public acts of a recognized foreign sovereign power committed within its own territory.") (internal quotation marks and citation omitted). Accordingly, the collateral consequences alleged by petitioners are not sufficient to satisfy Article III standing requirements and save this case from mootness.

In *Idema v. Rice*, 478 F. Supp. 2d 47 (D.D.C. 2007), Judge Sullivan found that damage to a *habeas* petitioner's professional reputation and denial of parental visitation rights did not amount to collateral consequences that would allow the petitioner to continue to pursue a *habeas* action challenging his alleged unlawful detention in Afghanistan. *Id.* at 51-52. Judge Sullivan found that the alleged adverse consequences, however serious, did not prevent the *habeas* action from becoming moot, because they were "based on the discretionary decisions of employers or judges and [were] not legally prescribed consequences of incarceration" that were "imposed by state or federal law." *Id.* at 52. The Court further observed that a grant of *habeas corpus* relief would not necessarily affect the decisions of those authorities. *Id.* Similarly here, petitioners'

alleged collateral consequences are dependent upon the independent choices and decisions of the Saudi government and do not prevent this case from being moot.⁹

Furthermore, the cases cited by petitioners to support their position do not counsel a different result. Virtually all of the cases cited by petitioner either pre-date the clarification in *Lane* and *Spencer* that collateral consequences are not presumed outside the context of criminal convictions, or they involve collateral consequences that arise by statute or otherwise through the direct operation of law in the context of a criminal conviction or otherwise.¹⁰ *See, e.g., Carafas v. LaVallee*, 391 U.S. 234, 237-38 (1968) (statutorily imposed disabilities of criminal conviction); *Sibron v. United States*, 392 U.S. 40, 55-56 (1968) (same); *Fiswick v. United States*, 329 U.S. 211, 222 (1946) (in *Fiswick* “conviction rendered petitioner liable to deportation and denial of naturalization, and ineligible to serve on a jury, vote, or hold office,” *Spencer*, 523 U.S.

⁹ Even if it were argued that the “enemy combatant” designation of a petitioner was a factor in the Saudi government’s decisionmaking regarding whether it would monitor or restrict a former detainee in some fashion, that would not prevent this case from being moot. In *Spencer* the Supreme Court described its holding in *Lane*, stating,

[W]e rejected as collateral consequences sufficient to keep the controversy alive the possibility that the parole revocations [challenged in the *habeas* case] would affect the individuals’ “employment prospects, or the sentence imposed [upon them] in a future criminal proceeding.” These “nonstatutory consequences” were dependent upon “[t]he discretionary decisions . . . made by an employer or a sentencing judge,” which are “not governed by the mere presence or absence of a recorded violation of parole,” but can “take into consideration, and are more directly influenced by, the underlying conduct that formed the basis for the parole violation.”

523 U.S. at 13 (quoting *Lane*, 455 U.S. at 632-33; internal citations omitted). Thus, the Supreme Court has rejected the proposition that a case is not moot merely because a challenged detention might be a factor in some later decision by an independent actor.

¹⁰ *See Idema*, 478 F. Supp. 2d at 52 (“In *Lane* . . . the Supreme Court limited post-release habeas relief to ‘civil disabilities’ imposed on former detainees by operation of law.”).

at 9); *Justin v. Jacobs*, 449 F.2d 1017, 1019 (D.C. Cir. 1971) (statutory disabilities resulting from commitment as sexual psychopath); *In re Ballay*, 482 F.2d 648, 651-52 (D.C. Cir. 1973) (statutory disabilities from designation as mentally incompetent); *United States v. Maddox*, 48 F.3d 555, 560 (D.C. Cir. 1995) (conviction affecting statutorily based sentence enhancement).¹¹ The cases do not involve, as in this case, harms outside the criminal conviction context that are speculative or that occur as a result of the determinations or decisions of third parties.

Accordingly, petitioners have failed to demonstrate collateral consequences sufficient to prevent this case from being moot.

CONCLUSION

For the foregoing reasons, not only is this case jurisdictionally improper under the Military Commissions Act and the law of the Circuit, it is moot as to petitioners and should be dismissed as contemplated in the Court's January 7, 2008 order to show cause.

Dated: March 20, 2008

Respectfully submitted,

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DOUGLAS N. LETTER
Terrorism Litigation Counsel

[signature block continued on next page]

¹¹ *Demjanjuk v. Petrovsky*, 10 F.3d 338, 355-56 (6th Cir. 1993) seems to take an approach inconsistent with the Supreme Court's approach in *Spencer*. In any event, *Demjanjuk* is a unique case, distinguishable in that the court was acting in the exercise of its "inherent power to protect the integrity of the judicial process within th[e] [Sixth] Circuit," to rectify judgments that the court deemed "wrongly procured as a result of prosecutorial misconduct that constituted fraud on the court." *Id.* at 356.

/s/ Terry M. Henry

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EXHIBIT 1

DECLARATION OF JOSEPH BENKERT

I, Joseph Benkert, pursuant to 28 U.S.C. § 1746, hereby declare and say as follows:

1. I am the Principal Deputy Assistant Secretary of Defense for Global Security Affairs in the Department of Defense ("DoD"). My office is organized under the Office of the Under Secretary of Defense for Policy. I oversee the Office of Detainee Affairs, which is responsible for providing policy advice to the Under Secretary of Defense on matters regarding detainees in DoD control. I have served in this position since November of 2006. The statements in paragraphs 5 through 8 of this Declaration provide a general overview of the process of transferring detainees in DoD control at the United States Naval Base at Guantanamo Bay, Cuba ("GTMO"), to the control of a foreign government. These statements are not intended to be an exhaustive description of all of the steps that might be undertaken in particular cases, but rather they reflect United States policy and practices with respect to transfers of detainees from GTMO. I make this Declaration based upon my personal knowledge and upon information made available to me in the performance of my official duties.

2. One of DoD's current missions is to use all necessary and appropriate force to defeat the al Qaeda terrorist network and its supporters. In the course of that campaign – which remains ongoing – the United States and its allies have captured thousands of individuals overseas, virtually all of whom are foreign nationals. Through a screening and evaluation process, DoD determines whether the individuals should be detained during the conflict as enemy combatants. Approximately 380 foreign nationals are being held by DoD at GTMO.

3. It is lawful and appropriate for DoD to detain enemy combatants as long as hostilities are ongoing. Nonetheless, DoD has no interest in detaining enemy combatants longer than necessary. Accordingly, DoD is conducting at least annual reviews of GTMO detainees who have been determined to be enemy combatants but have not been referred to military commission to determine whether continued detention is warranted based on factors such as whether the detainee continues to pose a threat to the United States and its allies. Where continued detention is deemed no longer necessary, a detainee may be transferred to the control of another government for release. Furthermore, the United States also transfers GTMO detainees, under appropriate circumstances, to the control of other governments for possible detention, investigation, and/or prosecution when those governments are willing to accept responsibility for ensuring, consistent with their laws, that the detainees will not continue to pose a threat to the United States and its allies. Such governments can include the government of a detainee's home country, or a country other than the detainee's home country that may have a law enforcement, prosecution, or other interest in the detainee.

4. Since 2002, approximately 395 detainees have departed Guantanamo for other countries including Albania, Afghanistan, Australia, Bangladesh, Bahrain, Belgium, Denmark, Egypt, France, Germany, Iran, Iraq, Jordan, Kuwait, Libya, Maldives, Morocco, Pakistan, Russia, Saudi Arabia, Spain, Sweden, Sudan, Tajikistan, Turkey, Uganda, the United Kingdom, and Yemen.

5. When the DoD transfers GTMO detainees to the control of other governments for continued detention, investigation, and/or prosecution, the DoD does so after dialogue with the receiving government. Such dialogue may be initiated by the receiving government or may be initiated by the United States. In either situation, the purpose of the dialogue is to ascertain or establish what measures the receiving government intends to take, pursuant to its own domestic laws and independent determinations, that will ensure that the detainee will not pose a continuing

threat to the United States and its allies. In all such cases of transfer for continued detention, investigation, and/or prosecution, as appropriate, as well as situations in which the detainee is transferred for release, the detainee is transferred entirely to the custody and control of the other government, and once transferred, is no longer in the custody and control of the United States; the individual is detained, if at all, by the foreign government pursuant to its own laws and not on behalf of the United States. When detainees are transferred to the custody or control of their home governments, it is frequently the case that the home government takes the detainee into its custody, at least for an initial period. In some cases, the home government has subsequently released the detainee, sometimes after a period of questioning or investigation, while in other cases, the detainees have remained in confinement or subject to other restrictions in their home countries for various reasons based on the determinations and laws of the home government. Of the GTMO detainees who have been transferred by the DoD to the control of their home countries, most have subsequently been released from detention.

6. Once a DoD transfer of a GTMO detainee is proposed, including for possible detention, investigation, and/or prosecution, the views of interested United States Government agencies are considered. For such a transfer, it is the policy of the United States, consistent with the approach taken by the United State in implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, not to repatriate or transfer individuals to other countries where it believes it is more likely than not that they will be tortured. Therefore, if a transfer is deemed appropriate, a process is undertaken, typically involving the Department of State, in which appropriate assurances regarding the detainee's treatment are sought from the country to whom the transfer of the detainee is proposed. The


Declaration of Ambassador Clint Williamson dated June 8, 2007, accurately and completely describes that process to the best of my information and belief.

7. The ultimate decision to transfer a detainee to the control of another government is made with the involvement of senior United States Government officials. The Secretary of Defense or his designee ultimately approves a transfer deemed to be appropriate. Decisions on transfers are made on a case-by-case basis, taking into account the particular circumstances of the transfer, the country, and the detainee concerned, as well as any assurances received from the receiving government. If a case were to arise in which the assurances obtained from the receiving government are not sufficient when balanced against treatment concerns, the United States would not transfer a detainee to the control of that government unless the concerns were satisfactorily resolved. Circumstances have arisen in the past where the Department of Defense elected not to transfer detainees to their country of origin because of torture concerns.

8. As noted in the Declaration of Clint Williamson, transfers of detainees are extremely sensitive matters that involve diplomatic relations with other countries, as well as the law enforcement and intelligence interests of other countries. Requiring the United States to unilaterally disclose information about proposed transfers and negotiations outside of appropriate executive branch agencies could adversely affect the relationship of the United States with other countries and impede our country's ability to obtain vital cooperation from concerned governments with respect to military, law enforcement, and intelligence efforts, including with respect to our joint efforts in the war on terrorism. Judicial review, including the possible overturning of decisions to transfer and delays in transfers occasioned by review and possible appeals, could lead to similar harm.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 8, 2007.



Joseph Henker